

**The New EU
Directives &
DPS**
Chris Lane



EU Directives:

- **Directive 2004/17** (the Utilities Directive)
- **Directive 2007/66** (the Remedies Directive)

Implemented into UK law through regulations:

- In England, Wales and Northern Ireland – **The Utilities Contracts Regulations 2006**
- In Scotland – **The Utilities Contracts (Scotland) Regulations 2012**

The Regulations are interpreted in manner consistent with the Directives with a view opening the Utilities markets to competition across the EU

OJEU Notices	Supplies	Services	Works
Contract Notice	£345,028 (€414,000)	£345,028 (€414,000)	£4,322,012 (€5,186,000)
Periodic Indicative Notice	£625,050 (€750,000)	£625,050 (€750,000)	£4,322,012 (€5,186,000)
Small Lots	£66,672 (€80,000)	£66,672 (€80,000)	£833,400 (€1,000,000)

Definitions

- Works: Contracts which have an output of ‘execution, or design and execution, or works relating to one of the activities in the Utilities Directive (Annex XII of the Utilities Directive)’ ¹.
- Supplies: ‘Contracts, other than works contracts, having as their objective the purchase, lease, rental or hire purchase of products (with or without the option to buy). A contract that has as its object the supply of products and which also covers siting and installation operations is generally treated as a supply contract’ ¹
- Services: ‘Contracts other than works contracts or supply contracts having as their objective the provision of services’ ¹. Services are also split between Part A and Part B dependant on if they are ‘priority services’ or not.

¹ Guide to the EU laws governing utilities procurement in the UK / CMS Law / October 2014

Exchange rate correct at time of printing

HOW DO UTILITIES COMPANIES CONTRACT NOW?

Summary - Benefits

- Can deliver best price and most flexible solution
- Best in non-dynamic markets
- Works well in regulated markets
- Allows churn of portfolio but not suppliers
- **Allows UU to compete margins for delivery when call off / buying is done elsewhere more intelligently**
- Best when enough suppliers to allow call-off competition
- Requires transparency and future pipelines to be visible
- Can remove future cost of bidding (including for SMEs) once initial tender is complete
- **Call off competitions take far less time than Direct Contracting procurements**
- Reduced risk of challenge at call off stage

Summary - Risks and Issues

- Can be more expensive than other options depending on product and market conditions.
- Cost of initial bidding can be prohibitive especially to SMEs
- Can increase opportunities for collusion behaviours
- **Will often stifle innovation**
- **Lock out of suppliers for significant periods**
- Lack of transparency on call offs unless data is published
- Increased risk of challenge to Framework Procurement
- Longest lead in time for all procurement forms
- Can still mean beauty contests between customers where more than one framework or buying organisation existing

Summary - Benefits

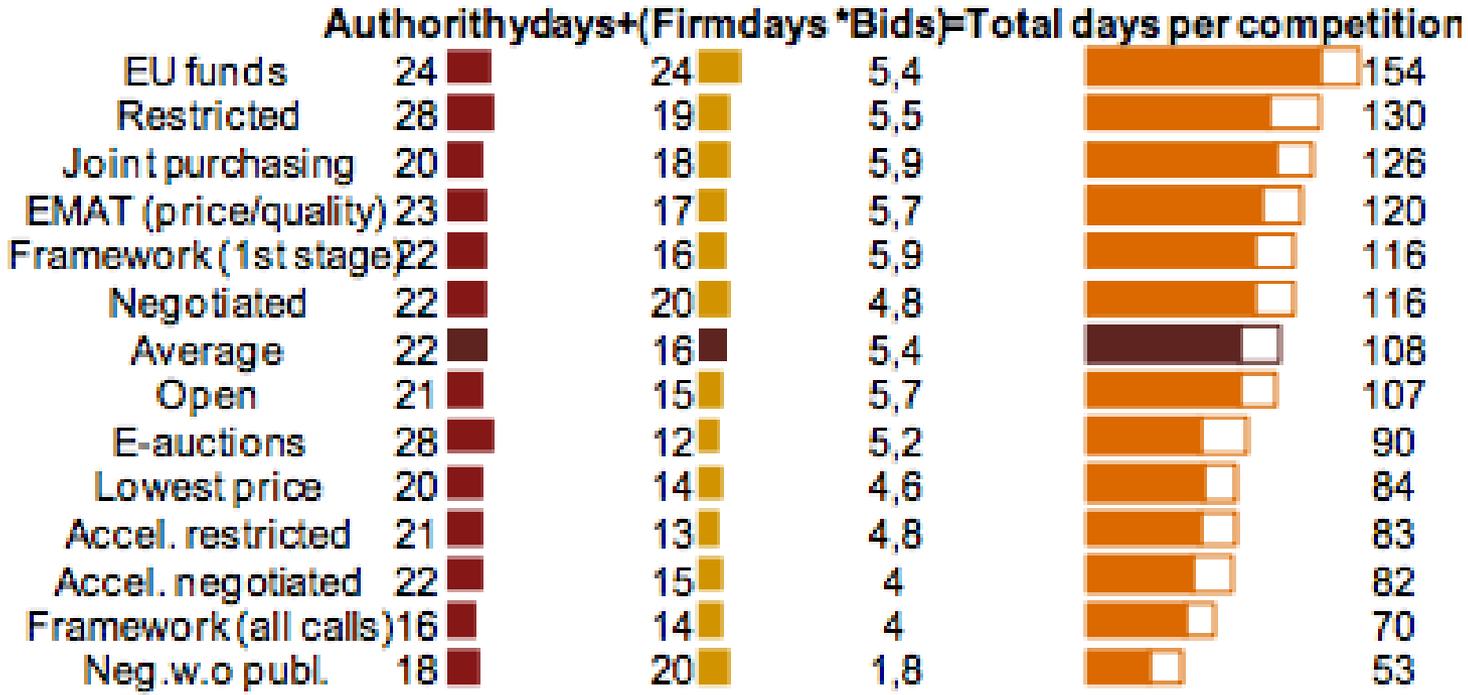
- Can deliver the best price and most flexible solution
- Reduced risk of challenge on basis of repeated market activity rather than locking suppliers out for a period
- Less barriers to SME
- Repeated smaller direct contracts give more scope to benefit from innovations in the supply chain and pricing changes
- **Defined / known volumes should attract better pricing**
- Transparency of individual contract awards can drive positive behaviours
- **Less possibility of collusion amongst bidders than under Framework**

Summary - Risks and Issues

- Potential loss of aggregation benefits
- Ability of UU to define accurate scope of works for aggregated buying
- Repeated nature of full OJEU procedure will increase the capacity and capability needs of UU in the longer term as opposed to Frameworks Agreements and call offs
- **Full cost of procurement (rather than one off costs) can be a barrier to smaller suppliers**
- Less suitable for repeated on-going requirements where a Framework or DPS remove barriers for entry and allow for competition at call off stage.
- Often seen as 'best price' mechanism however this is not true in all cases and will depend on the market, supply chain, product and customer needs.

Frameworks are cheap to manage

Figure 2.1 Person-day costs for authorities and firms and type of procurement (median days)



Source: Figure 2.1 Public Procurement in Europe, cost and effectiveness, PWC, 2011, available at: www.ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/cost-effectiveness_en.pdf

- **Utilities Directive 2014/25**

This new Utilities Directive was adopted in March 2014. Member states were afforded 2 years to transpose these into their National Law, meaning these will be implemented for us by April 2016 allowing an ongoing period of consultation (although the original intention was earlier)

Authorities are explicitly permitted to carry out pre engagement

The existing regulations are silent on this although the existing principles of transparency and fairness continue to apply

Electronic Procurement is a REQUIREMENT under the proposed regulations

‘Procurement Documents’ must be made electronically available to the public – meaning you and I can see full PQQ and ITT documents from EVERYONE

The Authority is now permitted to change a contract ‘after’ awarded

Although the allowable reasons are very specific and are most limited to minor changes

We all love ‘MEAT’!

The draft regulations stipulate that MEAT must be used as the criteria for contract award, but includes use of life cycle costing, qualifications, staff experience and social and environmental factors

The Authority must be clear ‘up front’ on criteria for Further Competition

This should make further competition more equal and address any bias post Framework Award towards any single contractor

Exclusion

The Authority now has specific rights to exclude suppliers / contractors for ‘significant or persistent’ deficiencies

DPS

The introduction of true Dynamic Purchase Systems is possibly the most exciting proposed change to the Regs

Supply Chain

- Will allow new competitors to enter your market irrespective of past performance
- Little sight of pipeline or ongoing commitment

Utilities Company

- Pause procurements for new entrants
- Could be time consuming and resource heavy to manage 'churn'
- Significant cost of management
- Will struggle to handle large more complex procurements
- Will require significant ongoing management (how often do certificates, company financial status get checked?)

Customer

- Innovation
- Great value through competition

Supply Chain

- Relatively low cost of entry and call off
- Means you can join a framework at any time, even after it is originally let, as long as you pass the entrance criteria
- Gives you more than one chance of entrance

Utilities Company

- Should allow more performance based selection of supply chain
- Low risk of challenge from initial or call off procurements
- Will provide significant MI and live market trend data
- Reacts to fast moving markets

Customer

- Embraces Innovation
- Great value through competition

UU procures a wide variety of goods, works and services across several categories with a diverse supply chain and various approaches to contracting methods and supplier relationships.

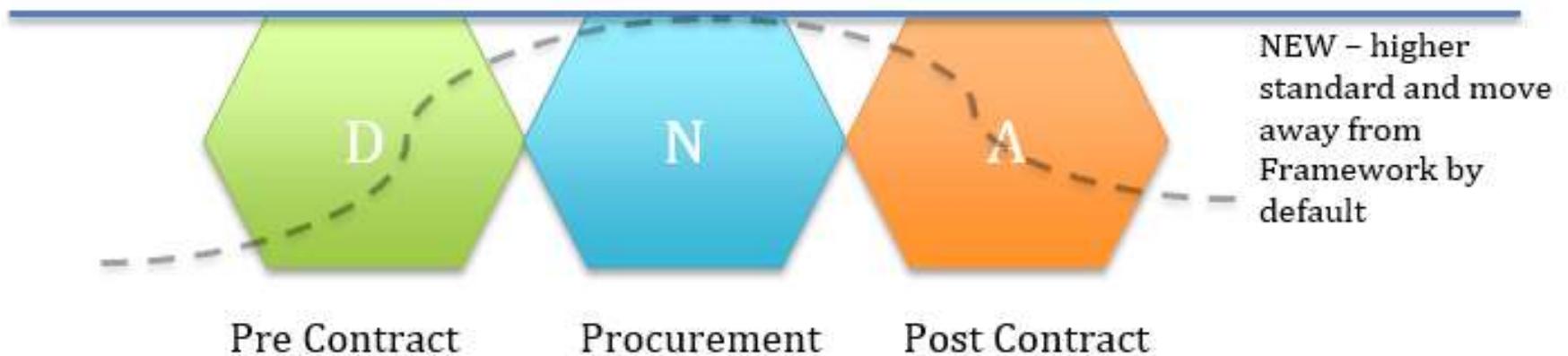
FRAMEWORK

£865m

NON-FRAMEWORK

£200m

It is likely that UU will adopt full Category Management across its entire procurement portfolio. DPS will allow both Framework and non-Framework spend to be bought more dynamically.



Define – The product, the market, the customer needs and best value procurement route

Nurture – Time, cost, quality, savings, value and risk in procurement delivery

Action – The contract, supplier management, innovation, commercial advantage, learning

WHAT COULD DPS MEAN TO YOU?