



# Brief Guide to Utilities EU Procurement Legislation

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The Knowledge  
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# Introduction

Public procurement in the EU was estimated at about £1000 billion in 2005 (16% of EU GDP). The opening up of this market was a priority for completion of the Internal Market. Reports for the European Commission indicate that cross-border competition has increased and that the prices paid by public authorities and utilities have fallen by as much as 30%.

The opening up of public procurement was facilitated by European Directives, the purpose of which was to reinforce Treaty requirements for the removal of national barriers to the supply within Europe of goods, works and services. Initially the Directives related solely to the public sector. Subsequently a slightly more flexible regime was introduced for both public and private bodies undertaking relevant activities in formerly excluded sectors (water, energy and transport).

The Directives were consolidated and revised in 2004 (taking effect in the UK from 31 January 2006) to enable purchasers to embrace the best procurement practices and to recognise the increasing liberalisation of some sectors. This is consistent with UK Government policy of enabling purchasers to seek value for money from the best sources of supply within the European Community or beyond.

The EU rules have been implemented into national legislation, compliance with which will also meet the EU's international obligations, for example, under the World Trade Organisation (WTO) Government Procurement Agreement (GPA) which applies to utilities in certain sectors.

The legislation requires competition above threshold values and prescribes detailed advertising and tendering procedures to which purchasers must adapt their contract award procedures. The use of specifications, standards, selection and award criteria, and contract conditions is also regulated.

The European Commission views the application of Community Law in Public Procurement as a priority and has taken action against Member States in over 150 cases of alleged infringement. There are also legal sanctions in UK law, such as the suspension of award procedures, the setting aside of decisions and the payment of damages.

Value for money is best served by a common sense approach to the legislation. Knowledge of the framework of the law allows utilities to obtain the benefits, but with the minimum cost, delay and disruption to their operations. This guide provides a brief outline of the legislation, which can be complex, and points to useful reference documents and sources of additional information.

## What is EU procurement legislation?

The EU legislation for the utilities sector sets out procedures and practices to which public authorities, public undertakings and private operators with special or exclusive rights must adapt their contract award procedures including the conduct of design contests.

**Annex 1** gives more details about sources of information about the procurement legislation. This guide covers the key issues very briefly.

The table below gives a brief guide to coverage:

	Areas of Coverage	Threshold
<b>Supplies</b>	<b>The purchase or hire of goods, which can include siting and installation.</b>	<b>£313,694</b>
<b>Works</b>	<b>The building and civil engineering activities listed in Schedule 2 of the Regulations. (Examples include site clearance and the erection/dismantling of scaffolding).</b>	<b>£3,927,260</b>
<b>Services</b>	<b>All other contracts for services (with listed exclusions such as rights over land and contracts of employment). Minimal rules apply to services listed in Part B of the schedule in the Regulations.</b>	<b>£313,694</b>

## Is the contract covered?

The regulations allow certain contracts to be excluded, these include:

- contracts for areas of activity not covered by the Utilities Directives (e.g. where the contract is for a non-related business activity - perhaps gold mining);
- goods and services intended for resale; and
- contracts to be awarded to affiliated undertakings or by joint ventures.

The Directives are implemented through UK Regulations (see Annex 1). There are special provisions for the oil and gas sector and for excluding sectors directly exposed to competition.

A key issue is the value of the contract - contracts are covered if they exceed the financial thresholds. However, valuation is not always straightforward. For example, the legislation requires the aggregation of the values of contracts having similar characteristics, which are awarded to meet recurrent needs for goods or services of the same type over a given period. The value of all the contracts for "a work" (i.e. a works project) has also to be aggregated. Consequently many more contracts will be covered than first appears to be the case. There are exclusions for small lots but the legislation specifically forbids splitting up contracts or using special evaluation methods to keep the values beneath the thresholds.

It should also be noted that some, less detailed, obligations may apply even to 'non-covered' contracts resulting from the obligations which flow from the EU Treaty.



## Publishing notices

The legislation requires a utility to advertise details about contract opportunities in the Official Journal of the European Union (OJEU).

There are four main kinds of notice:

- periodic indicative notice\*
- qualification system notice\*
- contract notice\*
- contract award notice.

## Call for competition

Three of these notices (those marked with an asterisk) are means of making a call for competition for the contract. This is required for most contracts above threshold other than Part B services. The purpose is to allow European and certain international suppliers (i.e. those in states which are signatories to the WTO-GPA) to apply to the utility for consideration for one or more forthcoming contracts.

### ■ Periodic Indicative Notice

This non-mandatory notice can be published at the beginning of the financial year to give the market an indication of anticipated spend by general product areas and service categories or it can be used for works contracts when projects are approved. It can be used as a call for competition if sufficiently detailed but it is principally intended to provide a 'snapshot' of the utility's expected spend on large covered contracts in the next 12 months.

### ■ Qualification system notice

This notice informs the market that the utility is carrying out some or all of its supplier selection using a qualification system, under which suppliers must be registered. A qualification system is a form of standing list of suppliers which may be relied upon to source suppliers for and comply with the EU rules. The utility may advertise the existence of a qualification system as a means of calling for competition. Contracts can then be awarded to suppliers registered in the system under the restricted or negotiated procedures.

Further details of the use of qualification systems are given in Annex 2 to this guide.

### ■ Contract Notice

This notice acts as a call for competition for a specific contract and provides specific details of the contract including criteria for the selection of applicants for invitation to tender.

### ■ Contract Award Notice

Within 2 months of the award of the contract, the utility must despatch a contract award notice to the OJEU. This applies to all 'EU covered' contracts, whatever the means of call for competition that is used. For Part B services the utility can withhold authority for notice publication in the Official Journal but one must still be despatched.

- All the notices must follow a format required by the OJEU and be published within the timescales indicated in the legislation. The Official Journal will not accept any notices sent in any other format. THEMIS contains the official forms in the format required.

## Timescales

The legislation imposes minimum timescales for responses to ensure that applicants are treated equally and given an appropriate opportunity to express interest or submit a tender for a contract.

It is important to note that these are minimum periods; where a requirement is complex or where there is a need for site visits or on-the-spot inspection of contract documents then additional time must be allowed. For each stage the regulations allow a reduced timescale, which it is implied is for use in urgent circumstances. These timescales can be further reduced by electronic or fax transmission (see below). The utility can agree a tender return period with those short-listed in the restricted and negotiated procedures in place of those given in the table below.

## Electronic procurement and timescales

The minimum timescales for responses and tenders can also be reduced if contract notices are submitted electronically through an approved system such as THEMIS and additionally if the contract documents are made available for immediate download.

Utilities can reduce the timescales in the table below where:

- The contract notice has been sent to the OJ through an approved electronic system (such as Achilles' THEMIS system) or by fax; 7 days can be removed from the minimum period for responding to the contract notice
- The contract documents are made available for immediate download from the date of publication of the contract notice in OJEU and the notice gives the appropriate web address; a further 5 days can be removed from the minimum period for receipt of tenders.

## Timescales

Procedure	Minimum period for expressions of interest.	Tender response period	Contract award notice
Open	-	52 days	2 months
Restricted	37 (22) days	24 (10) days	2 months
Negotiated	37 (22) days	24 (10) days	2 months

The timescales in brackets are the reduced timescales which are allowed.

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## Selecting tenderers and award procedure

Utilities must choose sufficient tenderers to ensure adequate competition.

The methods by which tenderers are selected to submit a tender or offer, must be objective and non-discriminatory. Suppliers who are not selected have the right to know the reasons for non-selection. These reasons must be carefully recorded.

There are three permitted award procedures for EU covered contracts:

- **Open Procedure;** where an individual contract notice is placed in the Official Journal inviting applications which meet minimum criteria. All bidders who meet these criteria must have their tender considered.
- **Restricted Procedure;** where a call for competition must be made in the Official Journal and the utility may reduce the number of applicants selected to tender according to the procedures set out in the legislation.
- **Negotiated Procedure;** where a call for competition must be made in the Journal and the utility may reduce the number of applicants selected to tender according to the procedures set out in the legislation. In certain instances, the negotiated procedure is available without publishing a call for competition.

Utilities have a free choice of these procedures. Most choose to use the most flexible of the available procedures, the negotiated procedure, with a call for competition.

## Technical specification and standards

Specifications must not be written so as to distort or restrict competition. Unless essential to describing what is wanted, they should not refer to trade names or patents. The specification may refer to a performance or functional specification or to a standard, in which case priority must be given to a national standard implementing a European standard. Essentially, the utility must describe what it wants and give suppliers an opportunity to prove that they can supply something which meets that technical requirement.

## Assessing tenders

There are two methods of assessing tenders or offers:

- lowest price
- most economically advantageous tender.

When using the second method, utilities must be prepared to:

- decide in advance the criteria to be used in justifying the tenders
- disclose the criteria and indicate the relative weighting of each criterion (or in exceptional cases, the relative ranking only).

## Standstill period

Once the winning offer has been chosen, the tenderer must be notified as soon as possible. At the same time the other tenderers and any applicants not already informed of their failure to be selected, including the reasons, must be notified of:

- the name of the 'winning' supplier
- the award criteria used
- the reasons for the decision, including the characteristics and relative advantages of the successful tender and score (if any) obtained by the winning tenderer and the score obtained by the supplier receiving the notification.
- a precise statement of the standstill period.

The full range of remedies is available to the court at this stage, (i.e. before the contract is let) including the power to suspend the procurement process, to overturn the award decision. Rendering the contract ineffective, shortening the contract, civil financial penalties and damages are further remedies, if the contract has been let.

A contract cannot be concluded with the winning supplier until the full standstill period has elapsed. The standstill period will usually be 10 days, provided that the contract award decision notice has been sent by electronic means or facsimile, however if one or more of the suppliers to receive a notice is sent the notice by other means, then the standstill period becomes 15 days from when the last notice is sent by such other means or 10 days from receipt.

## Keeping records

Utilities must keep records at each stage of the procurement process in case of challenge in the courts or for reporting to the European Commission. These records must detail all decisions made on individual contract awards and should be kept for at least four years. These include:

- decisions relating to the admission of candidates and choice of tenderers
- assessment of tenders
- dates and copies of notices sent to the Official Journal.

## What happens when a supplier challenges?

Suppliers have a number of remedies available to them where utilities breach the regulations. These include:

- suspension of the contract award procedure
- setting aside of unlawful decisions
- correction of documents to remove discriminatory clauses
- damages, including costs of tendering and possible loss of profit
- Ineffectiveness of a concluded contract
- Contract shortening
- Financial penalties.

The supplier must notify the utility of the alleged breach and of the intention to bring proceedings.

Suppliers can also make complaints to the European Commission, which can investigate the complaint and if necessary take action against the Member State (represented by the Office of Government Commerce/Scottish Government) in the Court of Justice of the EU.

The OJEU has also held that contracts outside the application of the Directives are nevertheless subject to Treaty requirements, including non-discrimination and transparency, which implies adequate advertising.

## Useful references

### 1. Directives

- **2004/17/EC**  
The Utilities Directive.
- **92/13/EEC**  
The Utilities Remedies Directive.

### 2. Regulations

- **SI 2006/6**  
The Utilities Contracts Regulations.
- **SSI 2006/2**  
The Utilities Contracts (Scotland) Regulations.

### 3. The WTO Government Procurement Agreement 1994

### 4. UK Office of Government

#### Commerce Guidance Notes, including

- Framework agreements
- Competitive dialogue procedure
- Environmental Issues and procurement
- Social Issues and procurement
- Introduction to EU rules
- Mandatory exclusion of economic operators
- 10 day mandatory standstill period

#### Commission Guidance Notes

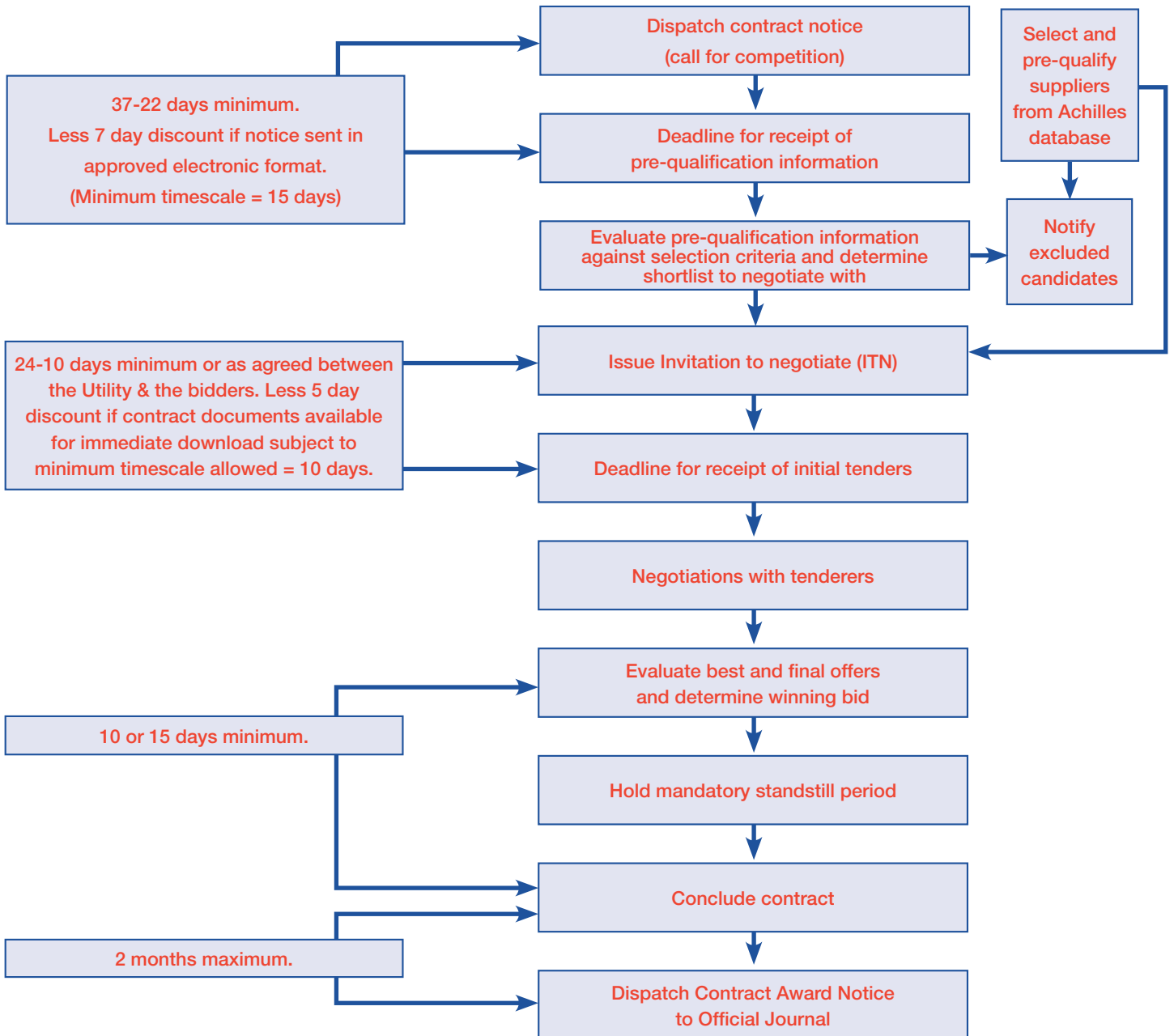
- Product Nomenclatures and Public procurement
- Defining the Term Product Area in Periodic Indicative Notices
- Framework agreements
- The Commission Interpretative document on the Environment and procurement
- The Commission Interpretative document on Social considerations and procurement
- The Commission Interpretative document on Concessions
- Procurements not fully covered by the directive rules (including low value contracts).

All these policy guidance notes are available through Achilles' THEMIS system as are the summaries and transcripts of relevant court cases (including European Court of Justice cases and those in the UK and Irish courts).

## Utilities qualification systems and joint vendor databases

1. The EU procurement rules for Utilities are contained in Directive 2004/17/EC, as implemented in the UK by The Utilities Contracts Regulations and the Utilities Contracts (Scotland) Regulations.
2. These rules allow a 'call for competition' to be made in the Official Journal of the European Union (OJEU) in three ways:
  - Using a Periodic Indicative Notice
  - Using an individual Contract Notice
  - Using a Qualification System Notice
3. The most flexible of these methods is the Qualification System Notice, which allows the utility to establish rules and procedures by which suppliers may apply to be 'qualified' to supply the goods/services, covered by that system. The notice is generally published annually and serves to notify the supply market of the existence of the system.
4. The utility then decides which companies should be qualified, in accordance with the rules of the system. By this means, a standing list of suppliers is created, which may be used as a source of candidates to bid for a contract covered by the system. Where a qualification system is published in OJEU as a call for competition, the utility can decide to draw tender lists only from suppliers qualified in this way.
5. The EU rules also allow a utility to use a qualification system operated by a third party for these purposes.
6. The databases operated by Achilles (UVDB for the electricity, water and gas sectors, Link-up for rail and transport and FPAL for oil & gas exploration) form a jointly operated, third party managed system, which provides the information necessary for qualification to its subscribing companies. Each database covers a wide range of goods and services purchased by the relevant industry sector.
7. The existence of the database, the goods and services it covers and the organisations subscribing to the database are publicised by means of a notice in the OJ. Achilles publishes this notice on behalf of subscribing purchasing organisations at least annually. When a new subscriber joins, a notice indicating this is also published.
8. Subscribing purchasing organisations also inform their existing suppliers about their intention to use the database, encouraging them to register with Achilles.
9. Subscribers are able to use the information provided by the suppliers, which is loaded on to a database by Achilles, to select those suppliers best qualified to provide the goods and services for which they have registered their capacity. Coding systems developed by Achilles and the subscribers ensure that each supplier registers appropriately.
10. The database is provided to the desktops of the users in the subscribing purchasing organisations, who are then able to search on the basis of the information provided. Once they have compiled a tender list, they are permitted to use either the restricted or negotiated procedure to seek tenders or proposals. No separate advertisement by the utility company is required and the timescales between requisition and bid can be very short.
11. The database thus relieves the purchasing organisations of the need to advertise each specific contract requirement.
12. The databases can also be used as a source of information in relation to other contracts or framework agreements, or in conjunction with auctions or dynamic purchasing systems.

# Negotiated Procedure with Call for Competition



**Notes:**

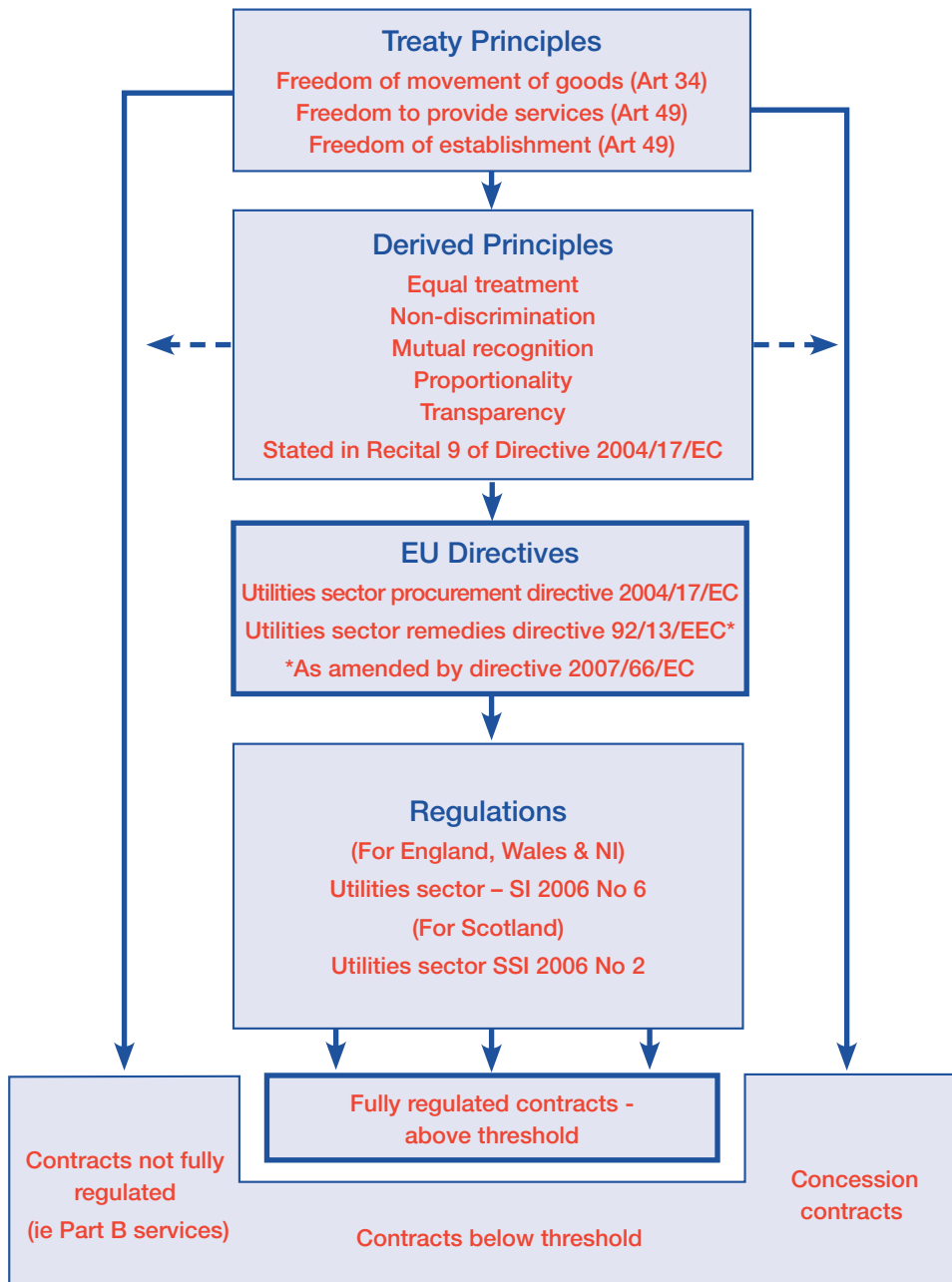
Pre-qualification information can be requested on the face of the contract notice or by using a pre-qualification questionnaire. The Directive and the Regulations do not mention the use of such questionnaires, although there is no reason to believe that they cannot be used.

If a tenderer requests further relevant information during the invitation to negotiate stage, then this has to be provided at least 6 days before the return deadline. The deadline for receipt of initial tenders may have to be extended in circumstances where a tenderer requests further information in sufficient time for dispatch to the tenderer 6 days before the initial tender receipt deadline date and for whatever reason the information is not dispatched in that time.

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# Treaty Principles and Sources of Legislation

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For more information and to discuss your specific requirements, please contact the EU services team:

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### THEMiS - the knowledge bank for regulated procurement

THEMiS is an online subscription-based system which provides purchasers with the tools to help them to comply with EU regulated procurement.

It allows you to:

- Have easy access to EU help
- Access up to date information on changes to EU procurement
- Ask your EU questions to dedicated experts in the field of EU procurement legislation
- Excellent source of information
- Quick response to questions asked
- Create and submit your Notices to OJEU electronically.

### THEMiS provides:

- UK , European and Irish Court Cases, summarised by Professor Sue Arrowsmith, Professor of Law at Nottingham University:
  - Key Issues
  - Facts
  - Judgments
  - The only system to include Professor Arrowsmith's summaries
- EU Directive and UK Regulations consolidated to include the latest amendments
- Full Amendment to the EU Directives and UK and Scottish Regulations
- Policy guidance from the European Commission, OGC and Scottish Government
- Infraction cases
- EU Articles written by experts in the field of EU procurement legislation
- A 'Give me guidance' section, with over 350 frequently asked questions, linked to other documents within THEMiS
- The ability to "Ask Achilles" advisors your EU question, answered via email
- Full search facility: product codes, CPV, CPC, Nace and Nuts codes
- Notice creation and submission tool allowing you to send notices to the OJEU electronically.

### There are three levels of subscription for THEMiS:

- Standard
- Premium
- Platinum

THEMiS is used by a variety of organisations including utilities within the rail, gas, electricity, water ports and airports, oil and gas industries, and lawyers.

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