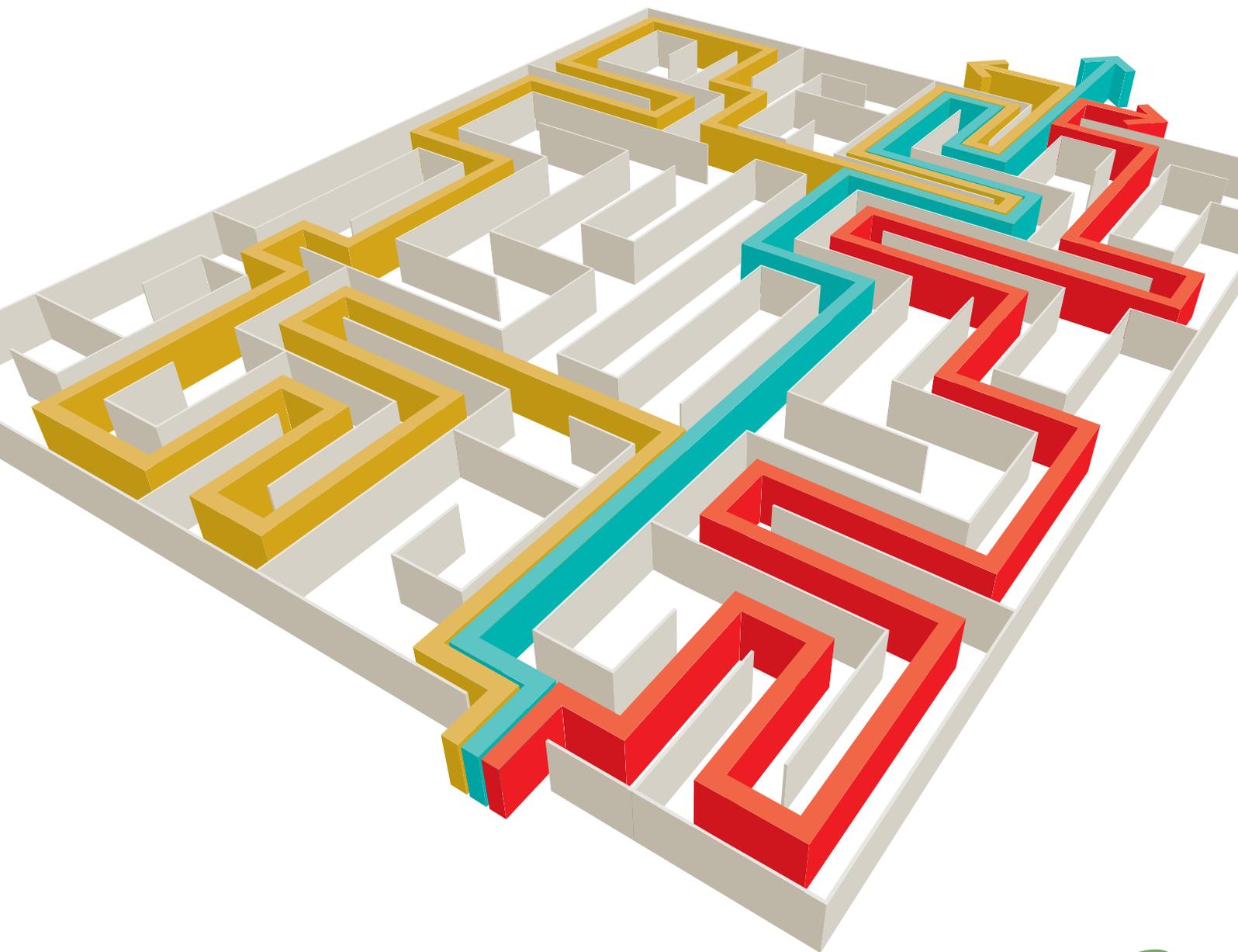


PATHWAYS THROUGH THE MAZE

A GUIDE TO PROCUREMENT LAW

ANTHONY COLLINS SOLICITORS LLP



navca

local focus national voice



ncvo

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Edited by **Jacki Reason**

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NCVO

The National Council for Voluntary Organisations believes passionately in the power of the voluntary and community sector to transform the lives of people and communities for the better.

NCVO has over 7,400 members. With over 280,000 staff and over 13 million volunteers working for our members, we represent and support almost half the voluntary sector workforce.

Our goal is to support members by creating an environment in which voluntary organisations can flourish and develop.

The **Public Service Delivery Network** is a free user-led resource for anyone interested in issues around third sector commissioning and service delivery. It aims to build knowledge and relationships across sectors to transform public services.

Established in 2006, the network has over 1,500 members across England, including voluntary sector service providers, public sector commissioners, support agencies and policy makers.

NAVCA

NAVCA (the National Association for Voluntary and Community Action) is the national voice of local third sector infrastructure in England. We aim to ensure communities are well served by the local third sector by supporting our members and their work with over 160,000 local groups and organisations. NAVCA believes that local voluntary and community action is vital for healthy and inclusive communities.

We provide our members with networking opportunities, specialist advice, support, policy information and training. NAVCA is a vital bridge between local groups and national government.

Our specialist teams take a lead on the issues that matter most to local third sector infrastructure organisations. We influence national and local government policy to promote local voluntary and community action.

For more details about the full range of ways that NAVCA can help you please go to www.navca.org.uk or call us on 0114 278 6636.

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Forewords

This guide is invaluable to anybody working for a local charity, voluntary organisation, community group or social enterprise who is interested or involved in the commissioning and procurement of public services. It will help you understand procurement processes and give you the information you need to challenge the myths and mistruths about procurement.

If you are a public sector commissioner, you should also keep a copy of this guide by your side. It can help you improve your engagement with third sector organisations and shows you the options, rather than constraints, procurement processes can present.

Commissioning and procurement are a means to an end and that end is good, effective services and stronger communities. This needs the involvement of local third sector organisations in designing and delivering public services – but bad commissioning and procurement practices can block their involvement.

By presenting the facts about commissioning and procurement in a clear and easy to understand way, this guide gives local voluntary organisations and public sector commissioners the knowledge to work together to create more intelligent commissioning processes. By improving the processes, we will improve our ability to get the effective services and stronger communities which local people need.

Kevin Curley

Chief Executive, NAVCA

Stuart Etherington

Chief Executive, NCVO

The IDeA is a strong advocate of partnership working and *Pathways through the maze* is a valuable tool that will support strong local partnership working and improve commissioning of public services for the benefit of local communities.

Good commissioning and procurement of public services needs third sector groups to be involved in service design and delivery. This guide will help third sector groups understand the context within which local authorities operate, including the complex world of procurement legislation and guidance. It will also help third sector organisations increase their knowledge of the legal context for procurement and enable them to play a more equal part in local commissioning and procurement strategy and practices.

Commissioners will benefit from using the guide as it will help them understand the issues that third sector organisations face when they engage in commissioning and procurement. It will also help commissioners develop ways to use local authority powers more creatively to improve public services.

This will no doubt prove to be an essential guide for anyone involved in commissioning.

Helen Hughes

National Adviser – Third Sector and Communities
Improvement and Development Agency

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About the guide

Background

Third sector organisations (TSOs)¹ delivering public services is not a new idea. Charities, voluntary organisations, community groups and social enterprises have successfully delivered public services for many years. However recent years have seen a shift from grants to contracts, which has affected funding relationships between public commissioning bodies and TSOs. This has brought procurement processes to the forefront of the debate about the sector's role and opportunities in the public service delivery market. The third sector needs greater clarity about the rules and obligations public bodies must comply with when procuring services. Some TSOs (especially smaller ones) also feel that the way some procurement processes are structured puts them at a disadvantage and makes it difficult for them to win contracts for the delivery of services that they have been effectively providing for years. Many TSOs are also disadvantaged by a lack of knowledge about procurement processes and the technical nature of the European Union procurement rules.

This guide was born out of a need to address these issues and level the playing field. It was commissioned by NAVCA and NCVO to be a resource for people working in the third sector who are engaged in or considering public service delivery. The guide will also be valuable for public sector commissioners, as it includes legal explanations and examples of how to make procurement processes more accessible to third sector providers.

Purpose and focus

The guide provides information and guidance for TSOs wishing to engage with the public sector and understand the legal framework of procurement processes.

It addresses the main legal issues that can arise where TSOs provide services to the public sector, or deliver public services. Opportunities for the public sector to do more and more effective business with the third sector are also covered, where appropriate.

The guide also addresses issues that have an impact on commissioning and procurement: how to distinguish a grant from a contract (chapter 6), whether the State aid rules might apply (chapter 6), and good (legal) practice for commissioners wishing to involve TSOs in their processes (chapter 7).

It concentrates on the procurement of services at a local or frontline level, as this is the way that most TSOs contract with public bodies. It includes those services not covered by the full extent of the EU procurement rules as well as discussing what action is necessary where the full EU procurement rules apply.

What we mean by 'commissioning' and 'procurement'

Public bodies achieve their objectives through a variety of routes, either by carrying out activities directly or by dealing with outside parties. In broad terms this process can be described as 'commissioning'. The term covers the entire cycle of assessing the needs of people in a local area, designing services and then securing them.

'Procurement' covers the specific activities of buying services, from the initial advertising through to the final contract arrangements. It refers to the procedures that public bodies must follow when they purchase services. The formal EU procurement process is just one of the routes open to public bodies when they are deciding what services to commission. The guide explains the EU procurement framework, clarifying what can be done when the EU procurement rules do, and do not, apply in full (see chapter 2 for a detailed explanation) and sets procurement rules in the context of the commissioning process.

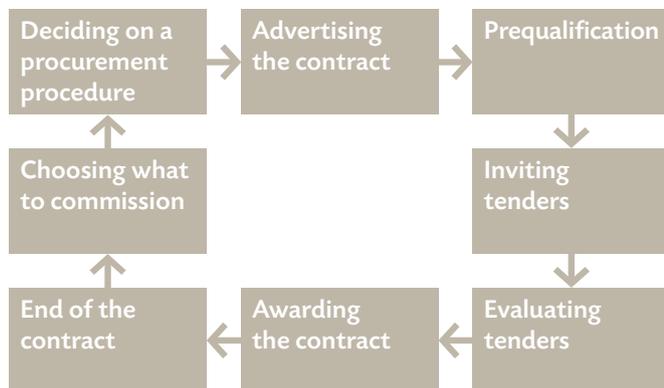
Using the guide

The guide is structured to enable readers to use those sections they feel will be most relevant. It is divided into eight chapters, which cover:

- an introduction to public sector commissioning
- the application of the EU procurement rules in the wider commissioning context to different situations
- a breakdown of the procurement process, both where the EU procurement rules apply in full, and where they apply only partially
- how to challenge a procurement process
- entering into contracts with the public sector
- related issues, including how to tell a grant from a contract, when the State aid rules will apply, and different contractual relationships
- guidance and good practice for TSOs and commissioners
- useful links and a glossary of terms used throughout the guide and elsewhere.

Key points, good practice tips and practical examples are included throughout.

The following diagram illustrates the stages of a 'typical' procurement process under the full EU procurement rules. It is used throughout the guide to show what stage in the process is being discussed, with the relevant stage highlighted.



Disclaimer

This guide has been prepared by Anthony Collins Solicitors LLP with *mutualadvantage* on behalf of NAVCA and NCVO. Given the guide’s potential circulation and the fact that any advice contained in it is not limited to any specific case, no responsibility can be accepted by NAVCA, NCVO, Anthony Collins Solicitors LLP, or *mutualadvantage* to any individual, organisation or public body for action taken or refrained from solely by reference to the contents of this document. Public bodies and TSOs should seek their own legal advice on the application of these general principles to their specific circumstances where they consider it necessary.

INTRODUCTION AND KEY ISSUES

Summary

In this chapter we address key issues relating to the context in which the EU procurement rules sit and their application to TSOs and give a brief introduction to public sector commissioning and public procurement.

Understanding commissioning

Public bodies achieve their goals in a number of ways, both through other bodies and by carrying out activities themselves. This process, described as ‘commissioning’, covers the cycle of:

- assessing the needs of local people or service users
- designing services
- securing those services
- monitoring and reviewing them.

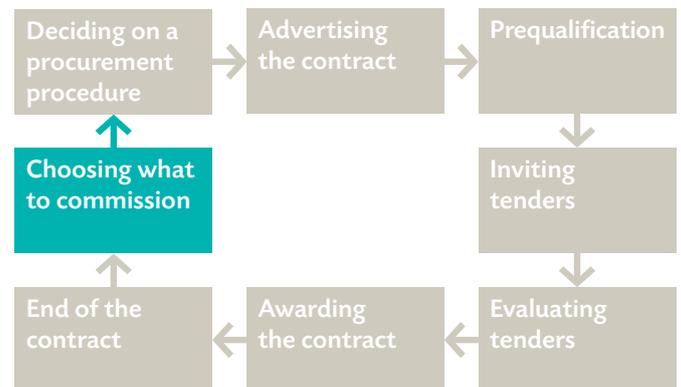
There are a number of ways of commissioning services including:

- the commissioner delivering the activity itself, by employing people and providing the necessary resources
- giving a grant or subsidy to an organisation to carry out the activity
- giving an organisation the right to provide the service (a concession or licence)
- providing capital funding to the organisation, which is then able to carry out the activity on a self-financing basis
- setting up a joint venture
- giving financial support to service users to meet fees charged by the service provider organisation or so that they can purchase their own service
- providing in-kind support (such as seconding staff or providing services, equipment or assets) to the organisation delivering the activity
- undergoing a ‘procurement’, which covers everything from advertising through to the final contract arrangements.

Understanding commissioning is important both for public bodies and the TSOs that work with them because:

- TSOs need to understand the constraints of the powers and policy framework within which commissioners must work
- TSOs can take steps to influence what services a commissioner sources, and how, by developing good relationships early in the process.

Choosing what to commission



Every commissioning process should start with the public body deciding what it wants to commission, before considering how. A good starting point is to clarify the public body’s high level objectives, ie what has it been set up to do and what legal powers does it have to help it to achieve those objectives? This decision should then be translated into the desired outcomes.

It can be extremely valuable to involve relevant TSOs (as well as other possible providers and key stakeholders) in deciding what to commission. Their direct link with service users and communities will often give a useful insight into users’ needs and how they can best be met. Encouraging TSO involvement in the process will also help to clarify what potential providers have to offer. By considering its options at an early stage, the commissioning body can level the playing field without discriminating against (or in favour of) any particular group.

Outputs or outcomes?

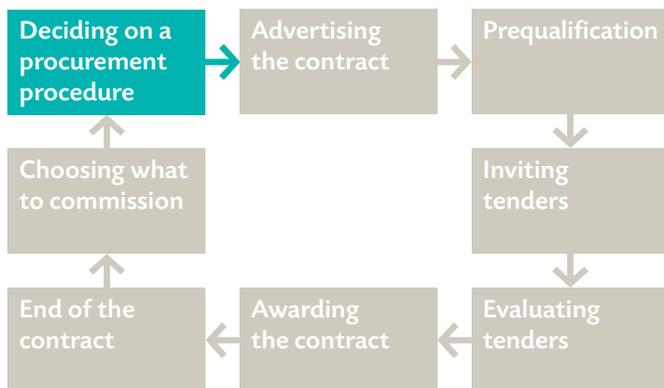
It is up to the commissioner to decide what services to commission, and whether to procure them (rather than choosing another commissioning route). The commissioner also chooses the specifications and ways of measuring performance.

Many commissioners still focus on the outputs of their commissioning, for example, the number of hours spent providing home care under a home care contract. However, focusing on the desired outcomes, for example the effect of the home care service on the beneficiary, such as increased independence and health benefits, can lead to innovative ways of satisfying the commissioner’s needs. It is now generally agreed that commissioning that focuses on the impact of the service and seeks input from providers on the activities needed to achieve such impact is likely to produce innovative and more effective services.

Outcome-based commissioning gives providers the opportunity to suggest solutions to the commissioners' needs that they may otherwise not have considered. In particular, TSOs can help local authorities and other linked public bodies to consider the goals of their local area agreements. An outcomes based approach can also increase the opportunities to consider the social, economic and environmental aspects of a contract.

Commissioners can integrate the principles of sustainable development in the procurement process by taking into account the social, economic and environmental impact of the activities they purchase, at the start of the procurement. This can be consistent with achieving value for money and meeting EU procurement rules. In order for requirements to be 'compatible with EU law' they must not breach any of the EU Treaty requirements and must be 'relevant to the subject-matter of the contract'².

Commissioning and procurement



Procurement of contracts for services must follow EU procurement rules (see chapter 2) and general EU Treaty principles. It is therefore important for both the commissioner and the TSO to be clear when a formal procurement process, as distinct from the wider commissioning process, has begun. This will help to avoid acting unlawfully and discriminating against or in favour of potential providers. If a commissioning process is not clear and well defined (for example, if the public body has begun more informal commissioning which resulted in a contract being tendered without entering into a formal procurement), it can make it difficult to be fair and transparent.

The EU procurement rules only apply once a contracting authority has decided to procure services. A commissioner can therefore consult with the potential marketplace for the services it needs before entering into a formal procurement, whether or not the EU procurement rules will apply.

Example

A local council regularly holds 'meet the buyer' events targeted at building the capacity of small and medium sized enterprises (SMEs),³ including local TSOs. It holds a two-way dialogue that enables it to decide which services will have the greatest impact on the social and economic wellbeing of the residents it serves.

Good practice tips

- TSOs should get involved with the public bodies they would like to be working with as soon as possible – there can be a lot of room for discussion with commissioners before they decide what they want to do.
- Good commissioning involves deciding what is being commissioned before deciding how it is going to be commissioned. Commissioners can and should engage with all potential providers, including TSOs, when shaping exactly what can be provided and ensuring the provision of the best possible service, taking into account their desired outcomes.
- TSOs and commissioners should be encouraged to engage with each other to learn what TSOs can offer in shaping service requirements. TSOs should demonstrate that they are interested in commissioners' policies and strategies and in helping them to meet desired outcomes.

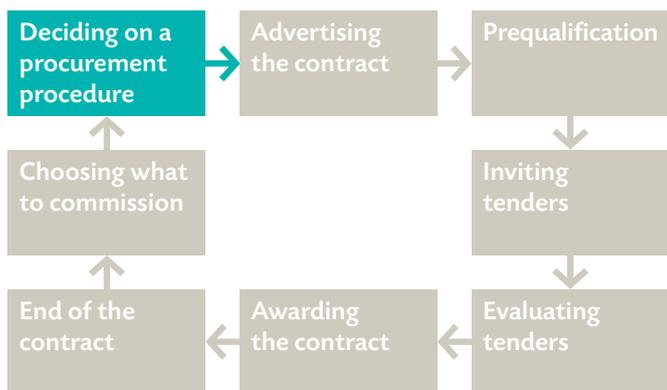
THE EU PROCUREMENT RULES AND WHEN THEY APPLY

Summary

In this chapter we discuss the legal framework behind the EU procurement rules and introduce the general principles of EU law as well as the legislation that sets out the EU procurement rules. We discuss:

- the legal framework behind all contracts that a public body enters into
- when the full EU procurement rules do and don't apply, and when only part of the EU procurement rules apply
- what 'Part A' and 'Part B' services are, and why it matters
- who must follow the EU procurement rules
- when a public body should follow the EU procurement rules
- what financial thresholds apply to contracts that must follow the EU procurement rules.

As this guide focuses mainly on contracts of interest to TSOs, which will not necessarily be procured under the full EU procurement rules, the rules that apply to all contracts are considered first, followed by discussion of the rules that apply to contracts covered by the full EU procurement rules.



The legal framework for procurement

The legal framework for public procurement is governed by three fundamental sets of rules and regulations:

- **The principles of the EU Treaty:**⁴ The EU Treaty sets out the fundamental principles that govern the EU. These principles will apply to all contracts.
- **The EU procurement rules:**⁵
 - The rules for EU procurement processes and procedures are set out in the EU’s ‘Consolidated Directive’ and implemented in England, Wales and Northern Ireland by the Public Contracts Regulations 2006.⁶
 - The EU procurement rules set out the processes and procedures that the public sector must follow when procuring (rather than providing) works, services and supplies.
 - Either the full EU procurement rules or a limited subset will apply, depending on the circumstances.
- **The wider legal framework for public bodies:** There is a broad framework of law that all public bodies must follow, including laws that govern contracts and the regulatory framework that defines public bodies’ duties and powers. These public bodies therefore establish their own internal procedures.

The EU Treaty principles

These fundamental principles will apply to all contracts that a public body enters into, regardless of whether the full EU procurement rules apply.

The EU Treaty principles include the following:

- **Free movement and non-discrimination:** a duty not to discriminate between individuals or businesses because of the EU Member State from which they come, and not to inhibit the free movement of workers, goods and businesses within the EU. This includes accepting products and services from businesses in other Member States if they meet the contracting authority’s legitimate requirements for the contract.
- **Fairness:** a duty to ensure that commissioning and procurement processes are fair, and do not unintentionally exclude potential suppliers.
- **Transparency:** a duty to ensure that commissioning, procurement and contracting processes are transparent and open. This means that any bidder for a contract should be able to see and understand the process that the contracting authority is following. For example, when a contracting authority invites tenders from interested bidders, it must make clear what it is evaluating, and how it will evaluate and score bidders’ responses.
- **Proportionality:** a duty not to include contract requirements and terms that are disproportionate to the size or value of the contract. For example, a contracting authority should not require technical capability, professional status or economic strength that is far beyond that needed to deliver a contract. The public body must accept technical specifications and qualifications if they are equivalent to the national specifications and qualifications the public body has specified.

These principles underpin procurement law and much other European law, and contracting authorities should always consider them throughout their procurements.

The EU procurement rules

Who must follow the EU procurement rules?

Public bodies covered by the EU procurement rules are known as ‘contracting authorities’, and this term is used throughout this guide. They include central and local government and many other bodies funded by the public purse (e.g. an Academy Trust opening a school funded by the Department for Children, Schools and Families) or managed by another public body (e.g. an Arm’s Length Management Organisation or “ALMO” set up by a local council to manage its housing stock).

When do the EU procurement rules apply?

Depending on the contract, either the full extent or a limited subset of the EU procurement rules will apply. Contracts that are below specified financial thresholds, or contracts for services which fall into the ‘Part B’ category (see below), will not be subject to the full EU procurement rules. However, it is still essential to consider the EU Treaty principles, and some of the EU procurement rules will still apply.

Contracting authorities often follow the full EU procurement rules although they do not need to. However, when public bodies are not obliged to follow EU procurement rules, they should consider using alternative procurement routes, as long as they ensure that the process remains fair and transparent. This can reduce the complexity and cost of participating in the process for a range of potential providers, including TSOs, and introduce elements of flexibility that could achieve wider policy objectives for the authority. TSOs should be prepared to query a contracting authority’s procurement method at pre-procurement stage, either directly or through their local infrastructure organisation (LIO – see chapter 8).

What are ‘Part A’ and ‘Part B’ services, and why does it matter?

The EU procurement rules divide all services into two categories: ‘Part A’ and ‘Part B’. Contracts for Part A services, where they are above the financial threshold (see below), will be subject to the full EU procurement rules. Examples of Part A services relevant to TSOs include:

- maintenance and repair of vehicles and equipment
- computer and related services
- research and development services where the benefits are received exclusively by the contracting authority
- management consultancy services
- publishing and printing services
- sewerage and refuse disposal.⁷

Contracts for Part B services are not subject to the full EU procurement rules.⁸ TSOs often provide services that fall into Part B, which include:

- supporting and auxiliary transport services
- legal services
- personnel placement and supply
- education and vocational education
- health and social services
- recreational, cultural and sporting services
- ‘other’ services (ie services that do not fit within the categories specified elsewhere, especially in Part A).⁹

Example

A housing association that is a contracting authority wants to fund a debt advice service for its tenants. This falls under the category of legal services. As this is a Part B service, as long as its process is fair and transparent, the housing association is able to employ a TSO to provide the services without prior advertisement of the opportunity under the full EU procurement rules. The housing association must still follow its own internal rules for contracts, which might include getting a number of quotes, and should consider what advertising is appropriate to the contract. The housing association receives quotes and proposals from three potential providers, and opts for the TSO as the best choice.

What are the financial thresholds?

The full EU procurement rules only apply if the total value of a services contract is over the relevant threshold. At the time of writing the threshold for Part A services is just over £90,000 for contracts awarded by central government bodies and just under £140,000 for most other public sector bodies.¹⁰ (For most purposes this threshold does not apply to Part B services, which need not follow the full EU procurement rules, whatever their value.)

How is a contract valued?

The value of a contract is usually calculated by estimating the total amount that will be paid over the duration of the contract or for four years if the contract is for more than four years or is open-ended.

Are contracts valued separately or together with other contracts?

Contracts need to be combined ('aggregated') with other contracts where they are:

- part of a 'single requirement' for those services (ie a requirement for services at a particular time or in a particular location)
- part of a series of contracts forming a 'requirement over a period' for those services.

Example

A contracting authority wishes to enter into a number of small contracts for services to help clear up after incidents of fly-tipping. It wants each service provider to concentrate on specified geographical areas or neighbourhoods within the authority, but is happy to enter into contracts with one or many providers. This would be considered a 'single requirement' for waste disposal services.

The aggregation rules need to be considered for contracts for Part A services below the threshold. If the combined value of aggregated contracts is over the threshold, each contract must be procured under the EU procurement rules. However, they do not need to be procured together, which means that the contracting authority can still enter into a series of smaller contracts, even though it must follow the full EU procurement rules for each contract.

Small contracts that form part of a larger project ('small lots')

A contracting authority is not obliged to follow the full EU procurement rules for individual contracts where:

- the total value of all the contracts is less than 20 per cent of a total requirement for services which are being tendered under the EU procurement rules at the same time
- the estimated value of each of those contracts is less than £54,327.¹¹

This is a modification in the EU procurement rules intended to allow contracting authorities to encourage SMEs by giving them greater access to these contracts. The small lots rule only needs to be considered for Part A services.

Example

A local authority wishes to advertise its services across the whole area it serves. The area includes communities that the local authority knows are difficult to reach and engage with, including community groups where English is a second language, and deprived areas. The rules on small lots could be used to commission a small marketing company with expertise in community engagement to provide marketing and advertising targeted at a particular audience. The authority would not have to follow the full EU procurement rules because the value of the smaller contract is less than 20 per cent of the total contract value. The remaining 80 per cent (or more) of the overall need for advertising and marketing would be procured under the full EU procurement rules.

When the small lots rule is used, the contract(s) for the remaining 80 per cent of the value of the services required would still need to be awarded under the EU procurement rules, and the EU Treaty principles apply to contracts using this exemption in the same way as they do to any other contract. It is important to remember, however, that this only applies to Part A services, not to Part B – if the services being procured are in Part B, there is no need to rely on this rule.

When do the EU procurement rules not apply?

Some types of contract are specifically excluded from the EU procurement rules, including:

- contracts purely for the sale of land
- employment contracts
- contracts for research and development services, unless the research is solely for the public body's own benefit and paid for wholly by the public body itself.

There are also special rules for contracts procured by utilities (e.g. public or private bodies that operate in the water or energy fields), which are outside the remit of this guidance.¹²

Services concessions

Concessions, where a public body gives an organisation permission (ie a licence or a right) to run a facility and keep the income, are excluded from the full EU procurement rules. An example would be a shop run by volunteers in a hospital where the organisation running the shop retains the income from customers but is not funded in any other way.

Special cases – disability and sheltered workshops

A special rule, which could be used more frequently than currently, allows contracting authorities to reserve contracts to be delivered by ‘supported businesses’ (referred to as ‘sheltered workshops’ by the EU) where a proportion of the employees has a disability.¹³ Disability here is defined as applying to ‘someone with a physical or mental impairment which has a substantial and long-term adverse impact on their ability to carry out normal day-to-day activities’.¹⁴ People do not need to be registered as disabled to satisfy this test.

This special rule only applies to the eligibility of bidders.¹⁵ It does not change the need for the contracting authority to follow the rest of the EU procurement rules.

The wider legal framework for public bodies

There is a broad framework of law that all public bodies must follow, which includes laws that govern contracts and the regulatory framework that defines public bodies’ duties and powers. As a result of this framework public bodies establish their own internal procedures, some of which govern their processes for contract tendering, depending on their value.

A public body will have to follow its internal processes when entering into a contract, regardless of whether it has to follow the EU procurement rules. However, public bodies generally have the power to waive their internal procedures as long as this is based on appropriate grounds, such as value for money considerations. This should be supported by appropriate decision making, with a clear audit trail.

How to tell if the EU procurement rules are being followed

Where the full EU procurement rules apply, they must be followed. The contracting authority may choose to apply them in any case and, if so, must comply with the rules from start to finish. From the point of view of a TSO interested in bidding, if a contracting authority has submitted a contract notice (see chapter 3) to the Official Journal of the European Union (OJEU), this is an indication that it is following an EU procurement procedure and must comply with the full EU procurement rules. This means that the contracting authority can be challenged if it does not follow the rules correctly, even if the contract involved is for Part B services.

Key points

- Public bodies are governed by the EU procurement rules and the EU Treaty principles when they go through a procurement.
- It is not always necessary for a public sector commissioning body to follow the full EU procurement rules.
- Public bodies should be aware of the circumstances where the full EU rules do not apply and understand the flexibility that is available to them. Procuring contracts through routes other than the full EU procurement rules may give greater opportunities to integrate wider policy objectives into procurements, although they will still be subject to the EU Treaty principles.
- The EU Treaty principles will always apply, whether or not the full EU procurement rules apply and all public procurement must be carried out in a fair, transparent and non-discriminatory way.
- Public bodies also need to comply with their own internal policies and procedures when awarding contracts. Being familiar with these policies will enable third sector providers to understand the constraints and opportunities commissioners face and be better informed about, and even contribute to, commissioning and procurement choices at a strategic level.

THE PROCUREMENT PROCESS

Summary

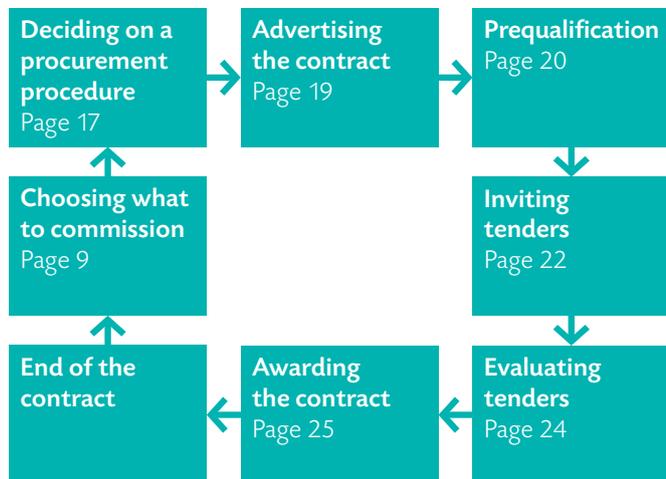
In this chapter we describe the different procurement procedures and discuss what requirements must be fulfilled when the full EU procurement rules do and don't apply. The chapter covers the procurement process phase by phase:

- advertisement
- prequalification
- inviting tenders
- tender evaluation
- contract award.

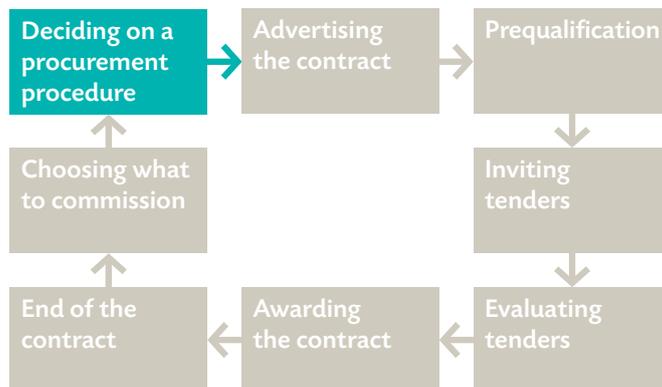
For each phase, the requirements applying to all contracts are outlined first, followed by details of requirements under the full EU procurement rules.

The diagram below shows a typical procurement process modelled on the full EU procurement rules. Contracts for Part B services must follow the rules set out in the sections headed 'all contracts' because they usually do not need to follow the full EU procurement rules. There are a few exceptions, which are explained in this chapter.

The good practice tips given in each section are also relevant whether or not the procedures follow the full sequence prescribed by the full EU procurement rules.



Deciding on a procurement procedure



If public bodies are procuring services under the full EU procurement rules, they must decide which procedure to use.

All contracts

As discussed in chapter 2, contracting authorities have internal processes that they must follow for all contracts.

For contracts where the full EU procurement rules do not apply, the contracting authority may opt for a process that looks very similar to one under the full EU procurement rules. Alternatively, it may simply require quotes to be obtained from a specified number of bidders (for example for very low value contracts).

EU procurement rules

Under the full EU procurement rules four different standard procedures can be followed:

- **Open procedure:** The contract is advertised. Any potential bidder can express an interest, ask for the contract documents and bid. The contracting authority then evaluates all the bids it receives.
- **Restricted procedure:** The contract is advertised, and a 'prequalification' stage is used to eliminate bidders. The contracting authority then evaluates the bids that prequalify. Once bids have been received in the open and restricted procedures, the contracting authority's dealings with bidders are limited to 'clarifying and supplementing' bids.
- **Negotiated procedure:** Similar to the previous two, but with the significant difference that the contracting authority can carry out post-bid negotiations with selected bidders.

There are only limited situations in which the negotiated procedure can be used.

- **Competitive dialogue:** A procedure for complex procurements which, again, is available only in limited circumstances. It involves one or more stages of comparing the technical solutions proposed by bidders to arrive at the best and most economically advantageous solution to meet the contracting authority's requirements.

Most contracts awarded by contracting authorities use the restricted procedure, under which:

- a notice is inserted in the OJEU advertising the contract
- bidders fill in a prequalification questionnaire (PQQ) which the contracting authority uses to ensure that they meet its minimum requirements for technical ability and financial security
- the contracting authority selects which bidders will be invited to tender for the contract from amongst those that prequalify, and issues an invitation to tender
- tenders are returned, clarified and evaluated
- the contract is awarded, unsuccessful bidders debriefed and the contract signed.

Many of the documents required (called the 'contract documents' in the EU procurement rules), the notices that must be published in the OJEU, and the rules concerning technical specifications, the rejection of bidders and shortlisting (if relevant) are the same whichever procedure is used.

Before advertising

Before advertising the contract the contracting authority should consider other issues, including whether to issue a prior information notice (PIN), how to package the contract and whether they want to establish a framework.

Prior information notice

If a contracting authority has decided it is going to procure services, but has not determined the specifics of what it intends to procure, it can issue a PIN in the OJEU to alert potential suppliers to the forthcoming procedure. This will ensure that the procurement process is transparent and non-discriminatory if the contracting authority wants to consult about what it is procuring, because the OJEU's publication across Europe gives everyone an equal chance to participate. PINs are optional, but they shorten the minimum timescales under the open and restricted procedures.

Contract packaging and lots

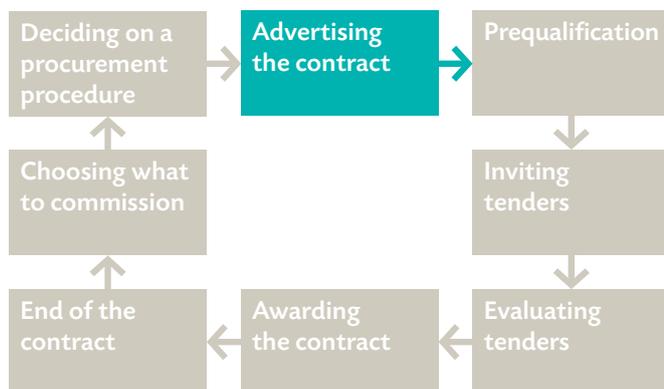
Contracting authorities have considerable flexibility over how they package contracts, as long as they do not artificially break up larger contracts to avoid the EU procurement rules.

There is a growing trend to package contracts into larger and larger units, with the intention of achieving economies of scale and saving on transaction costs. However, it is possible for a contracting authority to procure the contract as a series of 'lots'. These are separate contracts to deliver a part of what is being procured within, for example, separate areas. Bidders can bid for one lot, a number of lots or the whole procurement. Bids for each lot can then be evaluated separately. The public body should have a system for comparing the benefits of any economies of scale offered by organisations bidding for more than one lot. Procuring the contract by separate lots gives smaller organisations the opportunity to bid on their own, ie without having to form a consortium with other bidders.

Frameworks

Contracting authorities can also choose to establish framework arrangements (see chapter 5). These set out the terms and price for any subsequent contracts ('call-offs') awarded, but do not commit the contracting authority to make any purchases. There are specific rules about frameworks, also known as "preferred providers lists", in the EU procurement rules.¹⁶

Advertising the contract



Most procurements involve a decision about whether and where to advertise the contracting opportunity.

All contracts

Whether or not the full EU procurement rules apply, the EU Treaty principles of openness and transparency apply to all contracts. This means that contracting authorities should make sure that all interested parties know about opportunities. Though there is no explicit obligation to advertise for contracts that are not subject to EU procurement rules, advertising remains the clearest way to show openness and transparency.

Case law has extended the obligation to be transparent and objective into a need for contracting authorities to make a judgement about whether the contract is 'likely to be of interest' to potential suppliers based in other parts of the EU and, if so, to advertise accordingly.

The advertisement must contain sufficient information to enable a contractor to decide whether to bid.¹⁷ Contracting authorities can advertise on their own website or on a 'portal' website. Many contracting authorities' websites include a section dedicated to contracting opportunities. There are also national and regional portal websites listing opportunities, such as supply2.gov.uk.

Contracting authorities can choose to publish a formal notice in the OJEU voluntarily, even where the full EU procurement rules do not apply. However, if they do so they are bound by the full rules.

EU procurement rules

Contract notice

When contracts are subject to the full rules, contracting authorities must advertise them in the OJEU. Such an advertisement, called a 'contract notice', is required for all procurements.¹⁸ Contract notices can also be viewed online.¹⁹

The EU procurement rules set out clear timescales for the minimum periods between advertisement and the various stages in the process (prequalification, tender submission etc). These vary depending on the type of procedure used.²⁰

It is also possible for contracting authorities to advertise contracts outside the OJEU, subject to two requirements:

- where the full EU procurement rules apply, no advert can be placed elsewhere before it has been sent to the OJEU
- to avoid potential discrimination against bidders unaware of external advertising, adverts must not contain more information than is included in the OJEU notice.

Indeed, advertising outside of the OJEU may be very effective in reaching a wider audience of providers, including TSOs.

Contract notices will generally include the following information:

- the contracting authority's contact details and description (what type of body it is and what sort of services it provides or role it fulfils)
- whether the contracting authority is purchasing on behalf of others (ie as part of a buying club)
- a description of the contract; whether it is a framework; the estimated total value; the common procurement vocabulary codes;²¹ whether it is to be divided into lots; its length
- legal, economic, financial or technical details – including the main financing and payment arrangements; any deposits or guarantees needed; conditions relating to the personal situation of bidders (eg if they are expected to be enrolled on a professional or trade register); minimum standards for economic and financial capacity and technical capacity; whether the contract is being reserved to sheltered workshops or employment programmes (chapter 2)
- what procedure is to be used – open, restricted, negotiated or competitive dialogue; whether there is a limit on the number of bidders

Chapter 3

The procurement process

- award criteria – whether this is on price or the most economically advantageous tender basis; the weighting given to each criterion
- time limits for receipt of tenders or requests to participate
- additional information – eg where social and/or environmental requirements are to be used
- details of appeals and mediation procedures.

The contract notice can state that bids are welcome from a range of potential providers, including TSOs, but cannot stipulate that bidders must be based in a particular location.

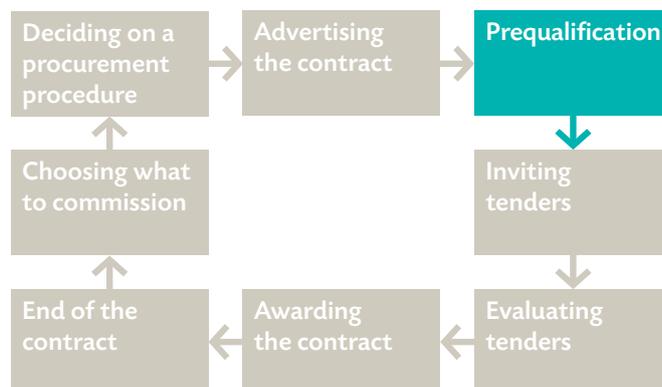
Key points

- Information on contract opportunities is available to all prospective providers.
- Contracts for services covered by the full EU procurement rules must be advertised through the OJEU.
- Contracts for services not covered by the full EU procurement rules need not always be advertised. However, advertisement is the easiest way of demonstrating openness and transparency.
- Contracts for Part B services need not be advertised, unless the contract could be of interest to bidders in other Member States.
- If a contracting authority chooses to publish a formal notice in the OJEU voluntarily, it must follow the full EU procurement rules.

Good practice tips

- Advertising outside of the OJEU can be an effective way of reaching a wider group of potential providers. Contracting authorities can advertise contract opportunities through local third sector channels without disadvantaging other potential bidders, as long as this is one of several avenues used.
- It is acceptable to contact organisations to check that they have seen an OJEU notice (as part of a strategy to stimulate a wide range of bids, without favouring particular bidders). However, those conversations must not lead to information being given that could favour any potential bidder.

Prequalification



Prequalification is used when contracting authorities anticipate a large number of interested bidders and/or wish to ensure only suitably qualified organisations submit bids. It provides a filtering process, and so limits the number of bids and makes the process more manageable.

All contracts

Even though prequalification is not a required stage in all procedures under the full EU procurement rules, contracting authorities may still choose to use a prequalification process in their tendering.

EU procurement rules

The prequalification process has multiple purposes:

- ensuring that bidders invited to tender are eligible
- ensuring that bidders invited to tender meet the public body's minimum requirements for technical/professional ability and economic/financial standing
- deciding which interested parties that meet the above requirements will be invited to bid.

Under the EU procurement rules the contracting authority must either specify the prequalification and selection information required when it publishes the contract notice or refer to a PQQ which bidders can request.²² The contracting authority may wish to limit the number of bidders it invites to tender further. If so, it must state how many bidders it will be selecting and select those that score highest in the PQQ.

The timing of the PQQ depends on the procedure used:

- open procedure – if a PQQ is used, it is sent to bidders with the contract documents (ineligible bidders and those that do not meet the contracting authority's requirements can be rejected at the first stage of the bid evaluation)
- restricted, negotiated and competitive dialogue procedures – a PQQ is sent to all bidders who request it having seen the contract notice. Whether a bidder is invited to tender/negotiate/participate in dialogue depends on the information provided in response to the PQQ.

Selection of bidders

The EU procurement rules specify the type of criteria that can be used to exclude or select contractors for the next stage of the procurement and the information that bidders can be asked to provide to assess whether they satisfy those criteria.

The Regulations set out criteria for the mandatory and discretionary exclusion of bidders. Contracting authorities can also set criteria for the selection of bidders based on their economic and financial standing and technical or professional abilities.

Economic and financial standing

Contracting authorities can set specific thresholds for the prequalification of bidders in relation to:

- the provision of a specified number of years of accounts²³
- meeting appropriate balance sheet requirements
- an indication of financial strength.

Minimum thresholds for prequalification should reflect requirements that are reasonable for the contract, and should not be higher than necessary. This will avoid TSOs being excluded from tendering for the contract.²⁴

If there is a valid reason why a TSO cannot provide the financial information requested in the PQQ, the contracting authority can choose to accept other information that it considers appropriate.²⁵

Example

A local council tenders the operation of a day care centre at the end of a contract with a local TSO. It is the TSO's only contract. In its PQQ the council asks bidders for references from three clients. This is an example of a prequalification requirement that is arguably unreasonable – ie the local council may not be able to justify it. The local council also requires that bidders demonstrate an annual turnover above £10m. As the contract is only worth £500,000, this could be seen as unfair.

Technical or professional ability

The information requested in the PQQ should satisfy the contracting authority that the provider is able to deliver the contract: contracting authorities have wide discretion over the information they can consider regarding the bidder's technical or professional ability. Questions must relate to the bidder's experience, capability, capacity and management structures available to deliver everything being procured under the contract.

The contracting authority's discretion means that failure to provide non-financial information may not be fatal if the TSO can demonstrate in another way that it has the ability to deliver the contract.

Key points

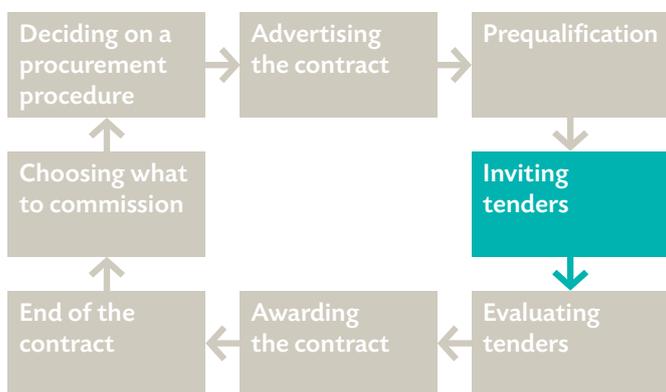
- The purpose of the prequalification phase is to ensure that prospective bidders meet the contracting authority's minimum requirements.
- Contracting authorities have wide discretion over the information they can consider.

Good practice tips

- The shortlisting of bidders should be based on a pre-determined scoring method which includes the contracting authority's minimum standards and the weighting given to different criteria.
- Contracting authorities should set thresholds and define prequalification criteria, taking account of the contract's complexity and value. Setting disproportionately high thresholds for financial standing can disadvantage smaller organisations.

- Where appropriate, contracting authorities should consider developing standard PQQs to reduce the burden on prospective bidders.
- When developing PQQs contracting authorities should also consider how they are going to deal with bids from consortia and provide clear guidance to prospective consortium bidders about the information required.

Inviting tenders



The invitation to tender (ITT) is a collection of documents that contracting authorities send to potential bidders with information about service requirements, terms and conditions. It includes forms for bidders to complete, setting out details of the service they want to provide.

All contracts

The ITT may include the service specifications setting out details of the services being procured, information on pricing models, evaluation criteria, requirements on technical standards and a copy of the contract.

Specifications

The service specifications should provide clear and comprehensive information on the services being procured. They should give prospective bidders enough detail on the scope of the services and on obligations that may impact on the price of the bid, such as the Transfer of Undertakings (TUPE).²⁶

Where a requirement for certain standards is included, to avoid discrimination European standards must be used in preference to British standards, where they are available.

This often means that British standards are harmonised with European equivalents or that countries agree to systems of mutual recognition. Contracting authorities must consider bids that offer standards equivalent to the British or European standards they have specified and so TSOs should not be afraid to demonstrate that their standards are equivalent to these.²⁷

The specified technical standards must be proportionate to the procurement and the contracting authority must not set unjustifiably high standards that could exclude smaller contractors. Requirements can only be included if compliance can be independently measured and verified.

Draft contract

TSOs may find that a draft contract is included with an invitation to tender, as well as specifications for the services covered by the contract. It is important that TSOs review any contract received (at any stage in the process) to be sure that they are happy with the terms. Contracting authorities will sometimes presume that their chosen bidder has accepted the terms of a draft contract unless it says otherwise. TSOs should not hesitate to ask for clarification of the contract at the tender stage. However, there is often limited scope to negotiate with the contracting authority (see, in particular, the rules governing the different procedures under the full EU procurement rules – see chapter 2).

Contract award criteria

Even when the full EU procurement rules don't apply, the invitation to tender may include information about the criteria on which the contracting authority will award the contract.

Locality

Public bodies cannot specify locality in any contract conditions (nor can they consider issues of locality in a tender evaluation). Clauses requiring local labour or stating priority to be given to local subcontractors are contrary to the EU Treaty principle not to impose barriers on the free movement of workers.

Example

A clause requiring a contractor to have a local office at the time of bidding is not allowed, although a requirement to open and maintain a local office is legitimate, as long as it is a genuine and necessary requirement for the contract in question.

It is difficult for a contracting authority to specify a need for local knowledge without also being discriminatory – to do so would potentially favour local providers unfairly. It would be preferable to require this knowledge to be built up once the contractor has been given the contract. However, it can be legitimate for contracting authorities to require bidders to identify how they will meet the needs of the intended beneficiaries. In reality, in-depth knowledge of the area and the beneficiaries of the contract may be the surest way of showing this. ‘Local’ knowledge cannot be requested or required, but TSOs may be in the best position to demonstrate an in-depth knowledge of users’ needs.

EU procurement rules

An ITT is used in the open and restricted procedures as the formal request for bids. In the negotiated procedure, the equivalent request is an invitation to negotiate (ITN); the competitive dialogue procedure uses an invitation to participate in dialogue (ITPiD). We have used the phrase ITT to refer to any of these documents.

Content of the ITT

Under the full EU procurement rules the ITT must include:

- the address from which bidders can request the contract documents and further information, the deadline for such requests and any fee payable
- the deadline for bids, the address to which they must be sent and the language in which they must be submitted
- details of the contract notice
- the contract award criteria (unless they are stated in the contract notice).

The contract documents (including, for example, the specifications and a draft contract) are generally provided with the ITT, but this varies depending on which procedure is being used.

It is also good practice for the ITT to include:

- a disclaimer in relation to any information supplied by the contracting authority
- details of how to inspect documents, including protocol for use of a data room (if used) – eg in relation to confidentiality or data protection
- a statement that bidders must bear their own costs of bidding without recourse to the contracting authority under any circumstances

- a statement that the contracting authority can discontinue the procurement at any time without liability to bidders
- any confidentiality or publicity requirements
- a clear statement that the contracting authority will not be legally bound until a formal contract is entered into
- a non-collusion and non-canvassing certificate for bidders to sign.

Key points

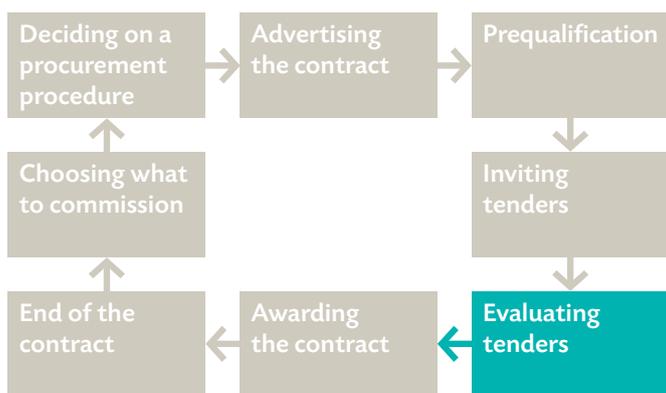
- An ITT is a formal request for bids.
- Under full EU procurement rules, an ITT must include the address for requesting documents, the deadline for application, details of the contract notice and contract award criteria.
- An ITT will also generally include a specification that gives details of the service being procured and a draft contract.
- Where a requirement for certain standards is included, to avoid discrimination European standards must be used in preference to British standards, where available.
- Public bodies cannot specify locality in any contract conditions, nor can they consider issues of locality in a tender evaluation, as this would be in breach of the EU Treaty principles of free movement and non-discrimination.

Good practice tips

- Specifications should provide clear and comprehensive information on the service being procured, including information on any obligations associated to the contract, such as TUPE.
- The specified technical standards must be proportionate to what is being procured and the contracting authority must not set unjustifiably high standards that could exclude smaller contractors.
- Even when the full EU rules don’t apply it is good practice for contracting authorities to include the contract award criteria in their ITT.
- Contracting authorities must consider bids that offer standards equivalent to the specified British or European standards. TSOs should not be afraid to demonstrate to contracting authorities that their standards are equivalent to those specified.
- When sending out draft contracts as part of the tender documentation, a contracting authority may assume acceptance of contract conditions unless bidders explicitly

state otherwise. While there is little scope for negotiation under most procedures, it is important that TSOs review any contract to be sure that they understand and are happy with the terms.

Evaluating tenders



Contracting authorities will have processes in place to evaluate the tenders they receive. This generally involves scoring against criteria that have been set out in advance and awarding the contract to the tender with the highest score.

All contracts

Where contracts are not being tendered under the full EU procurement rules there is no set process for evaluating tenders. However, in compliance with the EU Treaty principles, which apply to all contracts, evaluation criteria and weightings should be set clearly and used consistently throughout tender evaluation.

EU procurement rules

Under the EU procurement rules, contracts can be awarded to the bidder that offers either the lowest price or the most economically advantageous tender (known as MEAT). The criteria used to determine MEAT must:

- be relevant to the subject of the contract (including the delivery of any wider public outcomes)
- give a benefit to the contracting authority which has some economic value
- be consistent with the EU Treaty principles.

Most contracts in the UK will be evaluated on the basis of MEAT, rather than just on price.

The Public Contract Regulations²⁸ set out the following non-exhaustive list of criteria used to determine the most economically advantageous offer:

- quality
- price
- technical merit
- aesthetic and functional characteristics
- environmental characteristics
- running costs
- cost effectiveness
- after sales service
- technical assistance
- delivery date
- delivery period
- period of completion.

Environmental and social criteria can also be included if they are relevant to the subject-matter of the contract.²⁹

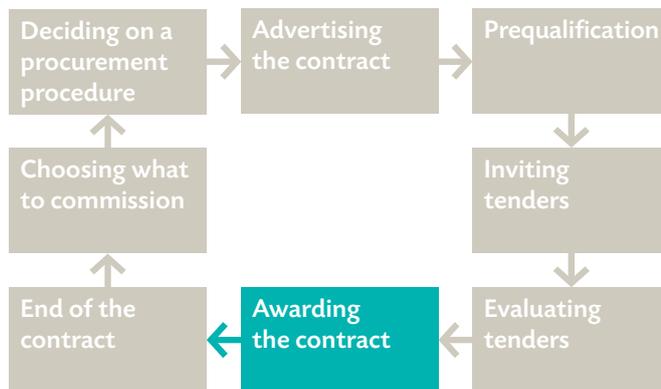
Example

A contracting authority procured serviced offices. It wanted to insert in the service specification a condition that required the contractor to source a proportion of its energy from renewable sources (beyond that required for the serviced offices the contract was procuring). The European Court of Justice did not allow this, on the basis that it was neither linked to the subject matter of the contract nor independently verifiable. The condition would have been acceptable if it had been limited to the electricity supplies for those offices included in the specification and had been verifiable. With the increased ability to choose and record where electricity supplies are sourced this should now be possible in the UK.

Key points

- Tender evaluation for all contracts must be carried out in compliance with the EU Treaty principles.
- Under the full EU procurement rules information on the award criteria and weightings must be provided in the contract notice or ITT.
- Under the EU procurement rules contracts can be awarded to the bidder that offers either the lowest price or the most economically advantageous tender (MEAT).

Awarding the contract



Once a decision has been made about awarding the contract, the next stage is for the contracting authority to notify bidders of the outcome.

All contracts

For all contracts, whether or not the EU procurement rules are being applied in full, unsuccessful bidders are entitled to know why their bid was unsuccessful and ask that the contracting authority reviews its decision to award a contract. In appropriate cases, this can mean that the decision can be set aside.

Contract award notice

Within 48 days of awarding a contract, a contracting authority must often send a 'contract award notice' to the OJEU, even where the full EU procurement rules do not otherwise apply. In particular, if a contract for Part B services valued above £139,893 is awarded (the threshold usually applied to Part A services), a contract award notice must be sent. As with other notices sent to the OJEU, there is a prescribed form. These notices are published in the OJEU, and are available on TED.

EU procurement rules

When the full EU procurement rules apply, there must be a gap (or 'standstill') of at least 10 days between the decision to award a contract and signing the contract.³⁰ This gives space for an aggrieved bidder to challenge the contract award before it is signed.

In such cases, contracting authorities must:

- send a notice (by the fastest possible method – eg email) to all bidders (including those excluded at prequalification or selection stage) telling them:
 - which bidder is to be given the contract
 - the contract award criteria
 - (where practicable) the unsuccessful and the successful bidder's score against those criteria
- wait 10 days before the contract is signed.

An unsuccessful bidder can ask why it was unsuccessful and why the successful bid was better than theirs. If they ask for this within two working days of the start of the 10 day period, the contracting authority must respond at least three working days before the end of the 10 day period. If this is not possible (ie because of a weekend or bank holiday), the contracting authority must extend the 10 day period to allow a gap of at least three working days before signing the contract. When an unsuccessful bidder asks for further information, the contracting authority must provide details of the characteristics and relative merits/advantages of the successful tender.

A bidder can also request feedback outside these timescales, or after being excluded at prequalification stage. In these cases the time limit for response is 15 days and the contracting authority can, in the meantime, sign the contract with the chosen bidder. Where there is no urgency to sign the contract, however, case law requires bidders to be debriefed and given an opportunity to bring a challenge before the contract is signed.³¹

Key points

- For all contracts, whether or not the EU procurement rules are being applied in full, unsuccessful bidders are entitled to know why their bid was unsuccessful and to ask the contracting authority to review its decision to award a contract.
- Under the full EU procurement rules, contracting authorities must send a notice to all bidders and wait 10 days before the contract is signed to allow aggrieved bidders to request further information and feedback and, potentially, challenge the contract.

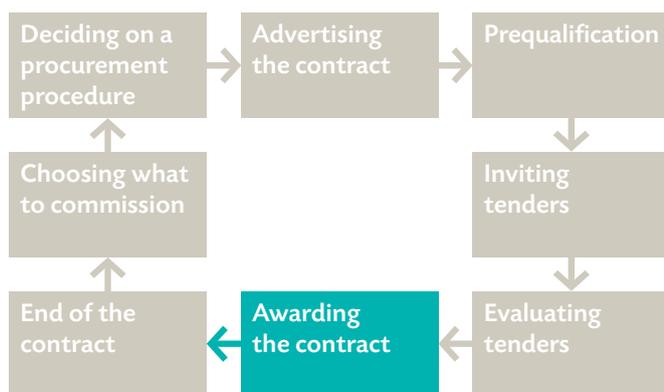
CHALLENGING PUBLIC BODY DECISIONS

Summary

In this chapter we discuss the actions that a TSO may choose to take if it feels that the wrong decision has been made. In particular we discuss:

- using the judicial review procedure to challenge a public body's decision
- where the public body involved is a local council, the importance of the monitoring officer
- how to challenge a contract for Part B services or one which is under the thresholds in the EU procurement rules
- challenging a contracting authority because the TSO believes it has not followed the full EU procurement rules correctly.

To help clarify what is possible in different circumstances, this chapter first covers all contracts and then considers procedures and processes that apply only when the full EU procurement rules should have been used.



Challenging – all contracts

A TSO that has been unsuccessful and wants to challenge the award of a contract should take legal advice as soon as it receives notice that it has not been awarded the contract, or earlier if it suspects that the contracting authority is not acting fairly. Given the short timescales under both judicial review and the EU procurement rules, there is little time to waste. As with any legal action, TSOs will need to take advice on the risks (particularly financial) against the chances of success.

Judicial review

The way to challenge a public authority decision that does not involve a breach of the EU procurement rules is by judicial review. The timescale for the challenge is the same as under the EU procurement rules: as soon as possible and in any event within three months unless there is good reason to extend the period. In a judicial review the court will never decide whether the actual decision was right or wrong, but will only rule on whether the process followed was right or wrong. A successful claim for judicial review will mean that the court orders the authority to take the decision again. The authority could end up making the same decision (albeit using a different process).

Local authorities

TSOs concerned about the process that a local authority has followed can correspond with the local authority's monitoring officer.³² This is often the best action to take, and can be done at the same time as considering a challenge under the EU procurement rules.

The monitoring officer is appointed to report and advise on anything or anybody which would be in contravention of the law or which would amount to maladministration. In effect, the monitoring officer must advise on the legality of a council's decisions and on the conduct of its councillors and officers. This includes breaches of the EU procurement rules, as they are incorporated into English and Welsh law.

The NHS

TSOs concerned about the process followed by an NHS primary care trust (PCT) can consider what help may be available from the Cooperation and Competition Panel for NHS-funded services. The panel exists to help 'ensure that the principles and rules of cooperation and competition for the provision of NHS-funded services support the delivery of high quality care for patients and value for money for taxpayers'.³³ It investigates potential breaches of the principles and rules on cooperation and competition, and makes independent recommendations to the Department of Health on how such breaches should be resolved. In particular, the panel will consider procurement disputes referred to it by strategic health authorities (SHAs).³⁴ Complaints about procurement should first be addressed through the dispute resolution procedures put in place by SHAs and the relevant PCT.

The Compact³⁵

Many TSOs may feel that litigation is too confrontational and expensive, and will not want to challenge a decision through the courts for fear of causing longer-term problems in their relationships with public bodies. The Compact can be a useful resource for TSOs in challenging public decisions without taking an aggressive position. TSOs should consider taking the advice of supporting bodies such as NCVO and NAVCA. Challenging public decisions based on non-compliance with the Compact can be very effective.

The EU procurement rules: challenging contracts for Part B services

When the full EU procurement rules apply, contracting authorities must allow at least 10 days between the decision to award a contract and signing the contract. Although this does not apply to contracts for Part B services, contracting authorities cannot deprive unsuccessful bidders of the opportunity to apply to have an award decision set aside, even where the full EU procurement rules are not being followed.³⁶

Although Part B services are not subject to the full EU procurement rules, it has been shown that contracts for Part B services are, in certain circumstances, open to legal challenge.

A recent case³⁷ suggests that, where a contract for Part B services is of interest across Europe and the process has not been transparent, the award of that contract to a bidder within the Member State can amount to a difference of treatment to the detriment of bidders or potential bidders elsewhere. This means that, where a Part B services contract is awarded within the same country, and the contract has not been awarded in a transparent manner, this could be deemed to be contrary to the principles of equal treatment across the nations in the European Union.

However, it cannot be presumed that a contract for Part B services is or was of cross-border interest. It is for the Commission (on a case-by-case basis) to establish that the contract was of interest to a potential bidder that had not been able to express its interest because the contract was not advertised appropriately.

In cases where the procurement of the contract was not subject to the full EU procurement rules and was not advertised, TSOs may also wish to consider approaching the European Commission on the basis that there has been a breach of the EU Treaty principles.

Challenging – EU procurement law

To date, few challenges have reached the UK courts, but many procurement processes have had to be restarted. Unsuccessful bidders are becoming bolder as their understanding of the processes increases and the economic climate becomes tougher. There are a number of possible challenges that can be brought.³⁸ In particular, TSOs that have been unsuccessful may want to challenge the award (or proposed award) of a contract to another organisation.

Bringing a challenge

There is a special process to challenge decisions a bidder considers involved a breach of the EU procurement rules, which will apply whenever the contracting authority should have followed the full rules (including when the authority chose to follow them). The challenge must be brought as soon as possible and in any event within three months unless there is good reason to extend that period.³⁸ A bidder wishing to

bring such a challenge should not wait until the procurement has been completed. The challenger has to show that the procurement process was not completed (or was not being completed) in accordance with the EU procurement rules.

A TSO considering challenging the award of a contract or the process followed must act quickly and will need legal advice. The first step is to write to the contracting authority in question immediately. The letter should:

- set out the facts (such as dates of any relevant correspondence)
- make requests for any relevant information (for example, scoring methodologies and scores/ranking)
- ask for the reasoning behind decisions made
- cite the relevant provisions of the Public Contracts Regulations 2006 and any deadlines for response
- specify a time limit after which the TSO intends to start legal proceedings.

Will challenging a procurement be expensive?

Although litigation can be expensive and time consuming, a fair tender process can be critical to organisations where the majority of the work flows from the public sector. Losing a contract can have devastating consequences for an organisation.

Effect of a challenge

If the contract has not yet been signed, the court may:

- suspend the contract award procedure to allow time for the dispute to be resolved
- set aside the decision to award the contract
- award damages to a bidder that has suffered loss or damage as a consequence of the breach.

Where the contract has already been signed, the EU procurement rules limit the remedy to damages (ie the court will not set aside the contract) – which may be small consolation to the aggrieved party. It is therefore crucial to decide whether a contract has been entered into, in order to decide whether the contract award procedure could be suspended.

The court has considered it preferable for a contracting authority to delay signing a contract so that a bidder has time to decide whether to make a challenge, rather than having to apply for an interim injunction to prevent the contract being

signed. However, the sanction for a contracting authority failing to wait before signing the contract is not clear.

The level of damages will generally be limited to the challenger's bidding costs. These may be reduced to reflect the fact that the challenger may not have been successful even if the procurement had been carried out properly.

Loss of profit is much more difficult to recover. This is generally possible only when the aggrieved bidder can show that, but for the breach, it ought to have been awarded the contract. However, it is possible that the bidder may recover a proportion of its likely profits, depending on the percentage likelihood of it being awarded the contract.

Example

A local council decided to re-tender its domiciliary care (care at home) packages, and elected to follow a procurement process under the EU procurement rules.

The council chose to hold interviews as part of the process. The ITT stated that the interview accounted for 40 per cent of the available marks. Unfortunately for an existing provider, it was not clear from the ITT what was being measured at the interviews, or how the interviews would be scored. There was a risk that the council could award high marks to people it felt it could get along with and low marks to people it happened not to like.

The existing provider sought legal advice, and was advised that the council should be asked:

- not to sign contracts with the winning bidders
- to rerun the procurement process.

As the council would not agree to this, a judge granted the existing provider an emergency injunction to stop the council from signing contracts. It then agreed to rerun the interviews in a fair and transparent manner and pay the existing provider's costs of bringing the proceedings.

ENTERING INTO CONTRACTS WITH THE PUBLIC SECTOR

Summary

In this chapter we look at the ways in which TSOs might contract with public bodies. These include:

- as a direct, sole contractor to a public sector contracting authority
- as part of more complex contracting arrangements and 'supply chains', including:
 - as subcontractors
 - forming part of a framework
 - as part of a consortium
- the potential for TSOs to be contracting authorities themselves, responsible for following the EU procurement rules.

TSOs as sole contractors to the public sector

Public bodies (in particular local authorities) are increasingly proficient in using a mixture of service providers, ranging from large contracts with major public companies (eg very large construction or development projects) to smaller contracts with SMEs). TSOs often fall into the category of SMEs (although there are, of course, notable exceptions). In this sense, even smaller and more specialist TSOs are increasingly able to contract directly with public bodies.

When tendering for contracts, particularly when under the EU procurement rules, all bidders must be treated equally. Public authorities are therefore not permitted to limit or set the type of organisation they contract with (eg to TSOs or charities) as, in essence, this would amount to discrimination against some organisational forms.

Perhaps the only exception to these rules that may be relevant, in certain circumstances, is the rule relating to 'reserved contracts',⁴⁰ which allows a contracting authority to limit a procurement to supported factories or businesses ('sheltered workshops').

TSOs in other contractual relationships

In some contexts, contracting authorities may choose to award larger contracts, including regional or national ones. In these cases, it is likely that smaller TSOs will form part of a group of organisations involved in a contract or project, rather than being a sole or 'lead' contractor. There are a number of ways in which TSOs can get involved in public contracts even where it is not possible for them to be, or they may not wish to be, the sole contractor to the public body. They include:

- participating in a traditional 'supply chain', working as a subcontractor employed by the provider chosen by the public body
- forming part of a 'framework' of potential providers with which the public body chooses to work
- forming part of a 'consortium' of organisations which together provide the services the public body needs.

TSOs as subcontractors

Public bodies can encourage their contractors to consider subcontracting to TSOs, especially those that fall into the category of SMEs. For example, if a core purpose of a contract is to stimulate the creation of SMEs, contractors can be asked to demonstrate their track record in working with such organisations and this could be part of the contract award criteria.⁴¹ Additionally, the EU procurement rules emphasise that 'in order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market, it is advisable to include provisions on subcontracting'.

Using TSOs on framework agreements

The term 'framework' or 'framework agreement' is generally used to describe an agreement with one or more suppliers that establishes the general terms on which contracts are awarded over a period. A framework agreement will set the terms and price for any individual contracts (often referred to as 'call-offs') awarded, but will not commit the public body to making any purchases. Framework agreements are used extensively by buying clubs (often also described as 'central purchasing bodies'), where a group of contracting authorities uses the same procurement exercise and then the same framework, which can have one or more suppliers. If there are multiple suppliers, these are often known as lists of 'preferred suppliers'.

Some frameworks will satisfy the meaning of a contract under the full EU procurement rules, and will therefore need to follow the full rules; others will need to be awarded using specific rules about framework arrangements which are set out in the full EU procurement rules. These are complex, and TSOs that feel they need to know more about arrangements being proposed by a contracting authority should consider seeking legal advice.

Within the public sector, framework agreements are often used with a view to achieving savings. By their very nature there is a risk of excluding smaller suppliers and the third sector because frameworks are often designed with economies of scale in mind. However, participating in a multi-supplier framework agreement can still be a way for TSOs to get involved in delivering public services. Some public bodies have set up framework agreements with a range of suppliers or service providers. The contracting authority can choose to let individual contracts under the framework to different providers on the basis of contract size. In this way, an enterprise that has secured a place on the framework can be awarded a contract

Chapter 5

Entering into contracts with the public sector

Pathways through the maze *A guide to procurement law*

of an appropriate size. Using framework agreements like this can be a positive way to involve the third sector.

Developing consortia

Consortium bidding, where a number of potential providers collaborate to provide the required services, is another alternative for TSOs. As part of a consortium, TSOs may be able to bid for larger contracts than they would be able – or willing – to bid for on their own. They are therefore a valuable way of bidding for work, and may justify the time and expense involved in setting them up.

In most cases consortia will need time to form and be set up formally and in good time if they are to be successful. Public bodies can help TSOs to form these consortia as long as they do this in a way that is not unfair on other bidders. One way of encouraging TSOs is for the contracting authority to invite any interested bidders to meet for a briefing about its needs before responses are submitted. This gives interested TSOs an opportunity to meet each other (and other bidders) and discuss the possibility of working together to bid for a contract.

TSOs as commissioners and procurers

In certain circumstances TSOs themselves may be classed as public bodies and contracting authorities, for example where they are funded or managed by a public body. This is unlikely to be a concern for smaller organisations, but a TSO that finds itself in this situation should seek legal advice.

Key points

- Contracting authorities are obliged to make their contract tendering processes open and not discriminate. TSOs will therefore need to compete with the rest of the market if they wish to win public sector work.
- Engaging with potential suppliers will not be discriminatory where the opportunity for engagement is open to everybody.
- The European Commission actively encourages subcontracting as a way of encouraging the involvement of SMEs.

- Multi-supplier framework agreements can provide an opportunity for smaller organisations to participate in delivering smaller contracts while enabling the contracting authority to enter into the size and length of contract it chooses.

Good practice tips

- A good commissioning process will involve TSOs as early as possible – this will help build their capacity and ultimately lead to a more competitive marketplace.
- TSOs should attend ‘meet the buyer’ and similar events as often as possible. This will ensure that they know what the contracting authority wants, and that the contracting authority becomes aware of which TSOs are interested in working with it, and what they can offer.
- TSOs wishing to consider bidding for a contract as part of a consortium should begin discussing this at the earliest possible opportunity to give the consortium the best chance of success.
- Public bodies can help organisations form a consortium to bid for the contracts they advertise, so long as they do so in a way that does not discriminate in favour of or against particular bidders.

CONTRACTS AND GRANTS

Summary

Contracts that are advertised and awarded using the EU procurement rules are only one way in which public bodies interact with TSOs. Many TSOs will be used to receiving grant funding from a local authority or other public body.

In this chapter we discuss:

- the differences between grant funding arrangements and contracts
- the possibility of funding from a public body being threatened by the State aid rules.

Public bodies should not be put off from giving grant funding where this is an appropriate and effective way of providing services to the communities they serve. Grant funding can be provided in a transparent way so that it cannot be confused with the awarding of a contract.

Contracts

The characteristics of a contract for services include:

- an obligation to deliver something to the paying public body, for the benefit of that public body
- the requirement to charge VAT on the supply of those services
- the ability of the paying public body to recover from the recipient organisation financial losses it suffers as a result of a failure of the recipient organisation to deliver the services it is contractually required to provide.

Grants

The characteristics of a grant include:

- it is given to enable the grant recipient to provide services to third party beneficiaries rather than to the public body
- the grant recipient is able to hand back the grant without having an obligation to deliver the services funded by the grant
- VAT is not payable
- the financial obligation of the grant recipient is limited to paying back all or part of the grant, rather than compensating the paying public body for losses incurred as a result of the non-delivery or failed delivery by the recipient organisation.

It is relatively settled law that grant funding does not fall within the remit of the EU procurement rules.⁴⁴ There is a clear distinction, for the purposes of the EU procurement rules, between awarding contracts and providing grant funding: contracts are subject to the rules; grant funding is not. On the face of it, grant funding cannot be challenged on the grounds of a breach of the EU procurement rules. However, the distinction between a grant agreement and a contract for services is often blurred, especially as grants are increasingly being given subject to conditions requiring the achievement of specific outcomes, and there is still widespread use of 'service level agreements', which are not always clear.

Powers to give grants

A public body can give grants where it has the legal power to do so. For example, local authorities may grant fund organisations under the 'wellbeing' power.⁴⁵ Central government is also able to provide grant funding where express powers exist. Though the NHS does not tend to give grants as such, NHS trusts and PCTs could do so if they wished, provided that doing so supported their main purposes. A public body cannot automatically award a contract to an organisation that it has previously grant funded – the EU procurement rules would apply to that contract and to whom it is given.

Potential for challenge to the allocation of grant funding

While grant funding is not subject to the EU procurement rules, it is sometimes unclear whether something is in fact a grant or a contract. It is possible for an agreement to demonstrate a mixture of the characteristics of both. If it is at all unclear, a grant agreement could be challenged on the basis that the arrangement should have been subject to the EU procurement rules. If the arrangements are challenged in court, the court will analyse each relevant factor and decide whether the arrangements form a grant or a contract. Clear drafting of grant agreements is vital to avoid legal challenge. It is important to draw up documentation in a way that would encourage the court to come to the desired conclusion in the case of any challenge: the way the arrangements are expressed by the parties is very important in a borderline situation.

Annual funding

Historically, it was generally accepted that grants were determined annually. Deciding to give a grant for a longer period has often been regarded (at least by auditors) as limiting the authority's discretion to award grants more frequently based on the grant applications they receive at any time. There is still uncertainty over the extent to which authorities can enter into long-term grant funding agreements, because their own funding and priorities cannot necessarily be guaranteed over the same period. The Compact encourages public bodies to adopt a strategic approach to funding, and longer-lasting (ie multi-year) grant funding is becoming more

common. Public bodies that have signed up to the Compact are expected to follow it, although it is not legally binding.

In contrast, contracts for services that the public body is under a duty to provide do not suffer from this uncertainty because, at least in part, the body's duties and priorities are more definite and long-lasting.

The State aid rules

The term 'State aid' is used to describe a multitude of ways in which public resources are used to support businesses. State aid rules have been designed to prevent the use of this support in ways that distort free trade in the EU.

The EU Treaty does not include a definition of what constitutes State aid. However, the European Commission has declared that it includes:

- direct subsidies
- tax exemptions
- preferential interest rates
- guarantees of loans on expressly favourable terms
- acquisition of land or buildings whether gratuitously or on favourable terms
- provision of services on preferential terms
- indemnities against losses.

There are some less obvious examples, including activities such as providing consultancy services, which can build the capacity of an organisation to work with the public body, even where no money changes hands.

The rules restrict the support the public sector may provide to TSOs that operate in a commercial environment. They do not apply to the whole of the sector, but only where the support could inhibit fair competition with other businesses.

There is a very good reason to take the requirements of State aid seriously and seek advice as early as possible. The European Commission can insist, and has insisted, that aid be stopped or even reclaimed if it is not permitted or has not been properly notified. This could lead to TSOs being made to return money given by a public body, even if they have already spent it. Aggrieved competitors can also challenge through the courts the aid that has been given.

In reality, there are many activities that public bodies and TSOs can enter into without risking a breach of the State aid rules because it does not seem likely that such activities will distort (or threaten to distort) competition or affect trade across Member States. Where trade between Member States is not affected, or where there has been a competitive process (such as a procurement following the EU procurement rules and EU Treaty principles) activities will not count as State aid.

It is important for TSOs to be aware that the EU State aid rules may apply if they receive funding from a public body. However, in most cases the rules will not apply.

Key points

- The distinction between contracts and grants can be blurred. It is important that the documentation reflects the label the parties want to put on their relationship and that the appropriate rules are applied. It is a matter of good drafting to ensure that a grant agreement is clearly set out as such.
- Grants and contracts should be used in appropriate circumstances. The issues arising when moving from grant funding to a contract mean that the decision to do so should not be taken lightly.
- The implications of the State aid rules need to be considered carefully by both TSOs and commissioners.
- Recipients of State aid can be made to return it if it is deemed to have been incompatible with EU law.

Good practice tips

- TSOs and public bodies should be as open with each other as possible when considering State aid implications to their working together.
- TSOs should be aware of the differences between grant agreements and contracts and the corresponding rules, and should take legal advice if they are concerned.
- Good commissioning should be clear about whether the commissioner intends to provide grant funding or enter into a contract: clear drafting is helpful to both parties and can avoid legal challenge on the basis of a breach of the EU procurement rules.

TOP TIPS ON PROCUREMENT AND COMMISSIONING FOR THIRD SECTOR ORGANISATIONS AND COMMISSIONERS

Summary

This guide is designed both for TSOs and public bodies hoping to work with them. We have included good practice tips and key points throughout the guide. In this chapter we discuss good (legal) practice for TSOs and public bodies that hope to contract with the third sector.

Chapter 7

Top tips on procurement and commissioning for TSOs and commissioners

Pathways through the maze
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Good practice for TSOs

TSOs can and should do more to develop their relationships with public bodies in order to find ways of getting recognition for the public value that they can offer. They can find opportunities for working in partnership and testing out new ideas, influencing a way of determining value for money that a commissioner is prepared to accept or winning contracts and then raising standards.

Key points

- TSOs should get involved with the public bodies with which they would like to work at the earliest opportunity. This could, for example, be through:
 - helping the body to decide what it wants to commission and demonstrating what the market can provide
 - attending events the public body hosts with the intention of getting to know the marketplace or helping TSOs and other interested parties meet each other.
- TSOs interested in working alongside other TSOs (or other organisations within an area or with the same interests) should consider bidding for public contracts as part of a group or consortium. They should think about this possibility as early as possible to give the group the best chance of success. However, consortia have received a mixed response and TSOs should consider their options seriously when thinking about this option.
- It is important to remember that the EU procurement rules will not always apply. While TSOs will sometimes find they are interested in a contract that is following the EU procurement rules, there will be opportunities that follow a different route, which TSOs should take advantage of as much as possible.
- TSOs should make use of public sector information and advertising specific to the sector, and find out where public bodies they are targeting advertise opportunities. There are portal websites aimed at smaller contracts, such as supply2.gov.uk, or which advertise opportunities within a particular area, which TSOs should familiarise themselves with and use as much as possible.

Good practice for commissioners

Public bodies hoping to commission services from TSOs cannot directly discriminate in how they choose who is to deliver those services. However, there are a number of ways for commissioners to make their processes more accessible to TSOs.

Engaging with stakeholders and the market pre-procurement

There are many opportunities for commissioners to engage with stakeholders and the marketplace prior to a competitive process. They can invest in building the capacity of the third sector, and can engage to a greater extent with the potential marketplace, especially when deciding what to commission or procure and in preparing their business case for a contract.

Building capacity

A number of local authorities offer training for social enterprises, voluntary and community organisations, charities and small businesses to help them bid for contracts. Some get together with other commissioners in their region to provide mentoring to organisations bidding for contracts in neighbouring areas.⁴⁶

It is unlikely that the State aid rules (see chapter 6) will prove problematic for public bodies wishing to build the capacity of potential suppliers, for the following reasons:

- an activity will only be State aid if it favours certain organisations. Where a public body is interested in building the capacity of all potential suppliers, this does not favour particular organisations over others, and will therefore not be contrary to State aid rules
- capacity building activity, even where covered by the State aid rules, is likely to fall within the principle that the value of the 'aid' is small enough not to affect trade between Member States.

Deciding what to commission

A public body can carry out research at an early stage to identify what the market is able to provide as long as it does not favour particular suppliers or types of supplier. This will help the public body decide what is realistic to procure, based on whether there are suppliers able to deliver the specification. It can also offer providers an opportunity to put forward ideas and proposals to commissioners.

Chapter 7

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Preparing a business case

Preparing a business case creates an opportunity to ensure that the contract reflects the full value of what can be achieved. A lot of work has been done to develop methods for demonstrating social return on investment in relation to public service contracts. Tools are available to help organisations identify added value in service delivery and express it in terms meaningful to commissioners and so strengthen opportunities for less conventional providers.⁴⁷ Commissioners can also use these tools to help them make the link between their strategic documents and their commissioning, on a case by case basis.

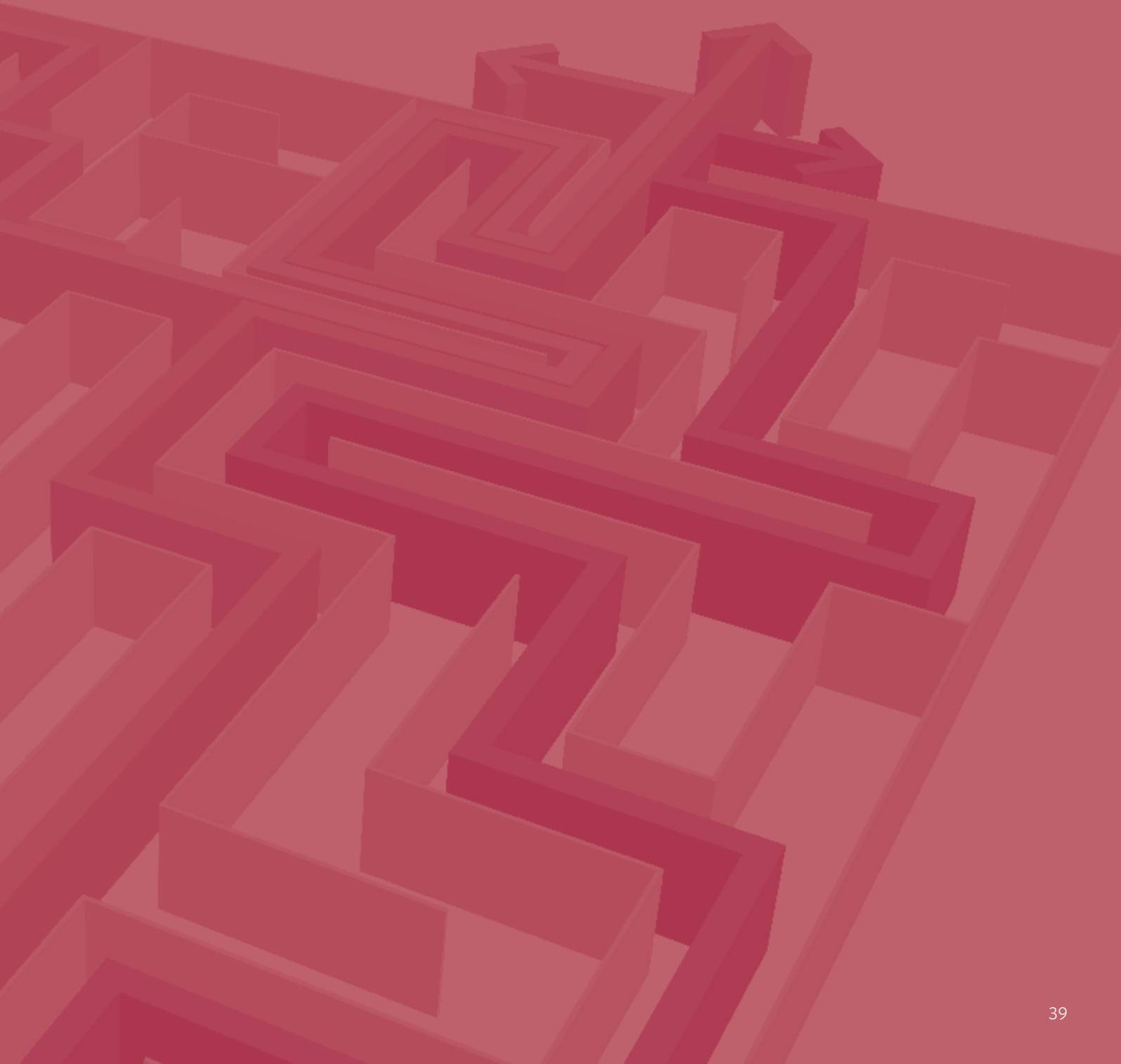
Making the commissioning process more accessible to TSOs

There are a number of ways in which contracting authorities can make the tendering process easier and more accessible to bidders from different sectors. They include clearly drafted procurement documentation, adequate tendering periods and flexible interview dates.⁴⁸

Contrary to popular belief, competition is not always legally required when commissioning services. Formal EU procurement is only one way to commission, and may be a poor approach for delivering services if used without thought. Commissioners should avoid excessive use of the full EU tender process when it is not needed. Alternative approaches can improve the chances of achieving the required outcomes and stimulate local markets. Commissioners should avoid over-dependence on competition as the primary driver for demonstrating best value, as alternative ways of choosing contractors, in addition to written submissions, can be useful and constructive. This does not, of course, affect the position where a commissioner must follow the full EU procurement rules.

Commissioning outcomes rather than outputs (see chapter 1) can be very successful in certain contexts – especially where commissioners are open to ideas and outcomes of which they may not previously have been aware.

USEFUL INFORMATION



Links and reference points

Achieving community benefits through contracts: law, policy and practice

Richard Macfarlane and Mark Cook, published for the Joseph Rowntree Foundation by The Policy Press (ISBN 1 86134 424 4)
www.jrf.org.uk/publications/achieving-community-benefits-through-contracts-law-policy-and-practice

Buying Solutions

The public sector's national procurement portal. The website (www.buyingsolutions.gov.uk) includes information for potential suppliers on how to get onto the frameworks and when they are expected to be open for tendering.
www.online.ogcbuyingsolutions.gov.uk/news/

The Compact

The agreement between government and the voluntary and community sector to improve their relationship for mutual advantage and community gain. The Compact and additional and background information is available from:
www.thecompact.org.uk/

The Compact and procurement law

A guide that helps commissioners to procure in a way that follows both Procurement Law and the principles of the Compact. Available from:
http://www.thecompact.org.uk/files/139878/FileName/compactandprocurementlaw_webversion.pdf

EU procurement law

The Consolidated Directive

'Directive 2004/18/EC of the European Parliament and of the Council of 31st March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.'

The European Directive on procurement which was brought into effect under English law in the Public Contracts Regulations 2006 and the Public Contracts (Scotland) Regulations 2006.
ec.europa.eu/internal_market/publicprocurement/legislation_en.htm

Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives

This and other key documents relating to procurement rules derived from the EU Treaty are available from:
ec.europa.eu/internal_market/publicprocurement/key-docs_en.htm

Guide to the EU procurement rules (2nd edition)

A clear English explanation of the EU procurement rules. Although written for housing associations, much of the guide is relevant to other sectors. Includes a chapter on the options for challenging procurement processes by housing associations and other public bodies. Published by the National Housing Federation, June 2007. Cost £65 plus p&rp. Available from:
www.housing.org.uk.

Hearts and minds: commissioning from the voluntary sector

Audit Commission, July 2007
Includes recommendations for local public bodies, TSOs, regulatory bodies and central government.
www.audit-commission.gov.uk/nationalstudies/localgov/Pages/heartsandminds.aspx

Improving financial relationships with the third sector: guidance to funders and purchasers

HM Treasury, May 2006.
www.hm-treasury.gov.uk/spend_ccr_guidance.htm

LIO – local infrastructure organisation

Local infrastructure organisations work with local TSOs to ensure they get the support they need. A directory of LIOs in England is available at:
www.navca.org.uk/liodir/

National Association for Voluntary and Community Action (NAVCA)

NAVCA's Local Commissioning and Procurement Unit provides support and resources for local infrastructure organisations.
www.navca.org.uk/lcpu

National Audit Office (NAO)

NAO guidance available includes 'Financial relationships with third sector organisations: a decision support tool for public bodies in England'.

www.nao.org.uk/guidance__good_practice/toolkits/better_funding.aspx

National Council for Voluntary Organisations (NCVO)

NCVO's Public Service Delivery Network is a user-led resource for commissioners and providers on third sector commissioning.

www.ncvo-vol.org.uk/psdnetwork

National procurement strategy for local government

Communities and Local Government's strategy for supporting councils in finding more effective, prudent and innovative ways of procuring services.

www.communities.gov.uk/localgovernment/efficiencybetter/nationalprocurementprogramme/nationalprocurementstrategy/

New Economics Foundation

Useful resources include 'Measuring value: a DIY guide to social return on investment', 2nd edition, May 2008.

www.neweconomics.org/gen/z_sys_PublicationDetail.aspx?PID=241

Small business friendly concordat: good practice guide

Prepared by Communities and Local Government, this guide supports the SME Friendly Concordat prepared for local authorities in support of the National Procurement Strategy for Local Government. It includes examples of good practice and explains how local authorities can frame and deliver their procurement strategies in accordance with the principles of the Concordat. It will be useful for SMEs where local authorities have signed up to the Concordat.

www.communities.gov.uk/publications/localgovernment/smallbusinessfriendly

Specification writing for community benefits

Free online learning course for local authorities developed by Northamptonshire County Council, South Kesteven District Council, BEST Procurement and Social Enterprise East Midlands.

www.specification-writing.info/welcome.aspx

State aid guidance

EU guidance on the State aid rules.

ec.europa.eu/comm/competition/state_aid/overview/index_en.cfm

Department for Business, Innovation and Skills (BIS)

State Aid Branch provides advice and guidance on State aid rules to national, regional and local government and government agencies.

www.berr.gov.uk/whatwedo/businesslaw/state-aid/

Supply to government

Website for public authorities to advertise below-threshold procurements. Suppliers may register for free access to public sector contract opportunities.

www.supply2.gov.uk

Think smart ... think voluntary sector

Good practice guidance on procurement of services from the third sector.

OGC and the Home Office, June 2004

www.commercial.homeoffice.gov.uk/documents/thinksmart.pdf?view=Binary

Glossary

Aggregation	The rules that decide when the value of one contract must be added to the value of another/other contract(s). The aggregation rules are used to decide whether the full EU procurement rules apply to the letting of a contract
Best value	The requirement for local authorities to make arrangements to secure continuous improvements to services and value for money
Central purchasing body	A purchasing group formed by one or more contracting authorities to buy services in bulk from the market for its members (also known as a 'buying club')
Commissioning	The actions of a public authority to achieve one or more of its aims through organisations other than the authority itself
Competitive dialogue procedure	A procedure used for large and complex contracts where the purchaser does not know in advance the best technical, legal or financial solution to its needs, which allows the purchaser to negotiate with bidders
Contract award criteria	The criteria used to award the contract, based either on 'lowest price' or the 'most economically advantageous criteria' (MEAT)
Contract award notice	A notice sent in the prescribed form to the Official Journal of the European Union (OJEU) within 48 days of awarding a contract, giving details of the winning tender
Contract documents	The documents used for awarding a contract. They include the invitation to tender, contract specification, description of services and conditions of contract and supplemental documents
Contract notice	A notice in the prescribed form sent to the OJEU stating the nature of the contract
Contracting authority	Those bodies listed (in England, Wales and Northern Ireland) in section 3 of the Public Contracts Regulations 2006 and (in Scotland) in section 3 of the Public Contracts (Scotland) Regulations 2006. These bodies have to follow the EU procurement rules. Examples include registered social landlords, central and local government departments and not for profit organisations formed, financed, supervised or controlled by another contracting authority.
EU	European Union
Framework agreement	An agreement with one or more contractors specifying the terms and conditions (including price) under which specific purchases ('call-offs') can be made but which does not commit the contracting authority to any purchases

ITN	Invitation to negotiate
ITPiD	Invitation to participate in dialogue
ITT	Invitation to tender
MEAT	The most economically advantageous tender – the alternative to lowest price as the basis of choosing the successful bidder. These criteria must be based on ‘economic advantage’ and can include, for example, price, quality and after sales service
Negotiated procedure	A procedure (which can only be used in limited circumstances) allowing a contracting authority to negotiate the terms of a contract with a selected number of bidders
OGC	The Office of Government Commerce – the non-departmental public body set up to support government procurement activity
OJEU	Official Journal of the European Union (where PINs, contract notices and contract award notices are advertised)
Open procedure	A procedure whereby any bidder is invited by the OJEU contract notice to submit a tender for a contract
Part A services / Part B services	The procurement rules divide services into two categories. They apply fully to Part A services but only very limited parts apply to Part B services
PCT	Primary care trust
PIN	Prior information notice – an (optional) notice sent to the OJEU alerting the market of forthcoming public contracts
PQQ	Prequalification questionnaire. An early stage in the procurement process to help choose which organisations will formally be invited to tender.
Prequalification (or qualification)	The means by which providers are screened for eligibility, financial strength and technical ability in the restricted, negotiated and competitive dialogue procedures (typically by completing a prequalification questionnaire)
Restricted procedure	A procedure by which contractors, suppliers or service providers are first prequalified to ensure they meet the authority’s minimum standards before a selection are invited to submit tenders
SHA	Strategic Health Authorities

Sheltered workshops/ sheltered employment programme	Organisations employing mainly disabled people
SME	Small and medium sized enterprise. A 'medium' enterprise is generally viewed as being one with less than 250 employees and either (i) an annual turnover of below €50m (around £39.75m) or (ii) an annual balance sheet no greater than €43m (around £34m). A 'small' enterprise is one with less than 50 employees and an annual turnover or balance sheet below €10m (around £8m).
State aid	European rules based on Article 87 of the EC Treaty. The rules generally prohibit any 'aid' granted by a Member State that distorts or threatens to distort competition, where this affects trade between Member States.
TED	Tenders Electronic Daily – the online version of the OJEU which contractors can search for details of contracts being advertised
Thresholds	Monetary values for contracts, above which the EU procurement rules must be followed
Treaty (EU)	The EU Treaty is a term which encompasses the set of international treaties between the EU's Member States, which together set out the constitutional basis for the EU, establish the main EU institutions (such as the European Commission and the European Court of Justice) and establish the EU's main objectives. This includes the Treaty establishing the European Community (also known as the Treaty of Rome) and the Treaty on European Union (the Maastricht Treaty), and various treaties that have amended these two fundamental Treaties.
TSO	Third sector organisation. Covers voluntary and community organisations and social enterprises

Appendix 1 Part A Services

- Maintenance and repair of vehicles and equipment
- Transport by land, including armoured car services and courier services but not including transport of mail and transport by rail
- Transport by air but not transport of mail
- Transport of mail by land, other than by rail, and by air
- Telecommunications services
- Financial services:
 - (a) Insurance services
 - (b) Banking and investment services other than financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments and central bank services
- Computer and related services
- Research and development services where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs and the services are to be wholly paid for by the contracting authority
- Accounting, auditing and book-keeping services
- Market research and public opinion polling services
- Management consultancy services and related services, but not arbitration and conciliation services
- Architectural services: engineering services and integrated engineering services: urban planning and landscape architectural services: related scientific and technical consulting services: technical testing and analysis services
- Advertising services
- Building-cleaning services and property management services
- Publishing and printing services on a fee or contract basis
- Sewerage and refuse disposal service: sanitation and similar services

Appendix 2 Part B Services

- Hotel and restaurant services
- Transport by rail
- Transport by water
- Supporting and auxiliary transport services
- Legal services
- Personnel placement and supply services
- Investigation and security services, other than armoured car services
- Education and vocational health services
- Health and social services
- Recreational, cultural and sporting services

Endnotes

- 1 Throughout the publication we use the terms 'third sector' and 'third sector organisation' (TSO) to refer to voluntary and community organisations and social enterprises.
- 2 A broader discussion of this topic is outside of the scope of this guide. Extensive guidance is available from a range of sources for contracting authorities wishing to make their procurement more sustainable.
- 3 A 'medium' enterprise is generally viewed as being one with less than 250 employees and either (i) an annual turnover of below €50m (around £39.75m) or (ii) an annual balance sheet no greater than €43m (around £34m). A 'small' enterprise is one with less than 50 employees and an annual turnover or balance sheet below €10m (around £8m).
- 4 The EU Treaty is a term which encompasses the set of international treaties between the EU's Member States, which together set out the constitutional basis for the EU, establish the main EU institutions (such as the European Commission and the European Court of Justice) and establish the EU's main objectives. This includes the Treaty establishing the European Community (also known as the Treaty of Rome) and the Treaty on European Union (the Maastricht Treaty), and various treaties that have amended these two fundamental Treaties.
- 5 Throughout this guidance we refer to the rules set out in the Consolidated Directive and the Public Contracts Regulations 2006 as the 'EU procurement rules'.
- 6 In Scotland, the equivalent regulations are the Public Contracts (Scotland) Regulations 2006.
- 7 These are listed in Schedule 3, Part A of the Public Contracts Regulations 2006. The full list of Part A services is in Appendix 1.
- 8 There are circumstances where some of the rules apply to Part B services. Some are only of importance to commissioners and are outside the scope of this guide, such as the requirement for contracting authorities to send every year a report on the contracts it has entered into to the Office of Government Commerce (OGC). Where the rules are relevant to TSOs they are covered further in the guide.
- 9 These are listed in Schedule 3, Part B of the Public Contracts Regulations 2006. The full list of Part B services is in Appendix 2.
- 10 The exact amounts are expressed in euro and are benchmarked to the pound every two years, on 1 January. They will next be changed with effect from 1 January 2010. The OGC publishes thresholds on its website www.ogc.gov.uk.
- 11 At the time of writing. The figure is translated into pounds every two years.
- 12 Regulation 6(2) of the Public Contracts Regulations 2006.
- 13 Those TSOs that are supported businesses should refer to the OGC 'Guidance on supported factories and businesses' available from www.ogc.gov.uk (published in January 2009). The guidance highlights a website giving details of the goods and services available from supported businesses.
- 14 Disability Discrimination Act 1995. Guidance on the definition in the 1995 Act is available from the Equality and Human Rights Commission at www.equalityhumanrights.com
- 15 Regulation 7 of the Public Contracts Regulations 2006.
- 16 Regulation 19 of the Public Contracts Regulations 2006.
- 17 See the European Commission's 'Interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives', available from www.ec.europa.eu/internal_market/publicprocurement/key-docs_en.htm.
- 18 The only exception is under the negotiated procedure without advertisement, under Regulation 14 Public Contracts Regulations 2006.
- 19 See Tenders Electronic Daily (TED), www.ted.europa.eu. The TED website is relatively straightforward to use, and includes a detailed search facility so that you can search for notices based on area, subject matter or contracting authority.
- 20 For details of timescales under full EU procurement rules visit the OGC website www.ogc.gov.uk.
- 21 An EU-wide set of classification codes which describe the types of services being advertised. The codes are available from www.ogc.gov.uk.
- 22 The OGC has developed a standard PQQ for use in procurements subject to the full EU procurement rules, available from www.ogc.gov.uk.
- 23 The OGC's financial appraisal guidance is that 'in the absence of audited statements, other information should be requested that is considered sufficient for assessment purposes' – see www.ogc.gov.uk.
- 24 These criteria are helpfully explored in the OGC/Home Office guidance: 'Think smart: think voluntary sector' (see chapter 8).
- 25 Regulation 24(5) of the Public Contracts Regulations 2006 states 'where an economic operator is unable for a valid reason to provide the information which the contracting authority has required, the contracting authority shall accept such other information provided by the economic operator as the contracting authority considers appropriate'.
- 26 Prospective bidders should always be aware of whether TUPE may apply to the contract. This is a complex issue that may require expert advice.
- 27 One example of a standard used by TSOs is PQASSO (Practical Quality Assurance System for Small Organisations), which offers a flexible approach to quality. The PQASSO Quality Mark is PQASSO's external assessment service. More information is available from www.ces-vol.org.uk.
- 28 Regulation 30 (2) Public Contract Regulations 2006.
- 29 Consolidated Directive Recital 46.
- 30 This was determined in the case *Alcatel Austria v Bundesministerium für Wissenschaft und Verkehr* – Case C-81/98, and is now set out in the Public Contracts Regulations 2006 (Regulation 32). The standstill is therefore often known as the 'Alcatel gap' or 'Alcatel standstill'.
- 31 The relevant case is *Rapiscan Systems Ltd v Commissioners of Her Majesty's Revenue & Customs* (2006) HC.
- 32 The most straightforward way of finding out who this is usually via the local authority's general helpline. The monitoring officer will often also be the local authority's head of legal services.
- 33 www.ccpnel.org.uk

- 34 For more information on the Cooperation and Competition Panel and its role in NHS procurement disputes see www.ccp-panel.org.uk/referrals-to-ccp/procurement.html.
- 35 An agreement between government and the third sector to improve their relationship for mutual advantage and community gain. For further details see www.thecompact.org.uk/.
- 36 The case of *Federal Security Systems Ltd v Chief Constable for the Police Service of Northern Ireland and Resources Group Limited* (2009 NICH 3) suggests that the 'Alcatel' standstill period may sometimes be applied to Part B services contracts in 'exceptional circumstances' under the EU Treaty principles of transparency, equal treatment and non-discrimination. For more information on the 'Alcatel' standstill period, see the section on the full EU procurement rules in chapter 3.
- 37 *Commission v Ireland*, Case C-507/03.
- 38 For example, the OGC has a supplier feedback service which serves as an 'avenue of recourse' to suppliers that are not confident that professional standards in public procurement are being upheld. The role of the service is to:
- provide a clear, structured and direct route for suppliers to raise concerns about procurement practice when attempts at resolving matters with the contracting authority have failed
 - provide feedback to suppliers on their concerns
 - help the OGC to identify areas of poor practice
 - take action to reduce the likelihood of similar issues arising in the future.
- 39 Regulation 47(7)(6) of the Public Contracts Regulations 2006 states that proceedings must not be brought unless "those proceedings are brought promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought".
- 40 Regulation 7 of the Public Contracts Regulations 2006. A reserved contract refers to a 'supported business', 'supported employment programme' or 'supported factory'. These require more than 50 per cent of the workers in the business, employment programme or factory to be disabled people who, by reason of the nature or severity of their disability, are unable to take up work in the open labour market. A contracting authority may expressly reserve the right to award a contract to bidders which operate supported businesses, employment programmes or factories.
- 41 The Home Office/OGC guidance 'Think smart: think voluntary sector' (see chapter 8) provides some policy basis for this point by suggesting that 'you can ask prime suppliers during prequalification to demonstrate their track record of achieving value for money through effective use of the supply chain: including for example through subcontracts or partnerships with TSOs or SMEs'. However, this is directed at demonstrating how value for money is secured, not how enterprises are encouraged.
- 42 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.
- 43 Further guidance on frameworks under the EU procurement rules can be found through the OGC website: www.ogc.gov.uk/documents/OGC_Guidance_on_Framework_AgreementsSept_08.pdf.
- 44 This opinion has been reinforced by a recent European case, *Commission v Ireland*. This concerned the provision of emergency ambulance services by Dublin City Council. The Eastern Regional Health Authority gave the council funding towards the costs of providing the services. The court held that 'the mere fact that, as between two public bodies, funding arrangements exist in respect of such services does not imply that the provision of the services concerned constitutes an award of a public contract which would need to be assessed in the light of the fundamental rules of the Treaty'.
- 45 The power of local authorities to promote the economic, social and environmental wellbeing of their area, provided in the Local Government Act 2000.
- 46 Additional guidance is available, for example from Learn Direct (www.learn-direct.co.uk) or Supply2gov (www.supply2.gov.uk/pdfs/file39469.pdf).
- 47 These include:
- social return on investment (SROI) – a technique pioneered in the US and championed in the UK by the SROI UK Network: www.sroi-uk.org
 - social accounting – see the Social Accounting Network: www.socialauditnetwork.org.uk
 - LM3: a way of measuring the 'local multiplier' effect – of particular interest where the aim is to stimulate local economic activity. LM3 has been developed by nef: www.neweconomics.org
- 48 For an example on work done to reflect community benefits in specification writing see the free online learning course: www.specification-writing.info.

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