
	<b>TITLE:</b> <b>EU Procurement Legislation TPP109</b>	<b>OWNER:</b> <b>Purchasing Manager</b>	<b>LAST MODIFIED:</b> <b>28<sup>th</sup> May 2008</b>	<b>PAGE:</b> <b>1 of 8</b>	 Deleted: <span style="float: right;">...</span>
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## 1. PURPOSE

- 1.1 To ensure compliance with applicable European Directives 2004/17/EC and The Utilities Contracts Regulations 2006

## 2. METHOD

### 2.1 General

- 2.1.1 The Purchasing Manager or representative must ensure that all decisions appertaining to the Tendering Process particularly the evaluation of potential tenders and the award of contracts are transparent, objective, non-discriminatory and are in compliance with current EU Procurement Legislation.

- 2.1.2 Under the EU Procurement Legislation different procurement procedures exist but it is recommended that purchasers operating in Utility Sector such as Translink should use the Negotiated Procedure with a call for competition for all contracts. The reason for this approach is that this procedure allows more flexibility in the contracting process, and is particularly appropriate for complex purchases.

### 2.2 Calculation of Contract Values

- 2.2.1 Prior to commencing the tender process the Project Manager must calculate excluding VAT the maximum value of the contract to be awarded, including any options for extensions and provide this figure to enable the Purchasing Department to check it against EU Procurement Legislation Thresholds.

### 2.3 Threshold Values

- 2.3.1 The Purchasing Manager or representative must ensure that all contracts that exceed the Thresholds defined in the Regulations are awarded in compliance with the Regulations.
- 2.3.2 These Thresholds necessitate requirements to be advertising in the Official Journal of the European Union (OJEU). They are updated every 2 years. The Thresholds at 1<sup>st</sup> January 2008 are:



Services/ Supplies      £279,785      (Total value of contract)

Works                      £3,497,313      (Total value of contract)

Values are to be nett of VAT  
(The Utilities Contracts Regulations 2006 Thresholds 11 (1))

### 2.4 Disaggregating

It is not permissible to disaggregate requirements to keep proposed expenditure below the level which requires compliance with the EU Procurement Legislation or any other level determined (The Utilities Contracts Regulations 2006 11(8)).

	<b>TITLE:</b> <b>EU Procurement Legislation TPP109</b>	<b>OWNER:</b> <b>Purchasing Manager</b>	<b>LAST MODIFIED:</b> <b>28<sup>th</sup> May 2008</b>	<b>PAGE:</b> <b>2 of 8</b>	 Deleted: <span style="float: right;">...</span>
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## 2.5 Calls for Competition

2.5.1 Where EU Procurement Legislation applies, the Purchasing Manager or representative must ensure that any contract to be awarded over the Thresholds is subject to a call for competition. Translink can call for competition by publishing a contract notice in OJEU.

2.5.2 Translink will use the Negotiated Procedure throughout unless the Legislation or the Purchasing Manager requires otherwise.

### 2.5.3 Part B Services

2.5.3.1 It is mandatory for all Translink Part B procurements to be advertised in the OJEU and have a Standstill Period.

2.5.3.2 Since the successful case against the PSNI in relation to a Part B Service (case shown below in Annex 1) all Part B service requirements in Translink over the thresholds must be advertised in the OJEU and must have a Standstill Period applied to them. It is highly recommended that the same principles as dealing with a Part A are applied to Part B Services unless there are exceptional circumstances in which case any proposed action must be authorised by the Purchasing Manager.

2.5.3.3 The advertisement for the Part B service must include the following wording prominently and frequently in the advert:



“This is a voluntary notice as this requirement is classified as a Part B Service and we do not intend to apply the full regulations to it”

2.5.3.4 The reasoning behind such action comes from the PSNI case in which the judge implies that NI requirements will be of cross-border interest and therefore if a standstill is to be applied to ensure transparency, non-discrimination and equal treatment imposed by the EC Treaty, it follows that Translink should then be advertising its Part B requirements as clearly as possible and this could be interpreted as advertising voluntarily in the OJEU.

2.5.3.5 This is despite the lack of a requirement in the Utilities Contracts Regulations for Translink to advertise Part B Services but as the PSNI case highlighted it is not a requirement to have a standstill period but it was deemed that PSNI should have had one. In addition the Judge also makes reference to a procurement process and contract having ‘certain characteristics’ that would require a standstill regardless of the Regulation, this can equally be applied to advertising; a procurement may have ‘certain characteristics’ that would require an advertisement and an appropriate place to do so would have been in the OJEU e.g. a narrow supply market may be one such characteristic.

## 2.6 Preparation of Notices

2.6.1 The Project Scope for Notices regarding contracts that exceed the value Thresholds of the Regulations must be prepared by the Project Manager with a member of the Purchasing Department and checked by the Purchasing Manager or representative prior to Translink releasing the advertising notice to the Supplement of the OJEU. The

	<b>TITLE:</b> <b>EU Procurement Legislation TPP109</b>	<b>OWNER:</b> <b>Purchasing Manager</b>	<b>LAST MODIFIED:</b> <b>28<sup>th</sup> May 2008</b>	<b>PAGE:</b> <b>3 of 8</b>	 Deleted: <span style="border: 1px solid black; border-radius: 50%; padding: 2px;">...</span>
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notice must be submitted electronically `on-line`. Notices must be in accordance with The Utilities Contracts Regulations 2006 Part 3,16 (4).

- 2.6.2 Translink is not required by the Regulations to publish indicative Prior Information Notices (PINs) in OJEU. For Divisions of Translink wishing to utilise a PIN this must be in consultation and agreement with the Purchasing Manager or his representative prior to the start of the Financial Year as PINs should be published in the OJEU as soon as possible after the beginning of each financial year.

## 2.7 Restrictions on the use of other publications

- 2.7.1 The Utility shall not place a notice in any other publication before the date on which the OJEU notice is despatched nor can any other publication contain any additional information which is not in the OJEU publication (The Utilities Contracts Regulations 2006 Part 8, 40 (3)).

## 2.8 Transmission of Notices to OJEU

- 2.8.1 Having prepared notices, the Purchasing Manager or representative must check that these are complete and compliant with the Regulation, at which point the notice can be electronically submitted to OJEU.

**NOTE: The Purchasing Department is the only Department authorised to submit notices in relation to advertising requirements/contracts on behalf of Translink to the OJEU or to any other publication.**

## 2.9 Recording Notices

- 2.9.1 A copy of the OJEU Notice publications and the confirmation of submission must be retained on file.

## 3.1 Requirement Specifications



- 3.1.1 The Purchasing Manager or representative must check that all specifications have been drawn up in accordance with the non-discriminatory objectives of EU procurement legislation.  
(The Utilities Contracts Regulations 2006, Part 2 Technical Specifications)

## 3.2 Timescales

- 3.2.1 The Purchasing Manager or representative must allow for the timescales defined in the Regulations relating to the responses to a call for competition. Specific timescales are applicable to PQQ responses, ITT responses, Standstill Periods and Debriefing timescales (The Utilities Contracts Regulations Part 3, 22).

## 3.3 Invitation to Tender (ITT)

- 3.3.1 The Purchasing Manager or representative must ensure that the ITT is compiled and administered in accordance with the Regulations and with Procurement Standard TPP104 Invitations to Tender. No ITT is to be released without approval being granted from the Executive Team or depending on the value the NITHC Board.

	TITLE: <b>EU Procurement          Legislation          TPP109</b>	OWNER: <b>Purchasing          Manager</b>	LAST MODIFIED: <b>28<sup>th</sup> May 2008</b>	PAGE: <b>4 of 8</b>	 Deleted:
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### 3.4 Tender Evaluation

3.4.1 Tender Evaluation is to be carried out in accordance with the Regulations and with Procurement Standard TPP105 Tender Evaluation.

#### 3.4.2 **Tender Evaluation Criteria and publishing PQQ scoring criteria**

3.4.3 In accordance with the OGC Action note 04/09 released on 28th April 2009 the following action points are mandatory for all Translink procurements:

1. Contracting authorities should ensure that they maintain the distinction between selection criteria and award criteria for their procurements. Where call-off contracts are let under a framework agreement contracting authorities must ensure that appropriate award criteria are used.
2. Contracting authorities should also make sure that detailed award evaluation criteria, sub-criteria, scoring schemes and weightings are made available to bidders.
3. Details of criteria and sub-criteria, scoring, weights and pass marks used in pre-qualification questionnaires at the selection stage should also be made available to suppliers.

3.4.4 If you would like to read the OGC Action note 04/09 which details some of the background and extra detail on the action points please follow the link below:

<http://www.ogc.gov.uk/documents/PPN0409.pdf>

3.4.5 Related reading: Sharepoint announcement released on the Purchasing Sharepoint site on the 9th February 2009 and 22<sup>nd</sup> May 2009.

### 3.5 Post Tender Negotiation

3.5.1 The Purchasing Manager or representative and Project Managers must ensure that any post tender negotiations are carried out in accordance with the Regulations.

### 3.6 Definitions under The Utilities Contracts Regulations



#### **'Services'**

A contract, in writing, for consideration under which a utility engages a person to provide services but does not include a works contract or a supply contract.

A contract for both goods and services shall be considered to be a services contract if the value of the consideration contributable to those services exceeds that of the goods.

**Schedule 3 of The Utilities Contracts Regulations 2006 illustrates activities constituting 'Services'**

#### **'Supplies'**

	TITLE: <b>EU Procurement          Legislation          TPP109</b>	OWNER: <b>Purchasing          Manager</b>	LAST MODIFIED: <b>28<sup>th</sup> May 2008</b>	PAGE: <b>5 of 8</b>	 Deleted: <input type="text"/>
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A contract, in writing, for consideration for the purchase of goods by a utility (whether or not the consideration is given in instalments and whether or not the purchase is conditional upon the occurrence of a particular event.

Or

For the hire of goods by a utility both where the utility becomes the owner of the goods after the end of the period of hire and where it does not.

'Goods' include electricity, substances, growing crops and things attached to or forming part of the land, which are agreed to be severed before the purchase or hire under a supply contract and any ship, aircraft or vehicle.

(The Utilities Contracts Regulations 2006 Part 1, Interpretation)

#### **'Works'**

A contract, in writing, for consideration for the carrying out of a work or works for a utility.

Or

Under which a utility engages a person to procure by any means the carrying out for the utility of a work corresponding to specific requirements.

#### **Schedule 2 of The Utilities Contracts Regulations 2006 illustrates activities constituting 'Works'**

### **3.7 Contract Award**

3.7.1 Under the Regulations the award of contracts is either on the basis of 'lowest price' or various criteria for determining which offer is 'the most economically advantageous'. Translink will always award contracts on the basis of the most economically advantageous tender throughout.

3.7.2 The Purchasing Manager or representative must notify the successful and unsuccessful Tenderers in accordance with the Regulations and must apply the 10 day 'standstill' period in accordance with the Regulations please note Procurement Standard TPP 106 Annex 1.



3.7.3 The Purchasing Manager or representative must complete a Contract Award Notice (CAN) on behalf of Translink and submit it to OJEU within 2 months of the award of a Contract. The Award Notice must be submitted electronically 'on-line'. A record of the submission must be kept on the requirement file for audit.

### **3.8 Debriefing**

3.8.1 There are very strict timescales for debriefing in standstill periods that must be complied with. These are shown in Procurement Standard TPP 106 Contract Award and debrief, Annex 1.

### **3.9 Contract Records**

3.9.1 It is necessary that for each contract that is awarded, the Purchasing Manager or representative must retain details to comply with the Regulations.

	TITLE: <b>EU Procurement          Legislation          TPP109</b>	OWNER: <b>Purchasing          Manager</b>	LAST MODIFIED: <b>28<sup>th</sup> May 2008</b>	PAGE: <b>6 of 8</b>	 Deleted: <span style="border: 1px solid black; border-radius: 50%; padding: 2px;">...</span>
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“A Utility shall keep appropriate information on each contract sufficient to justify decisions taken in connection with

- (a) the qualification and selection of economic operator and award of contract
- (b) The use of a procedure without a prior call for competition by virtue of Reg.17
- (c) When Regulations are not applied.
- (d) A Utility shall take appropriate steps to document the progress of contract award procedures conducted by electronic means.
- (e) The information shall be preserved for at last 4 years from date of award of contract.”

(The Utilities Contracts Regulations 2006 Part 8 Miscellaneous)

### **3.10 Review of New or Amended Legislation**




3.10.1 The Purchasing Department will review all new or proposed EU legislation appertaining to the procurement of supplies, works and services and shall try to incorporate any major alterations into this guidance. It should also be noted that due to the depth of Procurement Legislation and rapidly emerging Government guidance the latest version of the Regulations must always be the primary point of reference for all issues relating to procurement.

### **3.11 Excluded Contracts**

3.11 The Purchasing Manager or representative need not comply with the Regulations where a contract falls within the exceptions defined in the Regulations (The Utilities Contracts Regulations 2006 Sections 6 – 9).

## **4 RELATED DOCUMENTS**

Procedure (s) TPP101 Procurement Planning and Request for Contract Action (RCA form)  
 TPP103 Supplier Selection (Pre-Qualification Questionnaire)  
 TPP104 Invitations to Tender  
 TPP105 Tender Evaluation  
 TPP106 Contract Award and Debriefing.  
 TPP115 Document Control

	<b>TITLE:</b> <b>EU Procurement Legislation TPP109</b>	<b>OWNER:</b> <b>Purchasing Manager</b>	<b>LAST MODIFIED:</b> <b>28<sup>th</sup> May 2008</b>	<b>PAGE:</b> <b>7 of 8</b>	 Deleted: 
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## Annex 1

### Sharepoint Announcement 2<sup>nd</sup> April 2009

Title: NI Courts add another case for us to consider & the PSNI are the latest to end up in court.

Body:

Supply Management Court Report, 2 April 2009

#### **Federal Security Services v Police Service of Northern Ireland**

The case

Federal Security Services Limited (Federal Security) provided guards, driving and other assistance to the Police Service of Northern Ireland (PSNI) under a contract due to expire on 1 March.

At this time, the services (which are Part B - meaning certain parts of the public contracts regulations do not have to be applied when tendering) were to be transferred to rival supplier Resource Group, who last December had won the contract under a competitive procurement that had not included a 10-day standstill period.



Federal Security sought an injunction to restrain the chief constable of the PSNI from taking further steps to implement the contract pending trial, on the basis that it should have included a 10-day standstill period to allow a disappointed tenderer to make representations.

Federal Security wished to challenge the lawfulness of the contract award on substantive grounds and alleged that, if they succeeded, damages would not be an adequate remedy. Granting the injunction the court found that, although the Directive does not provide for a standstill period in Part B contracts, and there is no automatic requirement for this, in certain cases the characteristics of the contract and the procurement process may require one. This is in order to comply with the requirements of transparency, non-discrimination and equal treatment imposed by the EC Treaty.

The judge listed eight characteristics of this procurement, including the existence of cross-border interest. (Although all the bids were from UK-based companies, the fact that they were subsidiaries of non-UK firms was held to suffice to establish a cross-border element.)

The authority's awareness that the award was controversial indicated that there should have been a standstill period.

Only then could the plaintiff be given the opportunity to get an effective remedy if in fact the contract had been unlawfully awarded.

	TITLE: <b>EU Procurement          Legislation          TPP109</b>	OWNER: <b>Purchasing          Manager</b>	LAST MODIFIED: <b>28<sup>th</sup> May 2008</b>	PAGE: <b>8 of 8</b>	 Deleted: <span style="border: 1px solid black; border-radius: 50%; padding: 2px;">...</span>
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The court also suggested that if a contracting authority considers that a standstill period is required, it should normally be 10 days.

What this means

Does a Part B services contract require a standstill period?

In awarding an interim injunction restraining the defendant authority from implementing a contract awarded without a standstill period, the High Court of Justice in Northern Ireland has narrowed further the distinction between the treatment of Part A and Part B contracts. This case - consistently with the trend since the Telaustria verdict - further erodes the differences.

The court's decision leaves it up to contracting authorities to make a judgement on Part B cases as to whether to include a standstill period or not.

In practice we would expect the conclusion will be dictated by the decision, made in line with the European Commission's 2006 Interpretative Communication, of whether or not to advertise. **If a contract is worth advertising, it's a good idea to have a standstill period.**

by David Gollancz, partner and Christopher Thomas, trainee solicitor, Field Fisher Waterhouse LLP ([www.ffw.com](http://www.ffw.com))

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Attachments:



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