

DRAFT REGULATIONS TO IMPLEMENT THE PUBLIC CONTRACTS DIRECTIVE INTO UK DOMESTIC LAW

THE CJC RESPONSE

Framework agreements

- 01 The draft Regulations are drawn up in the expectation that the UK will adopt all the adoptive articles of the Directive, including article 32 (framework agreements). Draft Regulation 9 (duly reflecting Article 32) would however place needless constraints on contracting authorities by precluding framework agreements with terms exceeding 4 years 'except in exceptional circumstances, in particular, circumstances relating to the subject of the framework agreement'.
- 02 We believe that a four year limit would be particularly damaging for two types of project to which framework agreements otherwise lend themselves particularly well.
- 03 The first such projects are those for **large-scale refurbishment and improvement programmes**, for example raising social housing stocks to 'decent' standards, bringing outdated and dilapidated secondary schools up to standard, and improving neglected sections of the road system. Large numbers of suppliers, specialist contractors and often also sub-contractors are needed to cover the many types of processes and fittings involved. General experience is that great economies of scale, and also real progress with clearing the biggest backlogs of work, are possible; but only if all the preparatory work is rationalised, and sorted into the following successive operations
- ◆ identify suitable service-providers, in framework agreements
 - ◆ construct supply chains
 - ◆ carry out surveys and measurements
 - ◆ schedule the work chronologically, and place orders for it
- 04 It commonly takes at least two years to construct effective supply chains, and several more to complete all the detailed measurements. Both authorities and service providers have to invest heavily in these preparations, and 4 year contracts could not possibly give them the necessary production runs.
- 05 We appreciate that there are no constraints on the length of contract periods for any other types of contract, but no others appear suitable for this purpose. Framework agreements are ideal because
- ◆ they fit the sequence of operations, and the order in which the necessary data becomes available
 - ◆ they make joint procurement possible, without the legal complications of joint or parallel contracts
- 06 The second type of projects which are particularly well suited to long term framework agreements are those for which the agreed contract conditions contained in framework agreements include requirements for **contractors to take on previously unemployed people** who have been trained for the purpose in scarce skills, at client authorities' expense. Neither authorities nor contractors would want to incur such liabilities without the prospect of significantly more years' work on site than 4 year contracts can provide.
- 07 We therefore propose to include the following paragraphs in our Standing Guide, and **hope that OGC will be able to include similar paragraphs in their Guidance to Framework Agreements**
- 59.08B** 'Exceptional circumstances' appear to include the circumstances which commonly apply to
- ◆ large scale refurbishment and improvement projects, for example for social housing, secondary schools and sections of the road system, for which value-for-money requires the construction of supply chains of all the many specialists needed, followed by surveys and measurements of disparate work before orders can be scheduled
 - ◆ projects for which the contract conditions included in framework agreements require service providers to take on former long-term unemployed people who have been trained at authorities' expense in the scarce skills required for the work

The other adoptive articles

- 08 We support the adoption of all the other adoptive articles, particularly those covering sheltered workshops, the competitive dialogue procedure and the dynamic procurement system.

Aggregation

- 09 The draft Regulations appear to require significantly more aggregation than the Directive. Their respective words are as follows

In the Directive

9.5.(a) - Where a proposed **work or purchase of services** may result in contracts being awarded **at the same time** in the form of **separate lots**, account shall be taken of the total estimated value of all such lots

In the draft Regulations

8 (11) - where a contracting authority **has a single requirement** for goods or services or for the carrying out of a work or works and a **number of contracts** have been entered into or are to be entered into to fulfil that requirement, the estimated value for the purposes of paragraph (1) of each of those contracts shall be the aggregate of the value of the consideration which the contracting authority expects to be payable under each of those contracts

- 10 Draft Regulation 8 thus **increases the requirement for aggregation in the following three ways**
- 1 by replacing 'lots' with the (much more frequently occurring) 'contracts'
 - 2 by replacing the neutral words 'work or purchase of services' with a positive requirement for the aggregation of all contracts which fall within the (undefined) collective term 'requirement', and
 - 3 by discarding the limitation 'at the same time'

Discrete operational units

- 11 We welcome draft Regulation 8 which recognises discrete operational units as being separate bodies for the purposes of aggregation. The draft Regulations contain no definition or examples but we have ourselves always taken DOUs to include school governing bodies, but not DSOs.

Professional ability

- 12 The draft regulations pass on virtually none of the great scope in the directive to take professional ability into account.
- 13 The outgoing Services Directive and the corresponding Treasury Regulations (SI 1993/3228) defined **ability** as 'skills, efficiency, experience and reliability' and did not seek to constrain the information which authorities could seek in order to evaluate it. Article 48 of the Consolidating Directive introduced the term '**professional ability**' in the place of 'ability' and extended the scope to evaluate it to works, and also to 'supplies which require siting or installation work'. Like the Services Directive it does not constrain the information needed to evaluate it.
- 14 Contrasting words in the Directive and the draft Regulations are as follows

In the Directive

48.5 - the ability of **economic operators** . . . may be evaluated . . . with regard to their skills, efficiency, experience and reliability

In the draft Regulations

25 - a contracting authority may have regard to . . . the economic operator's . . . professional ability **where he is an individual**, taking into account in particular his skills, efficiency, experience and reliability

- 15 The draft Regulations thus **fail to pass on the scope in the Directive for authorities to evaluate the professional ability of any corporate bodies or their employees.**

Social & environmental factors

- 16 The passages in the Draft Regulations which provide for authorities to take social and environmental factors into account are

9.1 . . . **technical specifications** means . . . in the case of a public services contract or a public supply contract . . . environmental performance levels, design for all requirements . . . and . . . in the case of a public works contract . . . the characteristics required of the work . . . and these characteristics shall include . . . levels of environmental performance . . .

25.2.h (selecting tenderers) - 'a contracting authority may have regard to . . . environmental management measures . . . but only where it is necessary for the performance of that contract'

30.2 (tender evaluation) - 'a contracting authority shall use criteria linked to the subject matter of the contract to determine that an offer is the most economically advantageous including . . . environmental characteristics'

39 (contract conditions) - 'a contracting authority may stipulate conditions relating to the performance of a public contract, provided that those conditions are compatible with Community law . . . The conditions may include social and environmental considerations'

17 These passages include words which restrict the social and environmental factors which may be considered to those bearing directly on the subject matter of the contract. We appreciate that this restriction is necessary, and is to reflect the constraints of the Directive (Article 53) and the Beentjes case (C-31/87).

18 Principal local authorities do however have statutory power (under section 2 of the Local Government Act 2000 and section 21 of the Local Government in Scotland Act 2003) to promote the social and environmental welfare of their areas. This power may be exercised in such a way as to require contracts to be carried out so as to promote a wide variety of social and environmental objectives. This gives all such objectives the status of 'subject matters of the contract' for the purposes of the Beentjes case.

19 We and no doubt others intend to point this out in our own guidance, and **it would be helpful if OGC could do the same**. The proposed CJC guidance as to tender evaluation criteria is as follows. Guidance to contract conditions and tenderer selection will be on the same lines.

44.01A Criteria may be of any type or number of factors provided they are linked to the **subject-matter of the contract** (Reg 32). They may for example include technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, after sales service and delivery date.

44.01B The subject-matter of the contract has to fall within the **core objectives of the authority**, and may not therefore extend to other benefits to **society or the environment generally** (Beentjes). Wellbeing powers are however wide, and for principal local authorities give many of their purposes the status of core objectives.

Terminology

20 We agree that **candidates**, the collective term always used by the directives for parties who have applied to tender or negotiate, is too quaint and stilted for common use.

21 We think **applicants** is the most straightforward collective term, and preferable to the circumlocutions used in the draft Regulations, like 'the **economic operators from which the contracting authority will make the selection of economic operators to be invited to negotiate**'.

22 The Consolidating Directive, like its predecessors and previous Regulations, refers consistently to **variants**. The draft Regulations now refer however to **variations**.

23 We suggest that variant is better, because

- ◆ it is now in universal use by practitioners
- ◆ it appears to be etymologically correct anyway. It means, as here, the **result** of varying something; whereas variation is the **act** of doing so

24 The Directive uses the term **offer** only twice, and apparently then in error. Elsewhere it consistently uses the term **tender**. The draft Regulations however use the terms offer and tender as if they were interchangeable, which prompts readers to look for some difference in their meanings, and sometimes to

believe (erroneously of course) that they have found it. We suggest that it would be more straightforward to use the term **tender** throughout.

25 We note however that the draft Regulations use the term **bid** only for e-auctions (which is logical) and for in-house tenders. We support this very limited use of the term, because in wider use it too is mystifying, like the term offer.

26 We support the consistent use of the term **contract documents**.

The style & arrangement of the draft

27 We think the economical wording of the draft is excellent, and that the forceful rearrangement of the substance of the Directive into chronological procurement order is highly successful. We hope both will be retained.

The Utilities Directive

28 We have broadly the same observations on the draft Utilities Regulations, except of course that those made in the following paragraphs do not apply

- ◆ 1 – 8 (framework agreements)
- ◆ 12 – 15 (professional ability)

Publication

29 We have no objection to our response being copied to any third parties.