



# The impact of EU procurement legislation on councils

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## ***Introduction***

1. This report outlines the findings of an online survey of procurement officers which looked at European Union (EU) procurement legislation.
2. The purpose of this survey was to gather information on council's experiences of and opinions on EU procurement legislation, in order to inform the Local Government (LG) Association's view ahead of European Commission proposals to modernise EU procurement legislation on 2011. The overarching aim was to ensure that LG Association work on this issue helps to create more favourable EU procurement rules for councils in the future.
3. The report begins by outlining the survey methodology, response rate and characteristics of those that responded. It then draws out the key messages, before going on to look in more detail at:
  - Current EU procurement legislation
  - Challenges
  - Service concessions
  - Procurement procedures
  - Legal challenges
  - Suppliers from outside the United Kingdom (UK)
  - Information
  - Training
  - Role of the LG Association

## ***Respondents***

4. The survey was sent via email to the officer with lead responsibility for procurement in each of the 375 councils in England and Wales and was in the field over the course of November 2010. A total of 141 responses were received; a response rate of 38%.
5. Some respondents did not answer every question so the response base to individual questions can be lower than indicated above – response bases are indicated for each individual question throughout the report.
6. A breakdown of response rate by council type and region is shown in the tables below. The tables show a reasonably uniform distribution across all types of authority and region and can therefore be taken as a broadly representative picture. However it is worth noting that London and Wales had a slightly higher than average response rate whilst for the East Midlands and Yorkshire and Humber the response was slightly lower than average.

**Table 1: Response breakdown by region**

	Respondents	Total sample	Response rate (%)
East Midlands	10	45	22
East of England	23	52	44
London	16	33	48
North East	3	12	25
North West	17	41	41
South East	31	74	42
South West	14	41	34
West Midlands	12	33	36
Yorkshire and the Humber	5	22	23
Wales	10	22	45
Total	141	375	38

**Table 2: Response breakdown by type**

	Respondents	Total sample	Response rate (%)
Shire County	11	27	41
Shire District	68	201	34
English Unitary	22	56	39
Metropolitan District	14	36	39
London Borough	16	33	48
Welsh Unitary	10	22	45
Total	141	375	38

## **Key Messages**

7. Many respondents were broadly positive about the introduction of directive 2004/18 in 2006, with 36 per cent stating that the directive has led to more efficient and effective procurement practice. Further, 68 per cent felt that the directive had improved transparency in the procurement process whilst 57 per cent stated that equal treatment of different bidders had improved.
8. However, 50 per cent of respondents thought that the directive has not led to more efficient and effective procurement practice. Two thirds of respondents stated that procurement costs and administrative burdens had worsened as a result of the directive and 54 per cent felt that the simplicity of the procurement process had worsened.
9. The Remedies Directive<sup>1</sup> emerged as a key issue. Although only 17 per cent of respondents had been legally challenged under the Remedies Directive in the last 12 months, 69 per cent identified dealing with challenges from unsuccessful bidders as an issue which presents a difficulty to their council's procurement activities.
10. This, along with comments provided by respondents throughout the report, suggests that the threat of legal action is impacting on councils, leading in some cases to a risk averse procurement process which could be negatively impacting upon innovative approaches when procuring goods and services. Further, some

<sup>1</sup> The Remedies Directive refers to the national review procedures that businesses can use when they consider that a public authority has awarded a contract unfairly.

authorities highlighted that they have observed a change of culture amongst unsuccessful bidders in recent years, with an increase in informal challenges.

11. The three other most commonly identified challenges all centred around legal uncertainty (legal uncertainty if competition to tender is required when sharing, trading or ‘pooling’ services with other public sector bodies [65 per cent] or with another council [64 per cent], and uncertainty created by UK or EU case law from the courts [62 per cent]).
12. This was emphasised by open comments provided by respondents which consistently highlighted the need for clearer and more easily accessible guidance, clarification and support from the EU or Office of Government Commerce (OGC). Further, 46 per cent of respondents stated that whilst they know where to get information on EU procurement legislation and the associated national public contracts regulations, it is not easy to access and/or not all the information they need is provided, whilst eight per cent stated that they have difficulties accessing the information they need, and a further respondent did not know where to access the information.

## **Results**

### **Background information**

13. Respondents were asked to indicate which of the options listed in Table 3 best describes their council’s procurement arrangements, and were able to select more than one option. The most common options were that individual service areas/directorates are responsible for their own procurement arrangements (selected by 65 per cent of respondents) and that the council has a central procurement team (selected by 54 per cent).
14. Many arrangements comprise a mixture of the two, with 43 respondents (30 per cent) having selected both of these options. In addition, 15 of the 20 people that selected the ‘other’ option indicated they had this type of arrangement, with several stating that they have a strategic or advisory core team, with individual departments responsible for specific procurements.

**Table 3: Which of the following best describes your council’s procurement arrangements?**

	<b>Number</b>	<b>Per cent</b>
The council has a central procurement team	76	54
Individual service areas/directorates are responsible for their own procurement	92	65
Procurement arrangements are outsourced	8	6
Other	20	14
Base	141	100

Note percentages will total more than 100 as respondents could select multiple options

15. All 76 respondents that had a central procurement team were asked to indicate the number of full time equivalent (FTE) staff that are employed in their procurement team. FTEs ranged from 0.6 in one district council to 37 in one county council.

16. Table 4 outlines the full distribution of FTEs amongst respondent's procurement teams. The table shows that just less than three quarters (74 per cent) of respondents with a central procurement team had a team with 10 or fewer FTE staff. However a number of respondents did work in significantly larger procurement teams, for example eight per cent worked in a team with over 20 FTE staff.

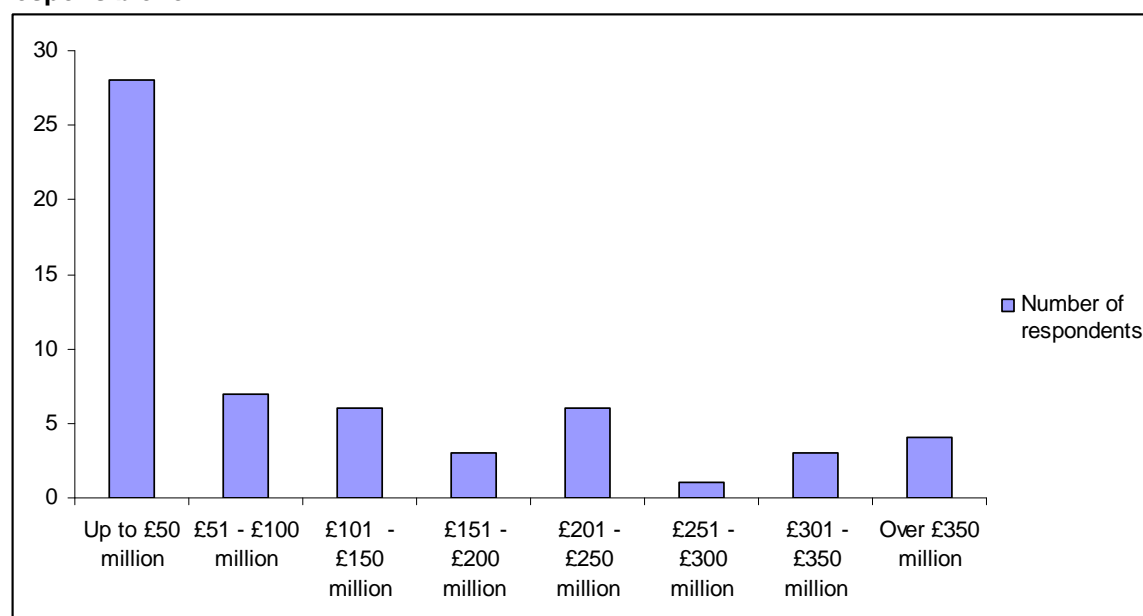
**Table 4: Number of full time staff employed in procurement teams**

FTE	Number	Per cent
Five or less	36	47
5.1 - 10	20	26
10.1 - 20	14	18
20.1 - 30	4	5
30.1 - 40	2	3
Total	76	100

Note that percentages may not sum to 100 due to rounding

17. The 76 respondents with a central procurement team were asked to give an indication of the approximate size of the current procurement budget their team is responsible for. Fifty eight respondents provided answers to this question. The distribution of responses is outlined in Figure 1, which shows that whilst respondents were most likely to have a budget of less than £50 million (48 per cent of those that provided this information), there was a wide range of budgets, with four respondents stating their team has a budget of more than £350 million for the 2010/11 financial year.

**Figure 1: What is the approximate size of the current procurement budget your team is responsible for?**

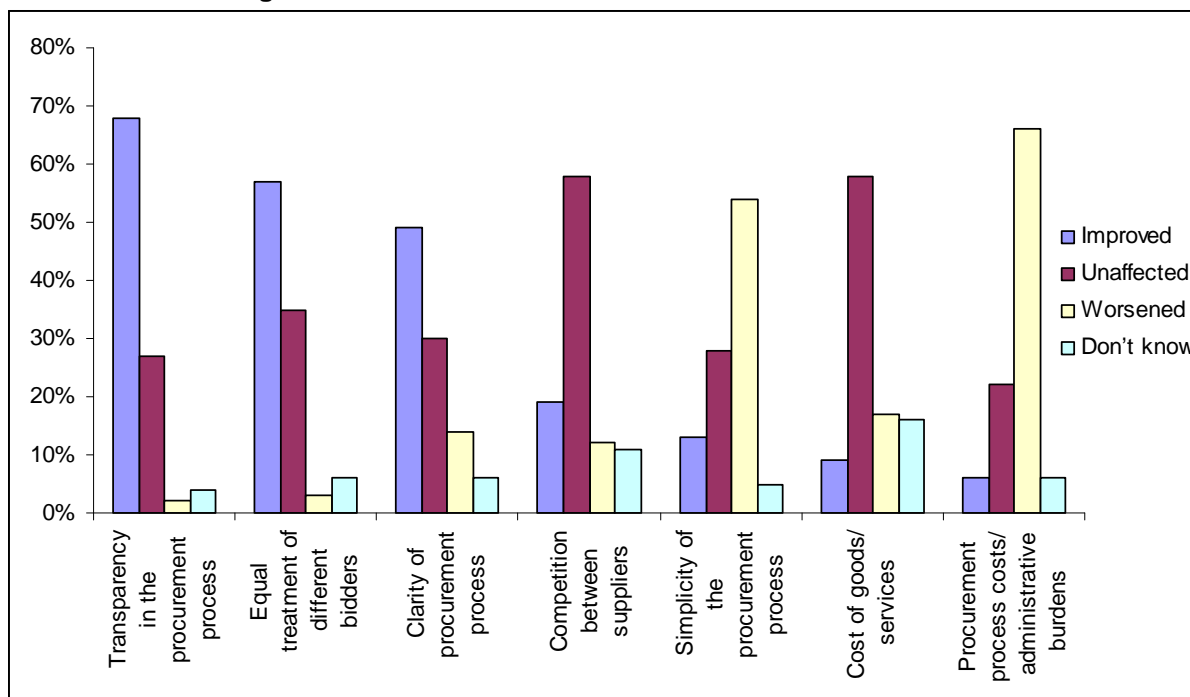


Base: 58 respondents

## ***Current EU procurement legislation***

18. With the introduction of the most recent directive (2004/18) in 2006 the EU intended to improve several specific aspects of public procurement. Respondents were asked what, in their opinion, the impact of this has been in a variety of different areas.
19. As Figure 2 shows, opinions varied widely depending on the area:
  - The area that most respondents thought had improved was transparency in the procurement process (68 per cent). This was followed by equal treatment of different bidders (57 per cent).
  - The areas that were most commonly identified as unaffected by the directive were competition between suppliers (58 per cent) and the cost of goods and services (also 58 per cent).
  - The area that the most respondents thought had worsened as a result of the directive was procurement process costs/administrative burdens (66 per cent) followed by the simplicity of the procurement process (54 per cent).
20. In addition, nine respondents highlighted additional areas that had worsened as a result of the directive. The areas respondents identified were:
  - the process is now more risk intense, particularly in terms of the risk of legal challenge
  - the directive has made it more challenging to negotiate cost effective contracts
  - case law has created ambiguity in terms of what is and is not allowable in procurement practice
  - the ability to consider innovative ideas has been negatively impacted
  - the procurement process now takes longer to implement.

**Figure 2: With the introduction of the most recent directive (2004/18) in 2006 the EU intended to improve several specific aspects of public procurement. In your opinion, what has the impact been on the following areas?**



Base: 139 respondents

21. Respondents were then asked whether overall they believe that the introduction of directive 2004/18 in 2006 (and the associated UK regulations) has led to more efficient and effective procurement practice. Of the 140 that answered this question:

- fifty (36 per cent) said that the directive has led to more efficient and effective procurement practice
- seventy (50 per cent) said that it has not
- the remaining 20 respondents (14 per cent) answered 'don't know'.

## Challenges

22. The current reduction in funds available means that councils will be likely to procure and deliver services in more innovative ways. However there are a number of factors which can make this particularly challenging. Respondents were shown a list of these potential challenges and asked to indicate which ones had posed a challenge to their own council's procurement activities.

23. As Table 5 shows, the most commonly experienced issue was dealing with challenges from unsuccessful bidders made under the Remedies Directive (selected by 69 per cent of respondents). This was followed by legal uncertainty if competition to tender is required when sharing, trading, or 'pooling' services with other public sector bodies (65 per cent). No respondents stated that none of the challenges listed had been experienced.



**Table 5: Please indicate those issues which you feel present a difficulty to your council's procurement activities**

	Number	Per cent
Dealing with challenges from unsuccessful bidders made under the Remedies Directive	97	69
Legal uncertainty if competition to tender is required when sharing, trading, or 'pooling' services with other public sector bodies	92	65
Legal uncertainty if competition to tender is required when sharing, trading, or 'pooling' services with another council	90	64
Uncertainty created by UK or EU case law from the courts	87	62
Inclusion of 'social' criteria in public contracts	85	60
Risk-averse procurement culture in councils generally	84	60
Inclusion of green (sustainability and energy efficiency) criteria in public contracts	70	50
Determining selection and award criteria	63	45
The level at which the EU thresholds are set (currently at £156,442 for goods and services)	57	40
Developing e-procurement procedures and e-market places	53	38
How to recognise 'non-profit' organisations as suppliers	51	36
Using the competitive dialogue procedure	48	34
Understanding and dealing with the EU's 'state aid' rules	40	28
Other	9	6
None	0	0
Don't know	0	0
Base	141	100

Note percentages will total more than 100 as respondents could select multiple options

24. Respondents were then invited to outline possible solutions for the challenges that they have experienced in relation to EU procurement procedures. Fifty one respondents suggested a range of solutions:

- **Guidance:** the need for guidance, clarification and support from the EU was the most commonly mentioned suggestion, including the need to share best practice examples. Specifically, the need for guidance around selection and award criteria was highlighted, as were several issues around case law. For example one respondent said *'there is a large degree of inconsistency with understanding of what recent case law/regulations mean between public bodies. Clear guidance from the OGC that is unambiguous would be very helpful'*. Other respondents suggested that case law outcomes should be incorporated in a single location to keep council's legal fees down, and that the EU should issue guidelines rather than wait for case law.
- **Thresholds:** the need to raise thresholds was mentioned several times. For example one respondent stated *'this authority has had no interest from other EU countries for its lower value contracts so it makes the whole process unnecessary, time consuming and not cost effective.'* Another said the thresholds should be revised to *'a realistic limit at which an EU participant might find it economically worth their while to bid'*.
- **Legal challenges:** another common theme was the impact of the Remedies Directive, with one respondent stating. *'the biggest fear facing my own staff is always regarding the risk of legal challenge and the now perceived bias in favour of the supplier since the introduction of the new Remedies Directive. This fear leads to cautious, risk averse procurement procedures that stifle innovation and the chance*

to deliver cashable savings'. A number of suggestions were made in terms of solutions, including:

- *'Clarify the Remedies Directive so that it is not left to varied interpretation by the courts.'*
- *'Provide under the Remedies Directive for unsuccessful challengers to bear the costs of the contracting authority and for loss of business by the contractor the contract was awarded to.'*
- **Negotiation:** some respondents highlighted the barriers caused by the competitive dialogue process, and called for the ability to negotiate post tender. For example, one respondent stated *'changes to the competitive dialogue procedures (are needed) as they are complex, increase costs and may not represent a cost effective solution'*. Another said *'I believe a fundamental change is needed in the EU regulations to deliver equal power to the buyer (as long as the tender process remains transparent) which leads to increased use of negotiation without having to enter an overly complicated process like competitive dialogue'*.
- **Shared services/collaboration:** several respondents highlighted the need for more guidance and clarity on the legal and practical implications of collaborations with other councils and the development of shared services.
- **Bureaucracy:** more generally, the need for more flexibility and less bureaucracy was also highlighted. For example *'such a rigid regime stops local authorities from being able to take advantage of innovative commercial offers that do not fit with the agreed evaluation criteria'*.
- **Social criteria:** some respondents asked for guidance on inclusion and use of social and green criteria in contracts, whilst others mentioned clarity was needed around the use of local Small and Medium Sized Enterprises (SMEs): *'we need to be clear if we are working under a big is best agenda or supporting SMEs as it is difficult to do both.'*

## Service concessions

25. Respondents were asked if they were aware of their council ever having awarded a contract as a service concession or franchise as opposed to a normal public contract. Service concessions are a distinct legal form of contract the EU may seek to regulate more strictly in future years. They are characterised by the risk and reward of running a service being transferred to the operator and not being borne by the local authority.

26. Just over a fifth (21 per cent) answered that their authority had awarded a contract of this type.

**Table 6: Are you aware of your council ever having awarded a contract as a 'service concession' or 'franchise' as opposed to a normal public contract?**

	Number	Per cent
Yes	29	21
No	84	60
Don't know	28	20
Total	141	100

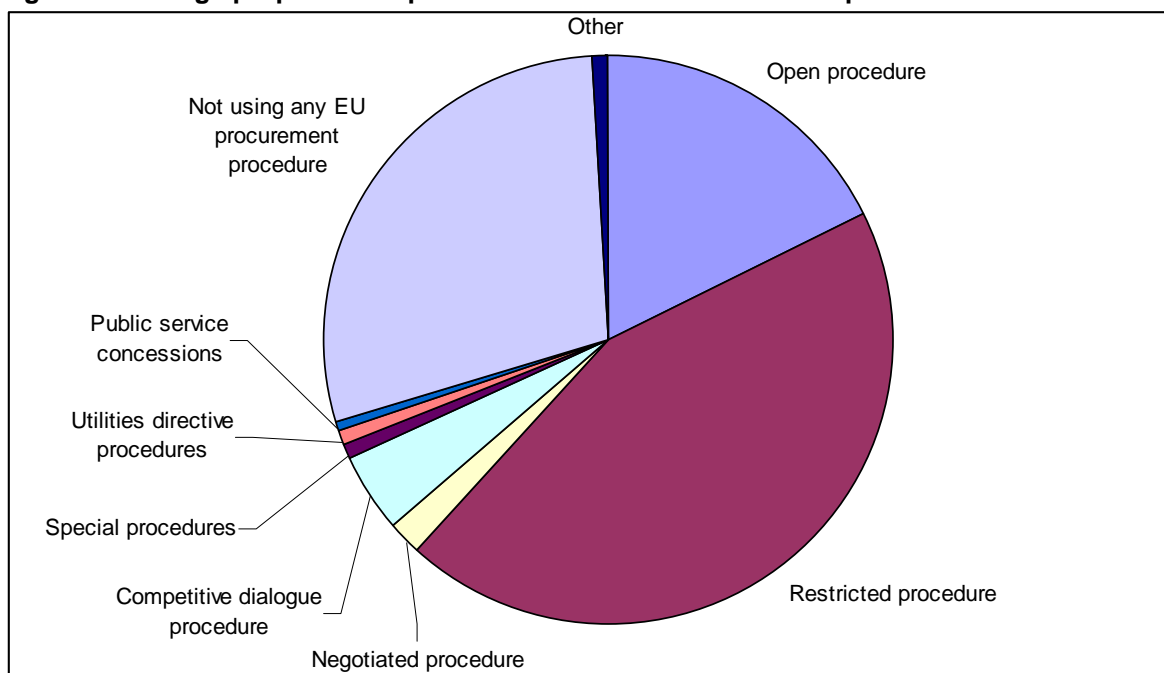
Note that percentages may not sum to 100 due to rounding

27. Those who were aware of their council having awarded a contract as a service concession were invited to provide any further comments specifically about this type of contract. These comments are summarised below.
28. Some respondents gave comments relating to how service concessions are currently treated in their authority:
- One respondent said *'departments/officers generally view the "value" of a service concession as just the payments made by the council not the total turnover value of the concession. I have concerns that the council may not therefore be advertising these requirements as transparently as we should.'*
  - Another explained *'we treat (service concessions) as competitive procurements.'*
  - A further respondent said *'I have tendered these services when perhaps you don't need to. A lot of time could be spent by officers on these services that provide some benefits to the community but none to the authority.'*
29. Additionally, some comments were made regarding current and future rules and regulations in this area:
- Two respondents stated that service concessions can be a confusing area, and that more clarity on the definition is required.
  - Another commented *'greater regulation may affect the viability of such arrangements and reduce the ability to provide the service, as potential partners would be reduced and the cost to the council increased.'*
  - A final respondent stated *'given that service concessions represent a partial transfer of an activity from the public to the private sector the regulations on these should be minimal, with only a requirement for fair selection of the concessionaire.'*

## **Procurement procedures**

30. Respondents were given a list of different procurement procedures, and were asked to provide an estimate of the percentage of their procurements that fall under each procedure. Figure 3 shows, for the 128 respondents that provided this information, the average proportion of procurements that fall under each procedure.
31. As Figure 3 shows, the procedure that procurements most commonly fall under is the restricted procedure – on average across all those that responded 44 per cent of procurements are of this type. This was followed by not using any EU procurement procedure (sub-threshold but still respecting transparency requirements), which was the case on average for 29 per cent of the procurements undertaken by respondents. The open procedure was also common, with 18 per cent of procurements on average falling under this procedure.

**Figure 3: Average proportion of procurements that fall under each procedure**



Base: 128 respondents

## **Legal challenges**

32. As Table 7 shows, 17 per cent of respondents indicated that their authority has been challenged by an unsuccessful bidder under the Remedies Directive at some point in the last 12 months.

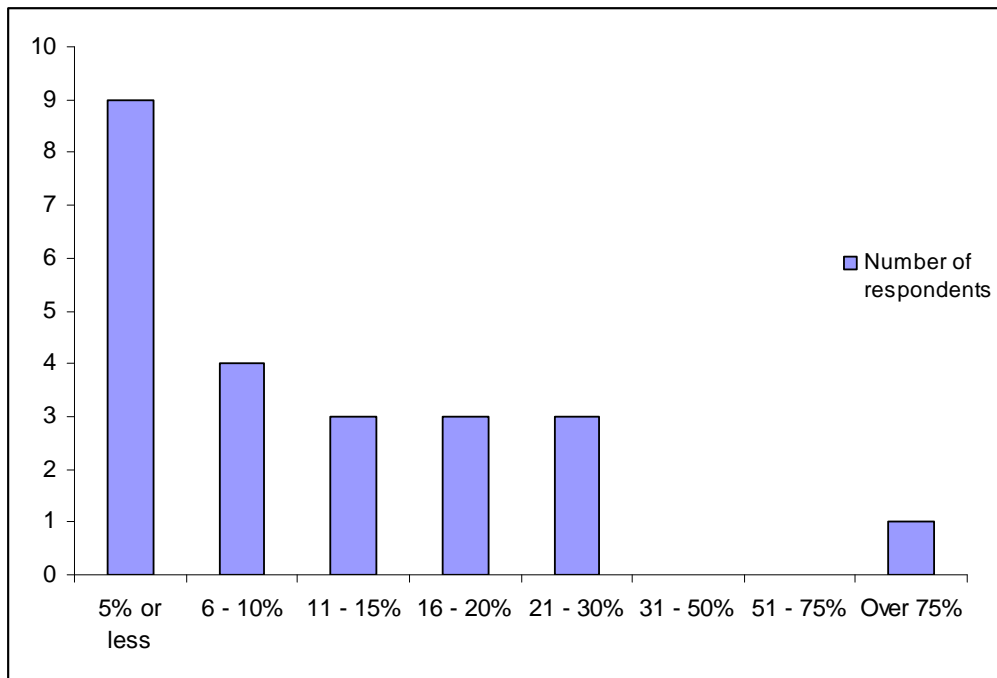
**Table 7: In the last 12 months, has your authority been legally challenged by an unsuccessful bidder under the Remedies Directive?**

	Number	Per cent
Yes	24	17
No	108	77
Don't know	9	6
Total	141	100

33. The 24 respondents whose authority had received a challenge were asked how much time, as a percentage of their overall workload, their responsible officers spent on legal challenges from unsuccessful bidders in the last 12 months.

34. Nine respondents (38 per cent) stated that their responsible officers spent five per cent or less of their time dealing with these legal challenges. However as Figure 4 shows, there were several cases where a substantial amount of staff time was taken up with this – with three respondents stating that their responsible officers spent between 21 and 30 per cent of their time dealing with legal challenges, and a further respondent stating that their responsible officers spent over 75 per cent of their time on this.

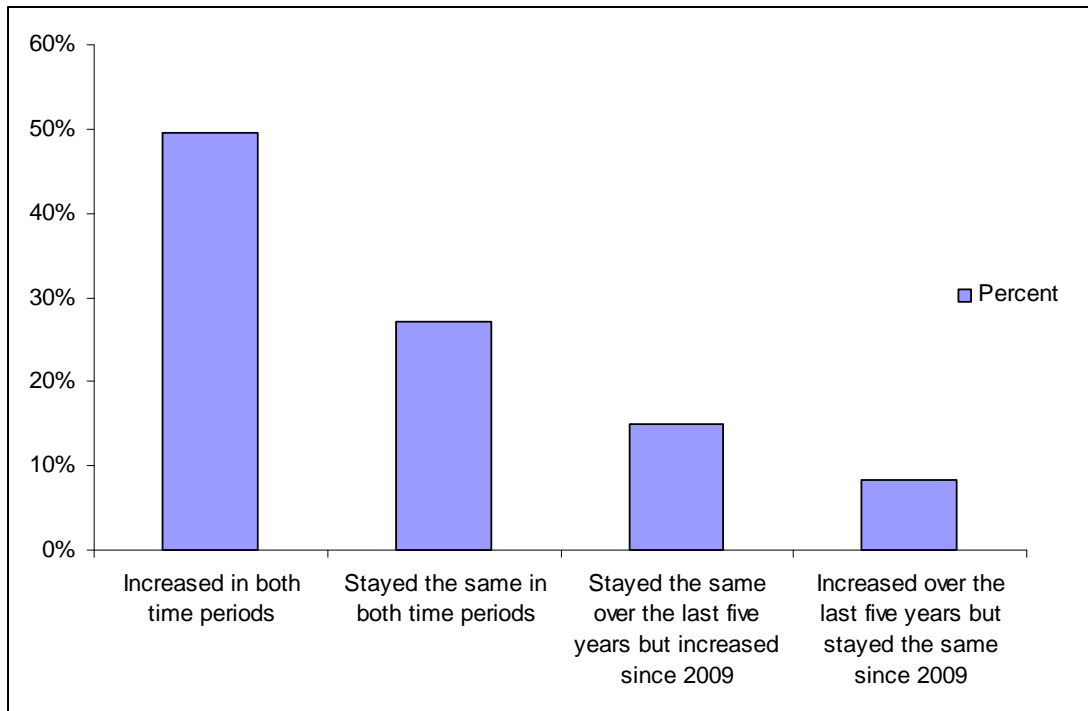
**Figure 4: How much time, as a percentage of their overall workload, have your responsible officer(s) spent on legal challenges from unsuccessful bidders ('remedies' issues, freedom of information requests etc) in the last 12 months?**



Base: 24 respondents

35. All respondents were then asked whether they would say that the amount of time spent on legal challenges had increased, stayed the same, or decreased in recent years – firstly, in the last five years and secondly, since the introduction of the Remedies Directive in 2009. Table 8 outlines the answers for those respondents that provided answers for both time periods.
36. The most common response was that the time spent on legal challenges increased in both time periods (50 per cent) followed by 27 per cent who stated that the amount of time spent on legal challenges stayed the same in both time periods. No respondents stated that time spent had decreased for either time period.

**Table 8: Would you say the amount of time spent on legal challenge issues has increased, stayed the same or decreased a) in the last five years b) since the introduction of the Remedies Directive in 2009?**



Base: 107 respondents (all those that provided answers for both time periods)

### ***Suppliers from outside the UK***

37. The next section looks at the extent to which, over the last five years, suppliers from outside the UK have submitted expressions of interest, submitted tenders, and been awarded contracts for tenders advertised by respondent's local authorities.
38. As Table 9 shows, it is unusual for suppliers based in other EU countries (with no UK base) to be involved with this process:
- seventy six per cent stated that they rarely or never receive expressions of interest from these suppliers
  - eighty nine per cent stated that they rarely or never receive tenders from these suppliers
  - ninety one per cent stated that contracts are rarely or never finally awarded to these suppliers.

**Table 9: When advertising an opportunity to tender in the last five years...**

	...how often have you received expressions of interest from suppliers based in other EU countries (with no UK base)?		...how often do suppliers based in other EU countries (with no UK base) actually submit tenders?		...how often is a contract finally awarded to a supplier from another EU country (without a UK base)?	
	Number	Per cent	Number	Per cent	Number	Per cent
Never	29	21	53	38	84	60
Rarely	77	55	72	51	42	30
Sometimes	24	17	7	5	1	1
Often	4	3	0	0	0	0
Don't know	6	4	7	5	8	6
Not applicable	0	0	1	1	4	3
Total	140	100	140	100	139	100

Note that percentages may not sum to 100 due to rounding

## Information

39. Respondents were asked how accessible they find information (such as guidance) on EU procurement legislation and the associated national public contracts regulations. As Table 10 shows, whilst 44 per cent were broadly positive about this, stating that they can easily access the information they need and know where to get it from, 46 per cent stated that whilst they know where to get the information, it is not easy to access and/or not all the information they need is provided.

**Table 10: How accessible is information (such as guidance) on EU procurement legislation and the associated national public contracts regulations?**

	Number	Per cent
I can easily access the information I am after and I know where to get it from	62	44
I know where to get the information but it is not easy to access/ not all the information I want is provided	65	46
I have difficulties accessing the information I need	11	8
I don't know where to access the information I need	1	1
Don't know	1	1
Total	140	100

40. Eight respondents answered that they have difficulties accessing the information they need. These respondents were asked to briefly outline what they think needs to be improved.
41. Several respondents suggested there is a need for some form of central resource 'hub', and highlighted the importance of having just one source for guidance. For example one suggested that a call centre type organisation should be set up to provide expert advice, whilst another suggested '*all advice (should) be deposited in an easily accessible website (the Office of Government Commerce [OGC]). They do have guidance but it is very difficult to find*'. Another stated '*one source for guidance is ideal*'. Two respondents suggested a manual should be produced.

42. In terms of content, one respondent suggested ‘*clear guidance on the use of selection/award, competitive dialogue, timescales, remedies etc with clear easy to follow guidance, how to guides, what not to do etc*’. Another stated ‘*whilst there are overviews, how about detail giving clear advice about areas where it’s easy to fall down on such as criteria/sub criteria, interviews/site visit scoring, panel scoring, clarification and due diligence*’. It was also suggested that models of good practice would be helpful.
43. An additional respondent pointed out more could be done to reduce the need to take legal advice: ‘*we all face the same issues but legal advice tends to be contradictory in some instances or very much “well if you’re willing to take the risk”. It would be really good to get a clear national steer with parameters so we’re not all engaging legal advisors on the same issues.*’
44. Finally, three respondents highlighted the importance of providing this information in a concise style and in plain English, although with sufficient detail to avoid doubt.
45. Respondents were then asked whether the OGC informs and engages with officers to test potential EU rule changes. Views were mixed on this:
- Sixty per cent of respondents stated that the OGC does engage with officers. However as Table 11 shows, this included 38 per cent who stated that more is needed in this regard.
  - Forty per cent had not been engaged by the OGC. The majority of these (37 per cent of total respondents) stated that they would like to see more initiative from the UK government in regard to this, whilst only 4 per cent of respondents stated that they don’t expect central government to involve local procurement officers.

**Table 11: Does the UK government (the OGC) inform and engage with officers to test potential EU rule changes?**

	Number	Per cent
Yes, and I am satisfied with the level of involvement and ways of communication.	30	22
Yes, but more is needed.	53	38
No, and I would like to see more initiative from the UK government	51	37
No, and I don’t expect central government to involve local procurement officers	5	4
Total	139	100

Note that percentages may not sum to 100 due to rounding

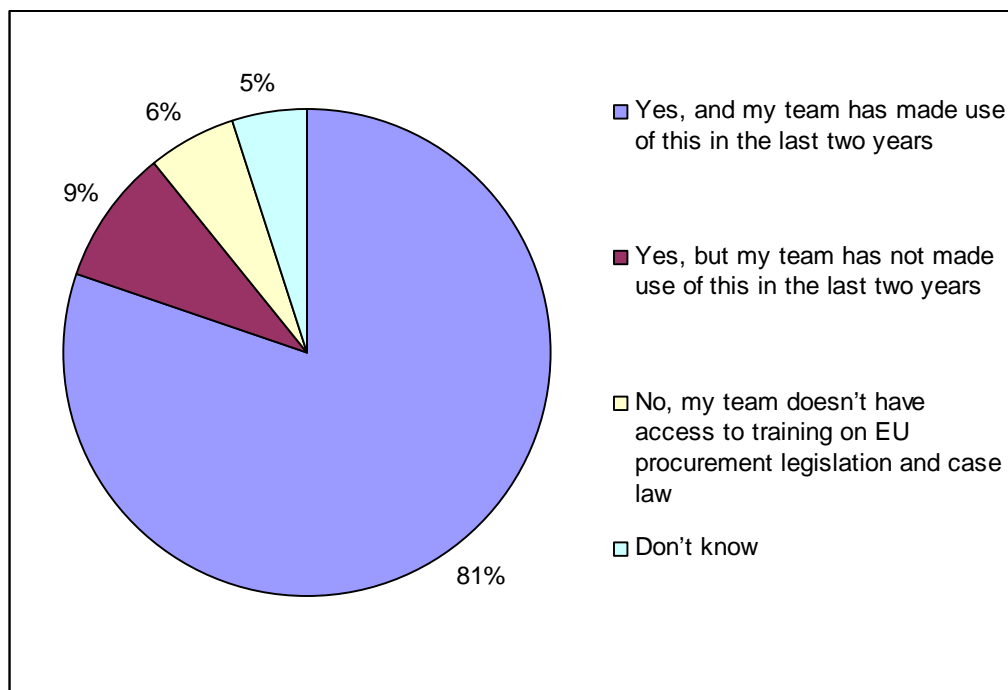
## **Training**

46. Respondents were asked whether their team has access to training opportunities on EU procurement legislation and case law. As Figure 5 shows, the vast majority (90 per cent) stated that their team does have access to training opportunities. This comprises 81 per cent whose team had made use of this in the last two years and nine per cent whose team had not.



47. Six per cent of respondents stated that their team does not have access to training on EU procurement and case law, whilst five per cent did not know whether their team has such access.

**Figure 5: Does your team have access to training opportunities on EU procurement legislation and case law?**



Base: 140 respondents

48. The 81 per cent of respondents who stated that their team has made use of training on EU procurement legislation and case law in the last two years were asked whether they would agree that this training helped their team to procure better within the current legal framework.
49. Respondents were broadly positive about this – 88 per cent agreed that the training had helped their team (comprising 31 per cent who agreed strongly and 57 per cent who agreed), as shown in Table 12.

**Table 12: To what extent would you agree that this training helped your team to procure better within the current legal framework?**

	Number	Per cent
Agree strongly	33	31
Agree	60	57
Neither agree nor disagree	10	9
Disagree	2	2
Disagree strongly	0	0
Don't know	1	1
Total	106	100

50. The nine per cent of respondents (12 respondents) who stated that their team does have access to training on EU procurement legislation and case law but has not made use of this within the last two years were asked why, in their opinion, their team had not made use of this training.

51. The reasons identified were around practical issues rather than the usefulness or content of the training; no respondents selected the options *'I don't think that training on this would be useful'* or *'training would be useful however the available training does not cover topics that would be of use.'* Rather, 58 per cent (seven respondents) stated that the training is too expensive, whilst a third (four respondents) stated that lack of time was an issue.

**Table 13: In your opinion, why has your team not made use of training opportunities on EU procurement legislation and case law?**

	Number	Per cent
I don't think that training on this would be useful	0	0
I think that training would be useful however the available training does not cover topics that would be of use	0	0
Not enough time	4	33
The training is too expensive	7	58
Other	3	25
Base	12	100

Note percentages will total more than 100 as respondents could select multiple options

52. Finally in this section, those respondents who stated their team does not have access to training opportunities on EU procurement legislation and those who didn't know whether they have access were asked whether they think that training on EU procurement legislation would be helpful for councils to procure better within the current legal framework. Of these 15 respondents:
- Ten (67 per cent) answered yes
  - One (seven per cent) answered no
  - Four (27 per cent) answered 'don't know'.

### ***Role of the LG Association***

53. All respondents were asked to outline the two main actions that the LG Association could take towards the EU to help councils in their procurement activities. Ninety respondents answered this question, with a number of key themes apparent.
- **Guidance:** The importance of accessible guidance and clear and easily understandable documentation was emphasised by several respondents. Various roles were suggested for the LG Association in this regard:
    - Lobbying to ensure that guidance on how to undertake EU procurement is as straightforward and accessible as possible. For example one respondent said *'I would like to see a vast simplification of legislation and the way it is communicated. We need simple plain English practical steps that we can take action on, not long legal documents that need a solicitor to interpret.'* Another commented that the LG Association *'should ask the government to set one interpretation of the regulations for the UK so that individual public bodies do not have to take independent legal advice'*.
    - Lobbying for better guidance on specific areas such as applying the Remedies Directive, how to operate the competitive dialogue process, the

remit of classification of goods, works and services, completing adverts (particularly around scope and values), arms length companies, allowing flexible models to be used by councils, and guidance on Part B services.

- Lobbying for or producing tools and documents to help with procurement, for example *‘a simplified checklist of the activities required to comply with EU directives which could be put before all officers involved in procurement’* and *‘produce standard, easy to read documentation and a “follow through” guide to EU procurement that would be useful to smaller councils who do not have a dedicated team. They would not then have to spend thousands on outside consultants to do the process for them’*.
- Lobbying for or undertaking activities to spread best practice *‘perhaps based on good practice displayed within authorities, rather than relying on case law to clarify points of law - as this does not always help when deciding how to improve the process on the basis of it.’*
- Some respondents suggested more practical help that would be useful to them, for example a free update session or cost effective training on specific areas of procurement law and practice, or practical assistance with regard to the day to day issues relating to the application of the EU directives. One respondent also said *‘the competitive dialogue approach requires the use of external consultants who are very costly. The LG Association should fund the development of internal consultants at a lower cost than private sector consultants as the same information is often required by many different public sector organisations.’*
- **Bureaucracy:** Some respondents mentioned that the EU procurement process is time consuming, lengthy and bureaucratic, and suggested that the LG Association should lobby for such things as increased flexibility around timescales and procedure, streamlined and more simple procedures and regulations, halting *‘procurement by process’*, and reintroducing a framework for good procurement linked to private sector best practice.
- **Thresholds:** Several respondents also highlighted that the LG Association could helpfully lobby for an increase to the thresholds for goods and services contracts. An example of a case where the level of thresholds is unhelpful was given by one respondent: *‘with continuous supplies of goods or services an annual spend of 40 thousand pounds (often) places the procurement above EU thresholds adding unnecessary time and cost to a modest procurement spend.’*
- **Balance of power:** It was commonly mentioned that the EU regulations appear to push the balance of power to suppliers rather than local authorities, and respondents suggested that this constrains procurement innovation and hampers the ability of councils to achieve best value from contracts. The Remedies Directive was seen to be a key issue in this respect and was described by one respondent as *‘so poorly formed as to make it a gold mine for lawyers’*. It was suggested that the LG Association should lobby to make challenging procurement decisions *‘far more onerous’*. Further suggestions included:
  - For the UK to have an agreed process for dealing with challenge issues which are short of court action.
  - The risk to services from challenges under the Remedies Directive should be reduced. A mechanism should be put in place to enable continued service delivery whilst legal challenges continue as part of due process.

- The Remedies Directive should be revised in such a way that there is not a positive incentive for suppliers to run challenge processes with a view to being 'bought off' to save the cost of dealing with the challenge.
- **Negotiation:** Some respondents mentioned that the inability to be able to negotiate after a contract is awarded also goes against achieving best value, and suggested that the LG Association should campaign for the ability to negotiate on individual contracts. For example one respondent stated *'we ideally need a procedure that easily (not with lots of justification, legal support etc) permits negotiation with the preferred bidder. The limitations often stop the public sector obtaining best value for money as we cannot make adjustments easily when tenders come back. The private sector can achieve better value in the final stages of tender. We can still be transparent at the start'*.
- **Social criteria:** Several respondents commented upon the need for increased flexibility to use social and environmental criteria to support SMEs, and clarity over the use of these criteria: *'simplify the legal framework - greater clarity is needed over use of social and green factors as national demands to improve the local economy and reduce (our) carbon footprint can conflict with over-riding European wide competition.'*
- **Other issues:** A number of other issues were highlighted by a small number of respondents, including the need for measures to help sharing of services, the need for clarity around frameworks, the benefits of promoting electronic tendering and a suggestion for standardised documentation across local government.

## **Final comments**

54. Finally, respondents were invited to submit any further comments on the topics covered in the survey, or on EU procurement policy more generally. Thirty three respondents provided comments, with themes echoing those emerging throughout the report. In particular, respondents took this opportunity to further highlight issues around:
- **The Remedies Directive:** Some respondents stated that whilst they had not received formal legal challenges, they have seen an increase in informal challenges, for example *'complaints and issues raised by suppliers who failed to win - this has increased hugely as they are being provided with more detailed information on why they did not win, or just the sheer extra companies bidding means more companies are failing to win contracts and want to complain. Huge extra burden to process all this, even when in most cases the process can be shown to be fair and the complaint is unjustified'*.
  - **Balance of power:** For example: *'the emphasis within the EU regulation changes has moved towards supporting business, at the expense of the council tax payer'*.
  - **Other European countries:** One respondent stated *'there is certainly the perception that UK councils are trying to undertake the correct approach and it would be nice to know if our European counterparts encounter the same problems that we have (as certainly a large number of procurement practitioners wonder if they even bother)'*. Another said *'I often get challenged about our ability to direct spend toward SME/local economy when the perception of member states is that they do what they like as far as supporting local trade'*.

55. In addition, there were several overarching comments, some of which stated that respondents agree with the need for and intentions of the EU regulations but that in practice they become unhelpful. For example one respondent stated '*whilst well intentioned some aspects of the EU regime have come to greatly inhibit sensible commercial approaches*', whilst another said '*there is a need for sensible regulation of commercial practice, however legislation, specifically EU procurement policy, needs to support professional procurement practice and not hinder it as currently*'.

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