

Review

UK Public Procurement Update



This update contains a brief description of recent OGC guidance and developments relevant to those involved in public procurement work.

NEW ADVERTISEMENT OBLIGATIONS IN RELATION TO LOW VALUE CONTRACTS

On 29 May 2010 the Prime Minister published a letter on Transparency setting out the specific commitments on transparency in procurement and contracting. The OGC Procurement Policy Note ("PPN") – 'New requirements for greater transparency in Central Government procurement' published on 30 June 2010, provides the background to the government's call for greater transparency in procurement and gives an outline of the proposed commitments that central government will have to abide by.

Particular commitments that central government departments will have to meet in the procurement process include:

- All new central government ICT contracts to be published online from July 2010.
- All new central government tender documents for contracts over £10,000 to be published on a single website from September 2010, with this information to be made available to the public free of charge.
- All new central government contracts to be published in full from January 2011.

"Central Government" means central government departments and the agencies and Non Departmental Public Bodies for which they are responsible. Largely, this will include all 'Schedule 1 entities' as listed in the Public Contracts Regulations 2006. The Intelligence Agencies are exempt, as are certain National Security-related contracts in a number of other departments.

Local government and other parts of the wider public sector will be handled separately and are likely to be subject to similar obligations in the near future.

Further OGC guidance will be published including information on the timing and format of publications, redactions and exemptions and new transparency clauses.

To view the full OGC PPN [click here](#)

FURTHER CLARIFICATIONS ON DEVELOPMENT AGREEMENTS FROM OGC

On 30 June 2010 the OGC updated its guidance note issued in October 2009 on the applicability of the public procurement rules to development agreements.

To view our previous Review on the OGC guidance from October 2009 [click here](#)

The guidance has been updated following the Court of Justice of the European Union's ("CJEU") decision in the Helmut Müller v Bundesanstalt für Immobilienaufgaben case, which makes it clear that the procurement rules will apply only where works are to be carried out for the contracting authority's direct economic benefit, and that the mere exercise of regulatory urban-planning powers by a local authority is not sufficient to trigger the procurement rules.

To view our previous Review on the Helmut Müller decision [click here](#)

“All new central government ICT contracts to be published online from July 2010 and all new central government tender documents for contracts over £10,000 to be published on a single website from September 2010.”



In the updated Guidance the OGC summarises certain matters which will be relevant in deciding whether a development agreement comprises a public works or works concession contract, and suggests that a 'development agreement' between a public body and a developer may be less likely to comprise a public works or works concession contract, if it meets some of the following characteristics:

- The proposed development (or a significant part) is to be undertaken at the initiative and autonomous intention of the developer (particularly if the developer already owns or has control of land to be developed);
- The development agreement is ancillary or incidental to a transfer or lease of land or property from the authority to the developer;
- The development agreement is based on proposals put forward by the developer, rather than requirements specified by the contracting authority, albeit that these proposals may be sought, and the "winner" chosen by the authority;
- There is no pecuniary interest passing from the contracting authority to the developer as consideration for undertaking the development (either through direct payment or indirectly);
- The development agreement does not include specific contractually enforceable obligations on the developer to realise a work or works;
- The development does not consist of or contain works for the direct economic benefit of the contracting authority; and
- The involvement of the contracting authority consists only in the exercise of statutory land-use planning powers.

The OGC's revised Guidance considers each of these issues in further detail and provides a summary of the court's decision in the Auroux case and the Helmut Muller case.

To access the OGC revised Guidance [click here](#)

WARNING: FRAMEWORK AGREEMENTS

On 12 July 2010, the OGC published a PPN on the 'Use of Framework Agreements Set Up By Non-Contracting Authorities'. The background to this is that certain private organisations which are not "contracting authorities" for the purpose of the Public Contracts Regulations 2006 have either been setting up or are in the process of establishing contracting arrangements which are described or promoted as being equivalent to 'framework agreements' for use by the public sector.

The OGC outlines the issues and risks for public sector contracting authorities who are considering using such framework agreements that have been established by organisations that are not contracting authorities. Where a contracting authority makes purchases through a Central Purchasing Body ("CPB") under a framework agreement, it will only have complied with the public procurement regulations to the extent that the CPB has complied with them.

The risk to a contracting authority or public body if they use an agreement established by an organisation that is not a contracting authority, is that they would themselves be in breach of the public procurement rules and would therefore be at risk of a formal challenge and possibly substantial penalties. The OGC provides ways in which a contracting authority or public body can ensure that a framework agreement is valid. These can be summarised as follows:

- A framework agreement has been awarded.
- The framework agreement has been established by one or more contracting authorities (or utilities) as defined in the Regulations.

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- The Contract Notice identifies that the contracting authority is purchasing on behalf of other contracting authorities.
 - The Contract Notice identifies that their organisation is able to access the framework agreement.

The PPN focuses on the practice in respect of public sector contracts, however, it may also apply to the utilities sector. To access the OGC PPN [click here](#)

ELECTRONIC AUCTIONS

On 12 July 2010, the OGC published a PPN on 'How to indicate the use of electronic auctions on contract notices'. The background to this is due to concerns that have been raised at the Central Government eAuction User Forum over the proper use of Section IV.2.2 of the Official Journal of EU ("OJEU"). Contract Notice form when establishing a framework agreement via the OJEU. This section requires contracting authorities to indicate whether an eAuction will be used to award the advertised contract.

The OGC has sought to provide clarification for contracting authorities on the appropriate wording to be used in contract notices to indicate that an eAuction may be used in either the evaluation of tenders to establish a contract or framework agreement; or in the tender evaluation as part of a mini competition to establish call-off contracts under a Framework Agreement.

The OGC provides advice as to how a contracting authority should complete Section IV.2.2 of the contract notice if they are intending to award a contract or a framework agreement through the use of an eAuction.

To access the OGC PPN [click here](#)

FURTHER INFORMATION

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