



Office of Government Commerce

OFFICE OF GOVERNMENT COMMERCE

CONSULTATION DOCUMENT

**THE APPROACH TO IMPLEMENTATION OF THE NEW
UTILITIES PROCUREMENT DIRECTIVE**

MAY 2004

OFFICE OF GOVERNMENT COMMERCE

CONSULTATION DOCUMENT

THE APPROACH TO IMPLEMENTATION OF DIRECTIVE 2004/17/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 03/02/04 COORDINATING THE PROCUREMENT PROCEDURES OF ENTITIES OPERATING IN THE WATER, ENERGY, TRANSPORT AND POSTAL SERVICES SECTORS

Executive Summary

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

This Directive replaces the existing Directives on procurement for the utilities (93/38/EEC and 98/4/EC). The main changes affect coverage and procedures. As far as the latter is concerned the new provisions facilitate e-procurement.

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 3-7	Signalling coverage
Article 14	Framework agreements
Article 15	Dynamic purchasing systems
Article 17	Methods of calculating contract value
Article 23	Affiliated undertakings
Article 28	Reserved contracts and sheltered workshops
Article 29	Central purchasing bodies
Article 30	Exemption mechanism
Article 47	Contract Documents
Article 39	Obligations relating to taxes, environmental protection etc
Article 56	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 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.
- 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 entities as defined in Article 2 of this Directive. The existing legal framework for the award of contracts by utilities above certain thresholds is currently defined by two EC Directives¹.

1 The Utilities Directive 93/38/EEC as amended by Directive 98/4/EC

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

1.4 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 71 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.

1.5 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. Practical information about this consultation process

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. Signalling coverage
- Section 5. Framework agreements
- Section 6. Dynamic purchasing systems.
- Section 7. Methods of calculating contract value
- Section 8. Affiliated undertakings
- Section 9. Reserved contracts and sheltered workshops
- Section 10. Central purchasing bodies
- Section 11. Exemption mechanism
- Section 12. Contract Documents
- Section 13. Obligations relating to taxes, environmental protection etc
- Section 14. E-auctions

Intended consultees

2.2 We are seeking responses from Government Departments responsible for Utilities as well as from Utilities themselves. 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
Office of Government Commerce
Procurement Policy Unit
Trevelyan House
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 Directive. 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 The existing Directive 93/38/EEC was reviewed together with the existing Public Sector Procurement Directives as part of a legislative package whose aim was to simplify, clarify and modernise the current legal framework.
- 3.2 Negotiations to reach political agreement on the Utilities Directive text continued after political agreement had been reached on the Public Sector Directive in May 2002. The sequence of negotiations and a desire for consistency meant that text on some issues was transferred from the Public Sector Directive to the Utilities Directive. Many consultation issues are therefore the same as in the Public Sector Consultation Document, which we are also circulating. Where this is the case, we will flag it up in this consultation document.
- 3.3 Whilst the revision of the Utilities Directive may not appear as far reaching as the public sector, this is because some of the new public sector approaches, such as the use of framework agreements, were already provided for in the

utilities.

However, some new provisions have been added to take account of modern procurement methods and developments in best practice. These include explicit provisions on E-auctions and so-called Dynamic Purchasing Systems for the first time. We intend to implement such new features to make full use of the flexibility offered and issues surrounding such features are highlighted and discussed below in the main body of this consultation document.

- 3.4 In addition, some Utilities have already expressed an interest in taking advantage of the other major change, the exemption mechanism (Article 30), whereby contracts for activities which are directly exposed to competition on markets to which access is not restricted can be removed from the application of the Directive. This is covered in more detail in section 11 below.
- 3.5 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.
- 3.6 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 15 - Dynamic Purchasing Systems

Article 28 - Reserved Contracts

Article 29 - Central Purchasing Bodies

Article 39 - Obligations relating to taxes, environmental protection etc.

Article 56 - 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.

Main Body of Consultation:

4. Signalling coverage

- 4.1 Articles 3 - 7 and many of the Annexes to this Directive deal with establishing coverage in the various utility sectors. The majority of categories of entities and activities are covered as before. The key changes are that the telecommunications sector has been removed following liberalisation, while the postal services sector, previously covered by the public sector rules, has been included, although Member States have until 1 January 2009 to effect this change.
- 4.2 Following the practice of the existing Regulations (SI 1996 No. 2911), which implement the Directive 93/38/EEC, we intend to specify the Utilities and activities by means of a regulation and associated Schedule. The regulation would include the amended definition of "special or exclusive right" and the Schedule would be divided into two columns setting out respectively the type of Utility covered and the activity for which they are covered.
- 4.3 We would welcome comments on maintaining the structure of the existing Regulations to indicate coverage for sectors and activities caught.

5. Framework agreements

- 5.1 Article 14 deals with framework agreements which, as detailed above, are already provided for in relation to utilities. Framework agreements are defined in Article 1(4) in the same terms as in Directive 93/38/EEC, and Article 14 corresponds to Article 5 of that Directive. The definition is the same as that in the consolidated public sector Directive but the use of framework agreements by utilities is less closely regulated.
- 5.2 A framework agreement, in this context, is a general term for agreements with suppliers, which set out terms and conditions under which specific purchases (call-offs) can be made throughout the term of the agreement. A framework agreement, as defined in the Directive, is not a contract to which the Directives naturally apply as it is normally only at the call-off stage that a contract is formed.
- 5.3 Article 14 (2) & (3), in conjunction with point (i) of Article 40 (3), explain that if the Directive's rules on advertising, selection and award procedures have been followed for the framework agreement then there does not have to be a call for competition for the subsequent call-offs. We could either implement this by spelling this out in the regulation implementing Article 14 (2) & (3) or by including a reference to the regulation implementing point (i) of Article 40 (3). Our preference is the former so that the regulation can be understood by itself.
- 5.4 We are interested to know if this approach is felt to be acceptable and useful.

6. Dynamic purchasing systems

- 6.1 In Article 15 Member States ‘may provide’ that contracting entities may use dynamic purchasing systems. Where contracting entities are allowed to use dynamic purchasing systems, they must abide by the provisions laid out in Article 15. Article 15 is very similar to Article 33 in the Public Sector Directive and the same consultation issues are discussed below.
- 6.2 A dynamic purchasing system is defined in Article 1(5) 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 15(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.
- 6.3 This is a new provision and we intend to enable contracting entities 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.

7. Methods of calculating contract value

- 7.1 Article 17 details methods of calculating the value of public contracts, framework agreements and dynamic purchasing systems. It is substantially similar to draft Article 9 of the Public Sector text and therefore the same consultation issues arise.

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.

- 7.2 In this Article, the term “amount payable” is used, however, our intent 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.

- 7.3 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 “contracting entities shall include in

² Collectively referred to in the Directive as “economic operators”. The term “economic operator covers contractors (for works contracts), suppliers (for supplies contracts) and service providers (for services contracts).

the estimated value of a works contract both the **cost** of the works and the **value** of any supplies..." (our emphasis) (see Article 17 (4)). This implies there is a difference between the two terms. Our intention would be to use "value" throughout.

- 7.4 Article 17 (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 consulting the Commission on this point but, in the meantime, would welcome any comments on this new wording.

- 7.5 Finally, we would also welcome all views in general on Article 17.

8. Affiliated undertakings

- 8.1 Article 23 deals with contracts awarded to an affiliated undertaking, to a joint venture or to a contracting entity forming part of a joint venture.
- 8.2 Article 23 (1) sets out the definition, for the purposes of Article 23, of “affiliated undertaking”. The equivalent is found in Article 63 (2) in the Public Sector text which sets out the definition of a “related undertaking”. The underlying text in Article 23 (1) differs from the Public Sector text. We do not consider that the texts are similar enough to be made consistent and are therefore intending to implement them following the respective Directive text in each case.
- 8.3 Article 23 (3), as well as providing for the extension to supplies and works contracts in addition to services, also clarifies that the 80% turnover figure can be estimated on the basis, for example, of business projections where 3 years of accounts are not available.
- 8.4 Article 23(4) is new. It excludes from the Directive contracts awarded by a joint venture comprising utilities to one of those utilities and contracts awarded by a utility to a joint venture of which it is a part, provided that the joint venture will operate for at least three years.
- 8.5 Overall our preferred approach is to copy out Article 23 but we would welcome views on whether the Article is clear enough as it stands.

9. Reserved contracts and sheltered workshops

- 9.1 Article 28 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 programs in certain specified circumstances. This Article is the equivalent to

Article 19 in the Public Sector text.

- 9.2 We would welcome any comments on the method of implementing this Article. The issues raised are more likely to be significant in the public sector context and the public sector consultation document deals with the parallel provision (Article 19) in more detail.

10. Central purchasing bodies

- 10.1 Article 29 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 entities may purchase works, supplies and /or services from or through a central purchasing body. Where contracting entities 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.
- 10.2 A central purchasing body is defined as a body which purchases works, supplies or services on behalf of or for direct sale to contracting entities. The central purchasing body must be a contracting authority as defined in either the Utilities or the Public Sector Directives. The advantage of using a central purchasing body is that, provided it followed the provisions set out in the Directive initially, other contracting entities who it supplies or for whom it contracts do not have to follow the rules a second time.
- 10.3 This Article is similar to Article 11 in the Public Sector Directive and the same consultation issues arise and are repeated below. However, in reference to the Utilities Directive specifically, it is important to emphasise the definition of a central purchasing body. Although contracting entities, covered by the Utilities Directive, may use a central purchasing body, this body must be a contracting authority.
- 10.4 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.
- 10.5 However it is worth stressing that this particular Article only applies to central purchasing bodies, as defined in the Article. Currently contracting authorities and entities 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 or entity is still responsible for ensuring compliance with the provisions of the public procurement Directives when using these other bodies.
- 10.6 We would like to invite any views on the clarity of this Article, especially given the issues discussed above and the importance of the definition in relation to the Utilities.

11. Exemption mechanism

- 11.1 Article 30 is new and provides that contracts for activities which are directly exposed to competition on markets to which access is not restricted can be removed from the application of the Directive. The first part of this Article describes the procedure for establishing whether a given activity is directly exposed to competition on markets to which access is not restricted. The second part describes options for the practical process that utilities may follow to request exemption: it provides that utilities may either apply to the Commission directly, where the implementing legislation provides for this, or go through the authorities in Member States.
- 11.2 We would welcome views on whether to provide for utilities to be able to make a request direct to the Commission in addition to providing for such requests to be made by HM Government.

12. Contract Documents

- 12.1 Article 47, 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 Utilities Contracts Regulations 1996 (S.I. No. 2911) 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, services, work or works required by the utility and all documents supplementary thereto”. 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. Obligations relating to taxes, environmental protection, employment protection provisions and working conditions

- 13.1 Article 39 provides that contracting entities 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 entities to do this.

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

- 13.2 There are existing provisions in the current Directives and Regulations which relate to providing information on obligations in relation to employment protection provisions and working conditions. This Article extends this

provision to obligations relating to taxes and environmental protection.

- 13.3 We intend to repeat the approach taken in the current Regulations giving contracting entities 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.

14. E-auctions

- 14.1 Article 56 provides Member States with the explicit option of allowing contracting authorities to use reverse electronic auctions ('e-auctions'). This Article is equivalent to Article 54 in the Public Sector Directive. An electronic auction is defined in Article 1(6) 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 is held 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 provisions 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 EMAT³ award criteria as laid out in Article 55 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.
- 14.4 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

³ EMAT stands for Economically Most Advantageous Tender

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 This 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 utilities. The public procurement rules seek to ensure that utilities award contracts in an efficient and non-discriminatory manner. Directive 2004/17/EC aims to simplify, clarify and modernise the existing EU rules for procurement⁴ by the utilities. There are new provisions to take account of modern procurement techniques such as the use of e-procurement. 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 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 utilities 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 utilities and their suppliers, and the simplification should reduce the burden on all in terms of adhering to the requirements of the 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 value for money if contracts are not awarded through a competitive process.

1.7 The utilities regime has always allowed for more flexibility than the public sector regime and already provides for frameworks. Many of the new elements of this Directive are in any case permissive, in that the contracting entities have the choice to make use of them. It is not compulsory for contracting entities to use new

⁴ The Utilities Directive 93/38/EEC as amended by Directive 98/4/EC and implemented into UK law as The Utilities Contracts Regulations 1996, amended by [Regulation]

facilities, such as e-auctions, but if they do choose to, they must follow the rules set out in the Directive. In addition, many of the new facilities are already being used in Member States, such as with e-auctions 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 3-7	Signalling coverage
Article 14	Framework agreements
Article 15	Dynamic purchasing systems
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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 The Directive does not impose any burdens on business generally and the savings from increased competition and structured procurement will considerably outweigh the costs of compliance.

3.2 The Directive already applies to operators in the energy, water and transport sectors. There is a lighter regime for oil and gas operators. Postal services are now brought in while telecommunications have been removed. There are exclusions and there is a new provision allowing utilities operating in areas directly exposed to competition to apply for exemption. The Directive will not bear directly on the undertakings who wish to provide the utilities with supplies, works and services.

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 The utilities are already complying with most of the new Directive. It allows for up-to-date, useful tools like e-procurement which are intended to create savings and is therefore of benefit to utilities.

3.5 Under this new Directive, the telecommunications sector has been removed from the regime which reduces the burdens on them. In addition, some Utilities have already expressed an interest in taking advantage of an exclusion mechanism, whereby contracts for activities which are directly exposed to competition on markets to which access is not restricted can be removed from the application of the Directive. This is covered in more detail in the consultation document we are circulating. Again this should create a reduction of burdens overall.

Environmental/Social costs

3.6 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 purchasers and should not impose additional burdens on suppliers and 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 a Utilities Remedies Directive⁵ 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 aside⁶ 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

The proposals for this Directive, and its predecessors, were the subject of widespread consultation with both sides of industry (purchasers and providers),

⁵ Directive XXXXX

⁶ A 'set aside' is when a decision is declared illegal and to all intents and purposes null and void.

through representative organisations (Confederation of British Industries, Chartered Institute of Purchasing and Supply and Trade Union Congress) and through the government departments responsible for various sectors.

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.

9.1 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 entities 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 entities not the wider 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 entities to have these provisions available but we are currently consulting on our approach.

ANNEX B – THE DIRECTIVE TEXT



New Utilities 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