THE ACQUISITION OF IT
a good practice guide
Foreword

This Guide has been prepared by a working party comprising representatives from the IT, legal and purchasing interests in local authorities together with Audit Commission staff. The objective of the project was to compile a set of guidelines on the wide-ranging subject of IT procurement and to give some advice on best practice, the EC Directives, the legal issues surrounding contracts, the financing options, and the question of how best to apply the various specialisms within an authority in the procuring of IT.

This is not the definitive book on the subject and the reader will be well advised to seek legal advice before embarking upon any IT contract. Management needs to be aware, though, of all the issues raised in this Guide and exercise informed judgement on the extent to which best practice is being met bearing in mind all the relevant considerations such as the scale and breadth and impact of the project, its risks and resource constraints. Management entails the effective use of resources and the exercise of judgement in the inevitable absence of complete information. The Guide should help to focus attention upon those areas where assistance should best be sought and should clarify some of the more complex areas of current European legislation. The situation is dynamic and EC regulations continue to be developed and published and the authors of this Guide will doubtless need to return to the task of providing an update in the near future. For the time being, though, this publication will hopefully provide a pragmatic and helpful guide to the IT procurement process.

The Audit Commission gratefully acknowledges the help and assistance given by local authorities in the compilation of this guide. Particular thanks are due to those individuals who prepared material and advised in the preparation of the publication:

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1. Introduction

Introduction to the guide

1. The task of acquiring IT facilities to meet the many demands within an authority has never been a straightforward task and having to comply with Directives from the European Commission has added an additional dimension to the public procurement process.

2. The Audit Commission's paper Acquiring IT drew attention to several of the problems facing authorities when acquiring IT facilities and made particular reference to the European Directives. But the Directives are not the only concern for authorities having to satisfy demands from an increasing number of users for new hardware and software. Competition amongst suppliers is fierce - particularly in the present climate - and with local government facing constant change the opportunities for new IT business continues to grow. The process of tendering and comparing products can be tedious and time consuming for the busy manager and yet there is a need to demonstrate that the public purse has been protected and the best value obtained.

3. One of the suggestions made in the Audit Commission's paper was that there could be some benefit both to authorities and to suppliers if the process of tendering was better defined. Several authorities looked to the Commission for further advice on these and similar issues and so a group of interested parties was formed to explore ways in which guidance could be provided to authorities. The objectives of the Group were to provide some practical help in the form of a basic guide for those acquiring IT, particularly those (such as the increased number of managers of new business units in schools, for example) who may be unfamiliar with the ramifications of EC Directives and tendering, and a more detailed set of guidelines explaining the procedural and legal implications.

4. Some indication of authorities' perceptions of general acquisition issues was necessary to at least satisfy the group that its own views on the state of the acquisition process could be sustained and help decide the guidance which was most needed. As a first step in helping identify local authorities' approaches to IT procurement, therefore, a questionnaire was sent to all chief executives in the autumn of 1991 inviting them to provide information on the advice they seek at different stages of the procurement process and the awareness by their authorities of the EC Directives.

5. Around 50% of authorities responded and one of the key messages of the survey was that 88% said that they did not think that the EC Directives had been sufficiently well brought to the attention of authorities and this has certainly been the experience of the Audit Commission's auditors when reviewing procurement processes. Around 74% of those responding said they were familiar with the various directives but several qualified this by adding that they interpreted this to mean that they knew of their existence! The EC Directives clearly do have a major impact upon IT acquisitions and yet the unfamiliarity with the general concepts as well as the finer print in the Directives could well cause local authorities real problems, particularly when the EC begins policing adherence to
the directives in earnest - as it intends doing. The distribution of the survey and the work that has been undertaken in preparing this guide have led to a better awareness of the issues.

6. Getting the right advice is all important and one of the key points to emerge from discussions with those who have been closely involved in contracting for IT has been the absence in many cases of the necessary mix of IT, legal and financial skills at the right time in the negotiation process. The Group asked, for example, whether the legal department was involved at different stages of the contracting process and the table below illustrates that advice is by no means regularly sought. Whether this is because some of the legal profession within local government are not familiar with EC Directives or whether they are not invited to participate is not known.

<table>
<thead>
<tr>
<th>Was advice sought from the legal department:</th>
<th>Always</th>
<th>Sometimes</th>
<th>Never</th>
</tr>
</thead>
<tbody>
<tr>
<td>before tendering</td>
<td>21%</td>
<td>53%</td>
<td>16%</td>
</tr>
<tr>
<td>during the preparation of the contract</td>
<td>48%</td>
<td>44%</td>
<td>8%</td>
</tr>
<tr>
<td>during the discussions of financial</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>arrangements</td>
<td>22%</td>
<td>43%</td>
<td>35%</td>
</tr>
</tbody>
</table>

7. When the same question was asked about internal auditors the survey showed that they were consulted less frequently and external auditors and consultants fared no better.

8. The Commission's Acquiring IT Paper had suggested that the use of more standardised contracts would better protect both parties and from the survey results, this seems to be the reaction of the buyers, too. 47% said they always used the suppliers' own contract (though some said that it was modified), only 2% always used the Institute of Purchasing & Supply's model contract, and only 7% always used their own contract. A resounding 95%, though, said that they would be interested in the availability of improved model contracts for the provision of IT.

9. On the topic of tendering, authorities have relied upon Standing Orders to provide the framework within which the tendering procedure should operate. But where authorities have wanted to retain a single supplier - particularly where computing upgrades are wanted - then the tendency has been to suspend the Standing Orders. The survey asked whether authorities have suspended Standing Orders where IT procurements exceed £50,000 and 57% said they had. This effectively removes a safeguard which was designed to protect the public purse and a more effective approach would seem to be to look again at Standing Orders and determine whether they should better reflect today's IT buying conditions and, more specifically, take account of the EC Directives. The survey found that only 10% have made any such attempt.

10. All of this seems to point to the fact that IT procurement could benefit from some help and advice and the IT Contracts Group hopes its efforts will go some
way to address some of the messages resulting from the survey and provide authorities with practical suggestions and best practice.

**Format of the guide**

11. The Guide has been structured to take the reader through the entire procurement process but there will be those who only want to pick out those issues on which particular guidance is needed and so a brief resume of the chapters is set down below.

12. As with any work which is dependent upon current legislation, it can only reflect the position at the time of writing and the authors recognise that they will have to return to the project and update the publication when further clarification of the EC Directives and legal opinions become available. The authors would recommend, therefore, that before any action is taken by authorities based upon the material in this publication they seek their own guidance based upon the legal position.

13. The Guide comprises nine chapters:

   Chapter 2 The IT environment sets the scene and provides a brief overview of IT in local government.

   Chapter 3 The procurement process sets down a set of guidelines for authorities. They cover the complete cycle of procurement and provide best practice pointers.

   Chapter 4 The EC Directives are described in detail and full explanations provided on current interpretation as they apply to local authority IT procurements. Material has also been included about other European legislation of which authorities should be aware.

   Chapter 5 IT Contracts - a legal view provides advice on the letting of contracts and describes those areas in which authorities need to exercise particular attention.

   Chapter 6 Standing Orders describes the role of Standing Orders in relation to IT procurement.

   Chapter 7 Financing issues describes the various options open to authorities when considering how best to finance the IT procurement.

   Chapter 8 Facilities Management suggests how FM arrangements are affected by the EC Directives and the procurement process.

   Chapter 9 Responsibilities of parties provides guidance on the respective responsibilities of officers and members in the procurement process.

   Included in the Appendices are examples of the steps to be taken for the recognised tendering methods: Open, Negotiated and Restricted.
2. The IT environment

Introduction

1. Investment by local authorities in Information Systems and Information Technology (IS/IT) is substantial and growing. It has an increasingly significant impact on local authorities and is difficult to manage because its nature changes so rapidly. At the same time there are new models and practices for IS/IT management, including extensive devolution of IS/IT responsibilities in many authorities. As IT spreads its influence, there is an increasing variety of investments being acquired. Those specifying or undertaking IT purchases are themselves equally varied in background and experience, and they may well be organisationally remote from the IT professionals. IT is becoming more important, and less subject to control from the centre.

2. In 1991/92 it was estimated by the Society for Information Technology Managers (SOITM) that local authorities would spend £954m on IS/IT. This element of expenditure has risen at a rate well above inflation for several years - there were year-on-year increases of 22% in 1989/90, 19% in 1990/91 and 8% in 1991/92. Although IT is continuing to deliver better price/performance, it is also being used more widely. This suggests that IT will continue to be a growth area for the next few years.

3. District councils spent 11.5% of their total net expenditure on IS/IT in 1990/91. Whilst this may have been exceptional (partly because of the impact of the Community Charge), it shows that management of IT procurement deserves considerable attention. The equivalent figures for the larger authorities (e.g. counties and metropolitan authorities) are much lower (1% to 3%), but in most cases these represent several millions of pounds.

Changing nature of IS/IT

4. There are three broad influences on the nature of IS/IT - technology, legislation, and the organisational and cultural climate.

Technological developments

5. Technological developments have transformed the shape of IS/IT. The arrival of the Personal Computer (PC) inaugurated a shift in the balance of power, with users becoming increasingly confident in their demands and competent in their use of IT. Whilst many PC users are still satisfied to operate strictly in a 'personal' way, more are finding the need to communicate. There is thus a growth of local area networks and of communications to and between mainframes, minicomputers and the outside world.

6. Managers are increasingly finding that their needs can be met by departmental or distributed systems, which often now have the power that until recently could only be obtained from a mainframe. Many of these systems require little technical
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management. The use of Unix, with the rapidly growing availability of suitable application packages, has developed such that few authorities are ignoring it.

7. Open systems and standards have taken many years to arrive, but the promise is now being delivered. MS-DOS and Unix are not strictly open or compliant with open standards, but they represent de facto openness and bring considerable freedom to exploit the power of competition. There is no longer a need to be locked in to a single supplier for hardware or software.

Legislation

8. Legislation has fuelled the process of change. EC legislation requires the use of standards. Domestic legislation has led to a greater fragmentation of IT, with the introduction of and continued pressures for compulsory or voluntary competitive tendering. (The Government’s ‘Competing for Quality’ Consultation Paper published in November 1991 points to substantial further competition.) As a result, smaller operational units have been created which have been more concerned with their own survival than with compliance with corporate strategy. They have increasing freedom and accountability over their own IT and central control is diminishing. Similar developments are occurring in Education (with Local Management of Schools and Grant-Maintained Schools), in Housing Management and in Social Services. The result is to create new needs for IS/IT, but of a different nature than before, and a new set of people responsible for buying IT.

9. Legislation has driven most of the IT development in local authorities in recent years. Central government has been able to assume that IT solutions could be put in place to handle complex legislative requirements such as Community Charge and Housing Benefits. The successor to Community Charge will put further pressures on IT, and there are many other areas from Payroll to Geographical Information Systems where IT is expected to perform effectively.

Organisational and cultural change

10. Organisational and cultural change runs in parallel with legislation. Local authorities are increasingly trying to get close to their customers, and internal organisational changes are creating client/contractor splits, business units, service level agreements and so on. These are exerting similar pressures on the management of IT.

11. The customers of local authorities are often the general public; those of IT departments may be staff in other departments. Both groups have come not only to accept the use of IT but also to expect and demand it. Good staff will often not be retained unless suitable modern tools are available. The image of the local authority is greatly influenced by whether it is seen to be making effective use of IT, and failures to deliver basic operational systems such as Community Charge are highly visible, embarrassing and costly.

Health and Safety

12. Health and Safety issues reflect all the themes of technology, legislation and culture. Users are increasingly aware and concerned about possible hazards from the long-term use of workstations, and these issues are being covered within legislation, such as the E.C.’s Directive on work involving the use of visual
display equipment. Technology has paid attention to ergonomics in all aspects of hardware and software design. New methods of input and greater 'user-friendliness' have helped to open IT to a wider range of users, who now expect high standards to be met.

**Skills**

13. The changing nature of IS/IT has required a change and development in the skills needed for its acquisition and support. Devolution is requiring the growth of the 'hybrid manager', who combines both a close appreciation of the needs of the business with a sufficient technical grasp of IT to ensure that he or she can ensure that it is applied cost-effectively. The 'hybrid manager' recognises what is possible through local resources and where specialist skills are required (such as to achieve systems integration and interworking of solutions acquired from a number of sources). The 'hybrid manager' has the procurement skills to commission and control the specialists, and will do so within the framework of legislation (such as that on Open Standards) and the organisation's IS/IT strategy.

**IT strategy**

14. Faced by the need to deal with change in so many areas, it becomes more rather than less important to ensure that there is an overall strategy and clarity of direction. In 1986 the Audit Commission found that only 38% of authorities had defined and documented an IT strategy. SOCITM annual surveys have tracked a steady improvement over the last five years, and over 90% of authorities now have a corporate IS/IT strategy or are currently preparing one. These strategies are also being kept up to date - two-thirds have been developed or reviewed within the last two years.

15. In 1990 the Audit Commission published a Management Paper on 'Preparing an Information Technology Strategy: Making IT Happen'. The paper shows that an effective strategy should cover many areas relating to contractual and procurement issues, and indeed SOCITM has found that the aspects most commonly included within IS/IT strategies are policies for approval, acquisition and development of IT. Ensuring that the policies are actually implemented is often more difficult, however, as decision-making is increasingly moved away from the centre - authorities need to establish suitable management arrangements to secure delivery of the strategy.

16. Through the Supplies and OSI Directives and Decisions, the EC requires local authorities to reference European or international standards in their IT procurement. Under certain circumstances it is possible to use a derogation, but with the proviso (in the case of the OSI Directive) that the authority must have a clear and documented strategy for transition to European standards. This is explored in more detail in Chapter 4 but illustrates the importance of having an appropriate strategy.
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IT management and provision
17. Stemming from the development of IT strategies, local authorities are introducing new arrangements for the management and provision of IT to reflect its changing nature. All authorities are becoming more conscious of cost and quality of service, and there is now much more monitoring of performance and assessment of customer satisfaction. IT is leading the way with Service Level Agreements, and many authorities have introduced revised arrangements for costing and charging of IT, invariably giving more control to departmental customers.

18. In some cases there has been a decentralisation of IT professional staff. Departments may set up their own IT sections, or may have staff seconded to them from the central IT department. Staff who are located departmentally are much less under the control of the centre.

19. Some authorities have made more radical changes, such as setting up their IT department as a contractor, perhaps dealing with a separate client unit which is often also accountable for IS/IT strategy. The contractors operate on a trading or quasi-trading basis.

20. Finally, some authorities have gone further and chosen to acquire part or all of their IT services through Facilities Management (FM) by an outside company. There are several different models which have been adopted - it appears that every FM arrangement has its own unique structure and generalisation is liable to mislead.

21. Some of the changes of IT organisation are in anticipation of legislation requiring Compulsory Competitive Tendering of IT. There will be considerable difficulty specifying how this might work, but the Government is currently suggesting that 80% of IT spend should be exposed to competition. If this materialises, it will place a new emphasis on IT procurement and contractual issues.

Types of IT procurement
22. Because of the varied nature of the IT environment, there are many different types of IT procurement, and each has its own problems. A number of basic types can be distinguished:

Hardware

23. Authorities do not manufacture IT equipment and therefore they have to buy it in from outside. Hardware varies in scale from a mainframe worth millions of pounds to small items such as PCs or their peripherals or components. Specification, evaluation and procurement processes may be very different, though when the PCs and associated items are acquired in sufficient numbers they may become subject to similar procedural requirements. Difficulties arise where many different officers may have the power of purchase but need to exercise this in close compliance with corporate acquisition policies and EC requirements.

24. A hardware purchase is often part of a more complex picture. It may be an upgrade for existing equipment; it may be part of a package which includes any or all of installation and commissioning services, software (package or bespoke),
cabling, interfacing to other equipment or systems, maintenance and other services. Part may be standard, but part may be custom-built. Each of these aspects may have different procurement considerations, which need to be managed in harness so that the desired end result is achieved. At the most obvious level, the hardware may be of no use without the software.

25. Some of the total package may be capital and some will be revenue, and there may also be a mix of financing methods. The financing issues are developed in Chapter 7, but attention must be paid to managing the mix.

**Software**

26. Software may often be bought separately from the hardware. Again, there is a similar range of value, and similar variation in the complexity of the purchase. Whilst basic system software is usually bought from outside along with the hardware (often through the supplier of the hardware), authorities commonly have an element of choice about whether application software should be bought from outside or developed in-house. Small authorities may in practical terms be forced to go outside, but even those authorities with substantial IT departments should, as a general principle, look first at the availability of packaged software.

**Packaged software**

27. A shrink-wrapped package for a PC from an established supplier is the simplest purchase, but even here care is needed to ensure that it meets the need and the best terms are obtained. As a general rule, packaged software should not be changed, and the more sophisticated packages are produced so that users can adjust their parameters to meet their own particular needs, without needing to modify the basic package itself. This enables the user to obtain full support from the supplier and to be able to take updates and new releases with few difficulties.

28. In practice, however, acquiring a package for any major system such as Community Charge is a much more complex exercise, particularly where some of the goalposts (e.g. legislative or user requirements) may be moving. Indeed Community Charge and Council Tax software has usually had to be purchased before being fully developed. In many respects it is more akin to bespoke software than to a true 'package' though suppliers find it useful - in marketing terms - to present it as a package. There are, however, many genuine packages for well-established applications such as financial systems, payroll, personnel, planning applications and so on. Packaged software of this sort often needs to be tailored to meet particular requirements, but it may not be possible to specify these in advance with completely unambiguous clarity. Much packaged software needs to have an interface to other systems (e.g. the General Ledger system), and these interfaces may prove more difficult to handle than the basic package itself. There are often grey areas where it is not clear who should take responsibility for establishing the interface or which end should be changed to resolve fundamental incompatibility. The need to ensure that the interfaces are maintained must also be addressed. All of these issues need to be identified and covered in the contractual arrangements as far as possible.

**Bespoke software**

29. Where software is bespoke, the difficulties increase again. Similar issues should apply whether the software is to be developed in-house or through an
outside software house, but use of an outside supplier is likely to focus the need to define contractual issues more clearly. The purchaser needs to be very clear about what is required and ensure that there is an adequate contractual arrangement before work is commenced. Project management skills and methodologies are developing to control the system development process, but an uncomfortably large percentage of bespoke developments still fail to a greater or lesser extent. In some cases, millions of pounds are squandered and great opportunities lost. Success requires painstaking planning and preparation, commitment, skill, tenacity and, often, an element of luck.

**Personal computing developments**

30. The development of personal computing tools has made it increasingly practical for the user to develop relatively simple applications without recourse to outside specialist help. This is an area where the only visible cost may be that of the PC and the personal computing tools, but where there is a real danger of substantial hidden costs arising. The time spent by the PC ‘enthusiasts’ may not be used as effectively as it should; whilst they may understand their own needs well, they may be inefficient in delivering the necessary system. Unless they are subject to strong management control, they will often fail to develop appropriate documentation and security measures, and the organisation may find itself unable to sustain the system if they leave.

**Maintenance**

31. A contract for the supply of hardware and/or software will commonly include provision for its ongoing support and maintenance. There are obvious advantages in having a single supplier for the provision and maintenance of a complete system - all problems can be channelled through a single point.

32. It may, however, be possible and desirable to treat hardware maintenance separately. One reason for doing so may be because of the difficulties of co-ordinating different suppliers - rather than needing to call in different engineers to deal with problems on different pieces of hardware, it could be desirable to have a single source of third party maintenance for all hardware. It is also likely to prove cheaper, but it needs to be handled carefully because of the greater remoteness from the original supplier. There may also be certain contractual requirements to address - for instance, are the terms of the lease such that maintenance must be obtained from the supplier?

33. Software maintenance covers many dimensions, ranging from bug-fixing through to major enhancements. Training and support may also be embraced within the concept. Basic maintenance is usually included within the arrangements for the procurement of the software, but it is increasingly possible to obtain support for certain elements from third parties. Some elements of maintenance and support will often be provided through in-house IT staff, even where the software has been obtained from elsewhere. Considerable attention to detail will be needed to define with sufficient clarity the service required from the supplier and how that meshes with the responsibilities of the users - the software vehicle needs to be driven by the user, and it is not always clear whether failure to reach the objective is due to the inadequacy of the vehicle or the inadequacy of the driver.
Direct and Contract Staffing

34. A special type of procurement is that of people. Most local authorities employ a number of skilled IT professionals directly, and they may supplement these from time to time by contract staff. For the directly employed staff there can often be complex issues about whether they should be on the same terms and conditions as other authority staff, and these can be highlighted where they need to work alongside contract staff. The role of management in ensuring that both types of staff have suitable contracts of employment and are then effectively employed cannot be overstated. One particular issue to beware of with contract staff is that of copyright of software they may produce - will belong to the authors if they are self-employed unless specific provision is made in the contract to ensure that the copyright is assigned to the customer.

Consultancy

35. Local authorities are increasingly using the skills of consultants to assist with IT strategic planning or particular projects. It is extremely difficult to specify the required end result from consultancy. It is not enough that a report is prepared or advice given - this report or advice must be of the required relevance and quality. The commission must be as clear as possible, but day-to-day liaison will often determine its success in practice. In most cases the main practical control comes from the fact that the consultant needs to maintain his/her reputation in order to win future work, whether from the current customer or from others on the basis of references and recommendations. The customer can then best keep control by ensuring that the contract is of limited duration.

Training

36. Training is a service which is commonly bought from the private sector. In many senses it is akin to consultancy in the difficulty of specifying the end result and judging whether it has been achieved. The more attention that is paid to the procurement process and to the review of the delivered product, the better will be the value for money obtained.
3. The procurement process

Introduction

1. Organisations who acquire hardware, software and services frequently are likely to have in place well defined procedures for dealing with the process of procurement. For many who face the task less frequently, however, the task is daunting and requires a range of experience and skills which are not easy to acquire when each procurement is different and there is significant elapsed time.

2. This chapter aims to help the organisation which is in that situation by setting down a process and best practice guidelines. While each organisation will adopt its own procedures, this chapter should provide a framework within which IT procurement can be undertaken with some assurance that the key issues will have been addressed.

3. Appendix 2 to the Guide provides examples of the Open, Negotiated and Restricted tendering procedures and readers may find it helpful to refer to this when reading this chapter and Chapter 4.

IT management arrangements

4. If any organisation is to obtain the full benefit from its investment in IT then it requires not only the purchase of appropriate hardware and software but also that the appropriate management structure is available to monitor and control its development. Without this structure, acquisitions may have insufficient justification, may be inappropriate for their requirements, lack compatibility and are likely to be unco-ordinated.

5. To ensure that IT achieves its objectives requires leadership from both chief officers directly charged with the provision of IT as well as those within the service departments. Each must ensure that adequate time is committed to the evaluation and selection of projects and to the implementation of the eventual acquisition. It is also important that elected members are aware of the significant impact they can have in assuring that IT is effective value for money.

6. Authorities will adopt the management approach most suited to their own culture and management style. Some local authorities, for example, may opt for three levels of management with the highest level comprising elected members and chief officers and being responsible for the setting of overall policy and for receiving and monitoring of reports from the other two groups. The second level would be concerned with the operational effectiveness of the IT function as well as the setting the overall strategy of the local authority. Usually comprising deputy chief officers, this group may well operate under the following terms of reference:

- agree review (and amend as appropriate) recommendations on the local authority’s IT strategy;
- promote awareness of and interest in the potential of IT to assist the effective delivery of service provision;
monitor the implementation of the strategy and measure performance in meeting agreed targets;
agree priorities and ensure that secondary users of systems are properly consulted;
produce and maintain guidelines for the evaluation and acquisition of IT products and services;
enhance the co-ordination of departmental initiatives; and
produce an annual report on computing performance for elected members.

7. The third level of management would then involve the decision-making groups within the service departments. Without these, the effectiveness of the other two groups would inevitably be reduced.

8. There is a significant movement towards the control and development of IT by service departments but without effective management many of the lessons learnt by the IT departments of the past are likely to be repeated. If departmental autonomy is to be increased, though, so must the degree of management supervision to ensure that projects are brought to a successful conclusion. Whilst the former two groups have been established by many organisations, the establishment of the departmental groups has been less apparent and so one area where IT has been seen to improve the service to the client may also be the least geared to the provision of that service.

**Procurement policies**

9. Most organisations have defined the scope and responsibilities for general contracting within their Standing Orders. This would normally allow some degree of departmental autonomy for the service departments whilst requiring that all major contracts require the agreement of the management team and elected members. In addition it would be normal to find that all significant acquisitions of IT would require the agreement of an IT steering group and at least have been assessed by the IT department. (Standing Orders are considered more fully in Chapter 6)

10. This approach has much to commend it. All acquisitions are assessed in relation to needs and the possibility of unco-ordinated and incompatible equipment is reduced. However it is important that procedures are not too rigid to inhibit managerial discretion - requiring all purchases to be restricted to a specific supplier, for example. There will always be legitimate exceptions to any general rule and the purchasing policy must allow some degree of flexibility. Authorities should however ensure that officers are fully aware of their acquisition policy and the steps that are required to be undertaken. This should be set down within the overall IT strategy and may be included within the Standing Orders.

**IT strategies**

11. Many organisations both private and public have seen the benefits of a corporate Information Systems and Information Technology strategy; the aim of
which is to set out the aims and objectives of the organisation together with an analysis of the resources required to achieve them. In this way the similarities as well as potential conflicts within an organisation can be identified and corrective but equitable solutions can be found.

12. To achieve the maximum benefits from any investment in IT all organisations should set down a clear statement of their business needs. A few years ago this would have been prepared by the head of IT. Computerised systems were then largely financial and requirements were in general well defined. Today the position is less clear. Significant changes have occurred both in the technology itself and in the users of that technology and there has been a shift in the responsibility for computing with the move towards a greater degree of decentralisation. Unfortunately this movement has not always followed a defined path. Acquisitions have been made without consideration for the overall corporate needs of the local authority or indeed with little knowledge of the true business needs of the individual department.

13. To establish and maintain effective management processes, management’s attention should be directed, therefore, towards:

- the definition of the decision-making process;
- the availability of skills to advise on these decisions;
- the organisation of the decision-making process;
- the co-ordination of IT plans;
- the allocation of terms of reference and responsibilities;
- legal responsibilities.

**Decision-making process**

Elected members can play a key role in the decision-making process by their involvement in determining the IT policy and agreeing the departmental and corporate IT strategies. This should influence their approach to budgeting for IT facilities and then helping to frame the procurement decisions.

Officers’ role in the decision-making process involves the setting of departmental and corporate IT strategies and defining the case for procurement. They will also promote their own application areas and need to specify their requirements and to participate in the acquisition process. Their co-ordination of IT development will be a crucial role, too, if acquisitions are to be for the corporate benefit and duplication of effort minimised.

IT management will be responsible for managing the computer resources, advising on the potential of IT, day to day operation of IT facilities, and long term planning. It must also be concerned with the timing of decisions on such issues as to whether there is a need to change, whether the acquisition is feasible, which suppliers are to be shortlisted, which supplier is best for the authority, whether contracts are acceptable and suppliers have met their
obligations, whether there is a requirement for consultation with trade unions, internal audit and external auditors, and then whether the acquisition was successful.

**Availability of skills**
Having people from within the organisation with the right skills and qualifications to advise on procurement issues is a critical factor in the management process. In the absence of such experience, there may well be those in other authorities who could offer help and assistance or, of course, it may be necessary to look to external organisations for advice.

**Organisation of the decision process**
The overall policy for IT should be defined within an organised framework. IT steering groups should be created with the responsibility to define strategies and monitor and control development.

**Co-ordination of IT plans**
It is important to avoid confusion about the relative priority of user requests for computer facilities and software, the timescale for IT planning, proposals for central hardware and software as well as plans for decentralised computing. There is a need too, for co-ordination of the technical and financial evaluation of suppliers’ proposals, and for the strategic direction of the organisation in relation to the respective roles of mainframes, minis, micros and office automation within the requirement of an Open Systems environment.

**Allocation of terms of reference and responsibilities**
The success of the management process will be influenced by assigning the respective responsibilities of policy-makers and implementors of such decisions. Those charged with the responsibility for delivering a service or set of actions must be clear how far their roles extend and so the delegation of powers to them must be clearly defined.

Consideration on the extent of delegation must take into account such issues as the determination of the IT strategy, the setting of IT expenditure budgets for the centre and departments, the approval of short and long term plans for the centre and departments, the approving of major acquisition decisions, the examining of and approving of the technical and financial aspects of acquisition, the examining and approving the areas where IT should be applied, and the instructions given about preparing and presenting reports to committees.

**Legal Responsibilities**
Conformance with EC Directives is mandatory upon all local authorities. Several of the Directives relate specifically to IT issues and these are described more fully in Chapter 4.
Establishing the need for change

14. Once the formal structure and procedures have been established, specific projects can then be assessed, planned and executed within the overall Information and Information Technology Strategy of the organisation. The initial process will be to identify why change is required and the various methods to help achieve change. The topic embraces the cost/benefit implications of any acquisition and is concerned with the definition of the problem, declaration of any assumptions, consideration of the alternatives to IT facilities acquisition, consideration of the costs of conducting a feasibility study and the process for the approval to proceed.

15. Defining the problem includes its quantification and determining its cause, effect and consequence. In addressing this, various assumptions are likely to be made: the effect of doing nothing, of deferring decisions and/or actions, the relative merits of high, medium and low cost solutions, the timescale, the priorities between projects, and interrelationships between systems and hardware.

16. The alternatives should be assessed and this will involve identifying improvement of the performance of clerical systems or in the performance of any existing computer equipment or software, and alternatives to the current provision of computer facilities (centralised versus departmental computing, for example).

17. The costs of the feasibility study need to be determined and this will call for the strengths and weaknesses of each alternative course of action to be set down to help identify the benefits to be achieved by client departments, assessment of the time, money and resources needed to reduce operational and maintenance costs on any existing computer facilities and evaluation of the ability of the acquisition to solve the problem.

18. Having gone through these various stages it is then necessary to gain approval to proceed with the course of action and this will call for approval of the terms of reference and costs of the recommended course of action, an assurance that the recommended course of action is compatible with the overall IT strategy, co-ordination of the recommended course of action with other actual or potential areas of study and consideration of the requirements of other projects, their relative benefits and the resources available for their execution.

Specification of requirements

19. When computing was first introduced into many organisations the original basis for acquisition invariably concerned the elimination of clerical routines and could be assessed in monetary terms. While savings can be reflected in the initial procurement, it is often more difficult to assess payback for subsequent enhancements where the original justification may well still apply. Today's acquisitions are likely to involve the second, third or fourth generations of that original procurement and are more likely to be concerned with the improvement within service provision and thus may have little intrinsic additional monetary value. While many acquisitions may be assessed on a pay-back method, it is not unusual to find an assessment based upon one or more of the following criteria:
The Acquisition of IT

statutory requirement
local authority resolution
cost savings
revenue generation
improved service to the public
communications/infra-structure pre-requisite
improved productivity
better management information
opportunity cost
external resources available to fund the development
stimulus for change

20. Outside the public sector, many IT projects are justified by the search for competitive edge. This is becoming more relevant in local government. The emphasis has shifted from 'savings' to the improvement and extension of services and latterly, to the evolution of new types of service. This has also gone hand in hand with the move towards decentralisation and the attempt to provide the client with a local or at least personal service. To do this has meant that access to information has to be provided further from the centre and has led to the need for complex networks and the increasing use of telecommunications.

Producing the specification

21. While seeming over-burdensome, the value of a detailed specification of IT requirements by the organisation will help minimise potential disagreements on functionality and performance. Problems will arise if projects are required to exhibit quite detailed performance standards but provide little or no scope for negotiation. In others, lack of time or experience in compiling the specification may mean that the supplier is left to define the specific requirements. Unfortunately failures at this point in the procurement process are altogether too frequent and there is a need to improve both the experience of those undertaking the procurement process and the documentation that is produced to support the purchase.

22. Identifying the feasibility of changing facilities will involve:

ensuring that the acquisition is only approved if it is likely to produce desirable benefits,

ensuring that all costs are determined before any commitment to acquisition is made,

establishing priorities by providing details of alternatives and the basis for the chosen option, and

giving approval to proceed.

Approval
Identifying the desirable benefits will involve defining the functions to be performed by the acquisition and the quality of the services to be provided, setting down the information to be processed by the acquisition and focusing
upon the assumptions about the future (staffing levels, user department locations and volumes of work, for example).

**Determining costs**

The total cost of procurement will include selection costs, installation, commissioning and conversion costs, operating costs (including allowance for losses due to failure to achieve the specified objectives), maintenance costs and disposal costs (including those for any existing computer facilities and also the proposed acquisition).

There should be a definition of life-cycle costing objectives, including the required timescale over which the costing is to apply, departmental costs of development, management, training and operation of the acquisition, the IT organisation that is to be costed in terms of operations and development personnel, and also in terms of the types of people, levels of skill and sources from which they will be obtained, and the key assumptions which are to be made. The forecasting of life cycle value and costs should include the most likely outcome, a forecast based on optimistic assumptions, a more pessimistic forecast, speculation of different acquisition strategies and the matching of the chosen approach to the objectives and benefits to be achieved.

The costing of alternative acquisition strategies should involve consideration of discounted cash flow projections, inflation, capital costs, financing costs, treatment of taxes or duties, operating and maintenance cost, maintenance characteristics, incidence and duration of preventive and breakdown maintenance, special skills, components and spares, reliability attributes in terms of quality, resilience and speed, and the incidence and duration of down time, the mean time between failure and the mean time to repair, flexibility of the proposed acquisition to meet changes in demand for computer services in size, quality and quantity, and obsolescence and the cost of carrying any capacity in excess of requirements.

An evaluation of alternative IT strategies and the possibilities for optimising life cycle costs should include studies of the trade-off between acquisition reliability and cost, acquisition resilience and cost, and acquisition life-span and capital and revenue cost.

**Establishing priorities**

Priorities should be assigned for both essential and desirable user requirements and those computer facilities which will have the earliest beneficial effect on the authority.

**Approval to proceed**

The process of approving the specification will involve determining the composition of the approval team, its experience and authority, the approval of the feasibility study evaluation, the approval of the return on investment, and an assurance of the fairness and reasonableness of the feasibility study.
Tendering arrangements

23. Where contracts are let under the EC Directive 88/295 organisations have to decide which criteria they should use to award contracts. This may be the lowest cost or the most economically advantageous. The former is easier to define but may not prove to be the most effective way of deciding which of the suppliers should be awarded the contract. Neither is lowest cost naturally indicative of best value for money.

24. The 'most economically advantageous' option requires the organisation to set down its criteria in order of priority. These may include cost, but could also relate to ease of use, compatibility with other equipment/software, quality of the solution or its long term flexibility. This option is likely to require more time to prepare but it should allow both the organisation and its potential suppliers to understand better the product required. (The wider issue of compliance with the EC Directives is discussed in Chapter 4).

25. There is a generally held view that to obtain the best service there is a need for co-operation between the user and the supplier. Each should ensure that there is continuous two way communication regarding the needs of the first and the ability of the second to provide them. Service is naturally important to any IT department but it is also important that the vendor/purchaser relationship does not develop into one where the vendor takes control.

26. Where organisations try to provide a low cost solution there is a risk that the requirements of users may be sacrificed and machines may be chosen which do not support the application software most aligned to users requirements. To try and avoid such conflict it is suggested that each user's 'priority' and the alternative solutions that may be available, be assessed, for example:

- whether any users will not receive the preferred software by the purchase of 'X' supplier's machine,
- whether the effectiveness of the department's clients will be impaired,
- what possibilities there are for 'stand alone' alternatives and what are the costs if compatibility is assured,
- what reductions in costs are available from the main supplier if a stand-alone solution is viable, and
- whether the IT section can support a stand-alone solution and what additional resources will be required both in the short and long term.

27. Local authorities are required to adhere to two particular EC Directives and Decisions. The first relates to data interchange generally and to the requirement to move towards Open Systems Interconnection and is known as EC 87/95. Authorities must include reference to OSI standards (if they exist) within tender documents. If however authorities are not able to move immediately to OSI then they must ensure that their IT strategy or plan states why adherence is not currently possible and what their plans are to implement OSI within a reasonable period of time.

28. The second major directive is not specifically related to IT but concerns all procurement of goods and supplies over 200,000 ECU’s (currently £141,431 net of...
3. The procurement process

VAT). A more detailed description of this directive is contained within Chapter 4, but the primary obligation upon authorities is to select one of three methods of tendering:

- Open Tenders (the EC’s preferred option)
- Restricted Tenders (where the authority invites suppliers to respond to its advertisement and then selects those that will be invited to tender).
- Negotiated Tenders (where the authority negotiates with one or more suppliers with or without a prior advertisement. The EC has stated that this option should only be used in exceptional circumstances).

29. At present services are included within the EC directive 88/295 where their cost is less than half of the total cost of the package. The Services Directive (when effective from July 1993) will mean that all IT procurement will be subject to EC law and so contracts for Facilities Management (which at present are outside the scope of 88/295) will be included within the regulations.

30. It is also important to note that since 21 December 1991 suppliers are able to take action in UK courts against authorities for contravention of EC directives. The actions open to the court range from a suspension or setting aside of tenders to the award of compensation for those suppliers who have been adversely affected by the decision of an authority.

The cost of tenders and the ‘Mini’ proposal

31. Within the public procurement arena it has been acknowledged that the cost of tendering is expensive for both purchasers and suppliers alike. Purchasers do not want to exclude potential suppliers but are often seen to complain about the number of tenders received and the time and cost of their assessment. Similarly suppliers complain that to take part in major tenders is both costly and time consuming.

32. A possible way of reducing this burden for both parties is the concept of the mini proposal. This is normally a short document produced by the supplier in response to the statement of requirements and it will contain the essence of the supplier’s proposals but will not be costed at this stage. Once received the purchaser can choose those suppliers that best fit the overall requirements and it is only at this stage that a full operation requirement statement is sent to suppliers.

33. The benefits of such an approach are as follows:

- only those suppliers who are shortlisted are required to submit a full tender,
- the purchaser does not have to spend time reading and analysing large numbers of tenders, and
- costs are reduced for all parties.

34. The mini proposal does not however, remove the need for a proper evaluation of the proposals. Indeed such a process still requires the purchaser to describe accurately the requirements and to lay down the evaluation scheme under which the mini and full proposals are to be assessed.
35. Having determined how best to proceed to satisfy the EC Directives, the organisation should adopt a disciplined approach to the tendering process. There must be a clear understanding as to what computer facilities are to be supplied, the conditions of tender, the potential sources of supply and the shortlisting of suppliers, and the approval of the shortlist.

Definition of what is to be supplied

36. Defining what is to be supplied must be reflected in a specification of the required hardware, system software and/or application software. Where provision must be made for new equipment then it may also be necessary to specify the computer site that may need to be constructed.

Selecting tenderers

37. The procedure for selecting tenderers involves a technical and financial evaluation, the provision of a specification and tender information in addition to that previously published, the adoption of technical evaluation techniques, the procedure for conducting the evaluation, and approval of the choice.

Initial contact with potential suppliers

38. A formal invitation to suppliers to participate will include details of timescales and deadlines for the tender. Notice will need to be given to suppliers about the criteria on which their proposals will be judged, the evaluation techniques that will be used in judging their proposals, a declaration of the non admission of extra costs over and above the tender, the suppliers' confirmation at the outset that they are prepared to bid on the prescribed basis, nomination of a person in the authority to whom the suppliers should direct themselves on matters directly or indirectly related to the submission of tenders, the steps taken to advise suppliers of any standard terms of contract, and conditions under which standard terms of contract may be varied.

39. The invitation to tender will include the arrangements for submitting tenders, opening them and withdrawing them partially or in total, answering suppliers' questions, answering the authority's questions, confidentiality pledges requested of suppliers whether or not they submit a proposal, rights reserved by the authority to reject proposals and/or not to accept the lowest of any tender, authority disclaimers for any liability for any costs incurred by suppliers in the preparation of their response to the invitation to tender, questions which suppliers are instructed to answer about their products, standards set for the format of suppliers' replies, steps taken to ensure that competitive suppliers all set out to solve the same problem and that this problem remains as defined when establishing the need for change, arrangements for providing suppliers access to information, and a requirement for a supplier to declare details of any sub-contracts that he intends to employ.

Research

40. Research into the background of suppliers could involve consultation of guides and directories, reference to other organisations and authorities, supply of hardware and software from computer manufacturers or software houses, supply of software from other authorities, building, environmental and electrical services available within the authority, supply of staff from the authority itself (numbers and experience), computer manufacturers, software houses, consultancies, contract staff agencies.
3. The procurement process

**Shortlisting**

41. The criteria for shortlisting tenderers should include the mandatory requirements that must be met by suppliers, the desirable requirements that it is hoped can be met by suppliers, requirements for some form of performance measurement to establish whether they are met, requirements which do not require performance measurement to establish whether they are met, mandatory requirements that do not require measurement and suppliers' confirmation at the outset that they meet these requirements and that they have the capability to satisfy the other criteria, and control over undue pressure to buy British, or buy from the local major employer, or not engage in competitive tendering.

**Approval for shortlisting**

42. This will involve approvals sought from, and given to, the shortlist, the composition of the evaluation team, approvals sought from, and given to, the invitation to tender document, and acknowledgements from suppliers of their receipt of the invitation to tender.

43. Procedures for selecting tenderers involves a technical and financial evaluation, provision of specification and tender information in addition to that previously published, definition of technical evaluation techniques, the conduct of the evaluation, and approval of the choice.

**Technical and financial evaluation**

44. The technical evaluation must examine the extent to which suppliers' proposals fall short of, meet or exceed the specified requirement for:

- hardware,
- system software,
- application software,
- networks and communication,
- computer site construction,
- support assistance, and
demonstration that the proposed equipment and/or services will work successfully.

45. The financial evaluation should examine:

- methods of funding the acquisition (rental, purchase, lease),
- identification of all the one-off and recurring annual costs, including those for hardware, including British Telecom and Mercury telecommunication lines, system software, application software, site preparation, support, delivery (including transport to the kerbside), installation (including the location of equipment at the site prepared by the authority), commissioning, consumables (including paper and magnetic media), insurance, miscellaneous equipment (including off-line machinery, cleaning equipment, fire-fighting devices), staff (including recruitment and salaries), conversion and maintenance.
- timing of payments and penalties for non-compliance
- life cycle costs as now known, compared with those anticipated by the feasibility study, and
- circumstances that require a re-evaluation of cost/benefit.

46. Additional information which may be required includes documentation of addenda to the invitation to tender and/or to the suppliers' proposals, and access to any additional information afforded to competitive suppliers.
47. Technical evaluation techniques may include weighted ranking procedure, cost value procedure and benchmark procedures.

Weighted rankings will involve determining the importance of each requirement criterion relative to the others, the range of possible situations that must be valued for each criterion, ranging from what is minimally acceptable to what is most desirable, the minimum score that suppliers must accumulate to remain in competition, and the minimum amount by which a supplier’s score must exceed that of his nearest competitor in order to be considered superior.

Cost value will require sterling values to be placed on each criterion, the minimum value that suppliers must accumulate to remain in competition, the minimum amount by which a supplier’s cost value must exceed that of the nearest competitor in order to be considered superior.

Benchmarks will call for the performance criteria that are to be met, the circumstances that should exist when these criteria are met, the responsibilities for preparing, running and reporting on the benchmark, the responsibilities for ensuring fair and reasonable conduct of the benchmark, the conduct of a benchmark or the use of other organisations’ benchmark reports as a yardstick, and the particular strengths and weaknesses of a supplier’s proposal.

48. In conducting the evaluation of tenders, regard must be had to the relevance of visits made to supplier premises and reference sites, any restrictions placed on contact between suppliers and members of the authority outside of the evaluation team, the presentations made by suppliers to authority members and officers and to members of the evaluation team, any restrictions placed on members of the evaluation team with respect to the confidentiality of their appraisals, the separation of those involved in determining what the evaluation criteria will be from those involved in judging whether these criteria are met, the steps taken to resolve disputes, the equal handling of suppliers with competitive products, the validation of supplier claims, and the validation of assumptions made during the evaluation.

49. In approving the tenders regard must be had to the size, experience and authority of the approval team, approvals sought from, and given to, the technical and financial evaluations, and any prior knowledge of the approving bodies that computer acquisition is being considered.

Contracts

50. Crystalising the needs of the organisation is normally accepted as a prerequisite for the successful purchase of IT equipment or software. However, it is evident that the level of analysis undertaken to assess the viability of the purchase is not always matched by the concern over the contract. Indeed within some organisations there would appear to little or no assessment of the contract at all. When questioned, the predominate reason for this stems from the belief that the contract proffered by the supplier is not negotiable.
3. The procurement process

51. It is important that this situation is redressed. Whilst it is accepted that suppliers are not enthusiastic when confronted with a purchaser who wishes to negotiate the contract, there is scope for the alteration of the supplier’s contract and for use of the purchaser’s own contract. While major hardware suppliers are often reluctant to concede any change to their contracts, there is a growing number of authorities who consistently use their own contracts or utilise the Institute of Purchasing and Supply’s Model Form of Contract. The smaller hardware and software suppliers are generally more open to the alteration of their own or the use of the purchaser’s contract. In these cases the supplier is more interested in securing the contract rather than ensuring that the contract gives it maximum security from legal action. The EC Directives do give authorities the opportunity to start from their own terms in order to ensure a commonality of approach in dealing with suppliers and this opportunity should be considered positively by authorities.

52. Opportunities to negotiate may also be affected by the monetary value of the contract or where the hardware or software is leading edge and therefore involves a greater degree of risk to the purchaser. Contracts for software development are usually negotiable because there is a need to ensure that the product fits the requirement.

Negotiations

53. A fuller discussion of the issues which should be considered concerning contracts is included in Chapter 5 but it is important that the following pointers are considered in relation to contract negotiations:

- **Scrutiny of the contract**

- **Conditions for acceptance of the contract**

- **Verification of the contract**

- **Authority interests**

- **Approval to sign**

**Scrutiny of the contracts**

The purchaser should initiate standard checks on contract terms and conditions with particular checks on contracts for hardware, software and support staff.

**Conditions for acceptance**

The conditions for acceptance should include an agreement of the conditions for acceptance of the contracts, arrangements for the negotiation of counter offers, a formal statement of the contract price, information on the way in which invoices should be submitted, request for formal acknowledgement and confirmation that work is being put in hand and the name of the person to whom all future correspondence should be addressed, and an agreement to the programme of work.

**Verification**

The purchaser should verify that no conflict exists between the contracts of
the different suppliers and that the contracts reflect the agreements that have been reached.

**Authority interests**
It is important to be aware of the risks involved in entering into a contract, the insurance responsibilities including fidelity bonds, the experience in other authorities, and any advice from user groups and other external bodies.

**Approval to sign**
In approving the contract, regard should be had to approvals sought of, and given to the agreed contracts, a formal statement of what is being accepted, a statement of the overall contract price and any detail relating to it, and advice on the contact point in the authority.

**Obligations upon suppliers**

54. The obligations upon suppliers will embrace:

- delivery schedules,
- acceptance testing,
- submission of payment of supplier invoices,
- maintenance of equipment and services.

**Delivery schedules**
There should be a delivery and completion schedule for computer site construction, supplies and environmental equipment. There will also be a need for a delivery schedule for the computer equipment, system software, application software and support staff. Delivery should include documentation of changes made to the order before delivery, any substitution of alternative equipment or services by the supplier, specification of changes made to the authority’s requirements, and the specification of changes made to the suppliers’ equipment, software or services and all of this should be agreed in writing beforehand by the purchaser.

**Acceptance testing**
Acceptance testing should cover the computer hardware, systems software, application software and networks and communication. For each of these, regard should be had to the evaluations carried out during selection, the system-testing procedure for the applications software, any probationary period for the support staff, the removal schedule for old equipment and services, the procedure for controlling the ongoing implementation, and a certification that the products perform to their standard specification.

**Payment of invoices**
In arranging payment of invoices, purchasers should certify that charges are as shown on the order, changes to price between the date of the order and the date of delivery, timesheets (where staff services have been supplied), and that work has been carried out.
3. The procurement process

Maintenance

Maintenance agreements should include the honouring of warranty agreements, response times, schedules for equipment preventive maintenance and the occurrence of corrective maintenance, plans for documentation updates and the occurrence of documentation errors, plans for software enhancement and the occurrence of faults, and schedules for implementation support and the occurrence of staffing changes.

Regard should be had to writing into maintenance contracts guaranteed periods of maintenance for software (often suppliers only provide for one year’s cover). There should, too, be careful scrutiny of excluded items and purchaser obligations.

Implementation and testing

55. The importance of planning the implementation and testing of all acquisitions cannot be over emphasised. There are numerous examples of projects failing even at this stage of development often because there were insufficient or ill-trained staff to test adequately the product, there was insufficient time to test the product, or there were no test plans or because there was a failure to co-ordinate supplier and user test programmes, or there was no live testing or the testing was inappropriate for the size of project. It is critical, therefore, that the test plan is produced at an early stage in the procurement cycle and that staff are well aware of their responsibilities.

Post-implementation review

56. Reviewing the results of a decision is not an easy task - particularly if problem have arisen and there is a likelihood that analysis will highlight uncomfortable results. Because of the impact of mis-directed procurement it is important that the organisation understands why the problems did occur and whether they could have been anticipated and avoided. The exercise is less to do with recrimination and more with understanding how best to improve the process for the next procurement.

57. A post implementation review (PIR) is a time-consuming task both for those who undertake it and for those who need to review its results. Nevertheless it should prove to be a valuable exercise and should justify the effort.

58. The overall objectives of a PIR are to satisfy management that the original justification of the procurement have been fully met and the extent to which the objectives at the outset remained unchanged during the acquisition process. The issues which would be covered in such a review will include whether:

- the computer facilities are operating in accordance with the agreed specification,
- the user departments are satisfied with the performance of the computer facilities.
The Acquisition of IT

- the requests for modification, enhancement or amendment to the acquisition were valid and each had a priority for implementation relative to the others,
- the planned system timings were realistic,
- the effect on staff levels, overtime working and costs was caused by poor performance,
- the planned cost savings (if any) were achieved,
- the planned cost budget was met,
- the shortfall in cost savings or overrun in cost budget was explained,
- the planned benefits other than costs were met,
- the shortfall in planned benefits was explained,
- the acquisition realised unplanned cost savings and benefits, and
- the control procedures for operating the acquired facilities are adequate.

59. To ensure an impartial review, the team undertaking the PIR should not ideally have been involved in any decision-making process before or during the procurement nor have been involved in its implementation.
4. The EC directives

The importance of the EC directives

1. This chapter covers compliance with European Community (EC) legislation that relates specifically to IT, or to general procurement and local authorities. UK legislation also exists in the form of Statutory Instruments 2679 and 2680, which have been effective since 21 December 1991 and which interpret and reinforce the EC Public Procurement Directives and define the legal process by which suppliers can take action against a local authority in breach of the regulations. The High Court has power to award damages or to set aside the award of a contract. While breach of the EC rules is not a criminal act under UK law it can be a very serious issue and it is important that procurement procedures take account of the increasing amount of EC regulations. Any local authority where central or departmental staff purchasing IT fail to comply with the relevant EC legislation, runs one or more of these risks:

- being pursued in the European courts,
- having a contract award suspended or possibly cancelled,
- losing EC grants (even non related ones),
- claims for damages,
- responsible officers being surcharged, (Local Government Finance Act 1982 SS 19 & 20)

2. When authorities apply for EC funding for projects, the European Commission requires the submission of a questionnaire on public procurement (see notice C(88)2510 published in the Official Journal C 22 26.1.89 page 3 which details the monitoring of Member States on compliance with public procurement rules in the case of projects financed by the EC structural funds and financial instruments.)

The purpose of the Public Procurement Directives

3. The EC Directives on public procurement are intended to encourage competition in the 'public domain' so that all member states are able to bid for trade anywhere in the community, and secondly to promote use of European Standards or Common Technical Specifications, a process referred to as harmonisation. It is believed this will encourage more competition and lead to better value for money. The EC heads of state put Public Procurement in their top five priority areas for the Single Market programme and it is compatible with UK domestic policy on value for money. Under the Treaty of Rome, as amended by the Single European Act, the EC can introduce mandatory legislation for the central, regional and local government bodies of all its member states. This is how the EC rules catch IT procurement by UK local authorities.

EC procurement legislation relevant to local authorities

4. The first EC Public Procurement Directive was 71/305/EEC which dealt with Public Works Contracts and remains a basic model for the later directives and there are some references back to it in later directives. It is also significant because some statements by the EC related to this directive are taken to apply to public procurement generally. The original Supplies Directive 77/62/EEC was also updated by 80/767/EEC for government bodies covered by the General Agreement on Tariffs and Trade (GATT). References to GATT bodies which have different threshold values can be confusing for organisations in the public sector. The UK regulations SI 2679 include definitions of 'contracting bodies'.
authorities) and a definitive list of those bodies covered by GATT. Put simply GATT bodies exclude local authorities but include central government and health authorities, for example.

5. The main EC procurement legislation relevant to IT is listed below:

88/295/EEC Public 'Supplies Directive', covers the award of contracts above specific threshold values, the use of specific tendering procedures and reference to standards. It covers state, regional and local authorities and legal persons covered by public law, but excludes transport, energy, water, telecoms and security. It amends the original Supplies Directive 77/62/EEC, and they are often collectively referred to as the 'Revised Supplies Directive'.

89/665/EEC The 'Compliance Directive', compels EC members to set up national legislation and procedures to deal with failure to comply with the EC Public Procurement Directives.

91/561/EEC 'Recommendation on standardised notices' seeks to standardise all notices for public contracts in the Official Journal (see Appendix 1 Reference 4). Its aim is to allow greater use of new technology to reduce publication costs and to assist Small and Medium-sized Enterprises (SME's). Standard forms use tick box style, but are basically the same as model notices included in the directives.

92/50/EEC The 'Services Directive' covers the award of public service contracts, including computing. It is effective from 1 July 1993 and has a two-tier system under which full tendering procedures similar to the Supplies Directive 88/295/EEC apply to a list of 16 priority services and the residual services must comply with rules on technical specifications and award notices.

6. In addition to the Public Procurement Directives, any EC legislation specific to IT must be considered by local authorities purchasing IT goods and services. The main items are listed below and discussed further in the section dealing with other relevant EC legislation.

86/361/EEC Public Telecoms Networks and Terminal Equipment covering 'Type approval' for connection to public networks. From 6 November 1992 it is repealed by 91/236/EEC which requires national notified testing bodies to issue approval certificates and mark approved equipment. It relates to the purchase of telephones, PABX's, terminals or modems etc. for use on public networks.

87/95/EEC 'IT Standards Decision' is specific to IT and covers the use of standards for exchange of information and data and for systems inter-operability. Taken generally to refer simply to Open Systems Interconnection (OSI), it actually applies to all computer media used for data exchange. The threshold is ECU 100,000 (£70,716 in 1992-3). The decision applies not just to purchases but also to IT standards in technical regulations for the collection of information in machine readable form, issued by central government departments such as the Departments of Health and Education. It covers all sectors of public activity including utilities such as transport, water and energy.
4. The EC Directives

90/270/EEC 'Health & Safety' at work in relation to all display screens (eg VDU’s) on workstations first installed after December 1992, and all existing screens within four years. This covers all organisations, not just public bodies.

91/250/EEC 'Legal protection of software' (ie copyright) covers all contracts and not just those of public bodies. It protects preparatory design work as well as code, it allows decompilation and gives employers the rights to employees’ work.

COM(90) 314 The 'Privacy Directive' is an EC proposal dealing with Data Protection issues, currently under review by the European Parliament Committee. It will probably require changes to the UK Data Protection Act to extend cover to manual records and to reflect the requirement to notify subjects of any release of data.

COM(92)24 the proposal for a Database Directive was adopted by the EC on 29 January 1992 and covers the protection of databases. One aspect of the proposal relates to the compulsory licensing of databases created by public bodies.

7. It is important to recognise that the directives are evolving all the time. Further developments in the EC Public Procurement Directives family are expected, eg extending them to cover the power and water utilities which were initially excluded sectors. Any of the directives may be reviewed and amended in future. Similarly the UK regulations will need to change to reflect the Services Directive and then add public service contracts to the Compliance Directive 89/665/EEC when it is adopted by the EC.

8. Two Statutory Instruments (SI 2679 The Public Supply Contracts Regulations 1991, and SI 2680 The Public Works Contracts Regulations 1991) came into effect on 21 December 1991. These are HM Treasury’s implementation of the respective Supplies and Works Directives and the UK response to the Compliance Directive 89/665/EEC. They paraphrase and clarify the respective EC directives and define the legal mechanism by which a supplier who suffers from a breach of the regulations can seek redress through the UK courts. The regulations on public supply contracts SI 2679, are most relevant to IT. It is unlikely IT projects would involve contracts for Public Works but if they did, then they would come under SI 2680. The implications of SI 2679 are basically the same as 88/295/EEC and are discussed together. The legal remedies are summarised below:

Compliance with the regulations is a duty owed to suppliers. A supplier who suffers from a breach may seek redress in the High Court.

The High Court has powers to award damages to a supplier who has suffered from a breach and case law will eventually have to provide guidance. Nevertheless it is assumed that the extent of damages could include tendering costs and consequential loss.

The High Court has powers to delay the decision to award a contract but cannot revoke a contract once it has been awarded. However a recent European Court case (272/91) involving the Italian national lottery indicates that in extreme circumstances contracts can be stopped by the European court. It is not clear how the UK courts will respond to this issue.
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General procurement legislation

9. Local authorities should be familiar with the general EC procedures for procurement and the IT department should be able to refer to the nominated individual within their own authority who is familiar with these procedures. Failing this the references listed in Appendix 1, especially publications by IPS and DOE circulars should be used to assist in an understanding and application of these directives, and the UK regulations. Further general guidance from HM Treasury and DoE guidance for local authorities covering the UK regulations SI 2679 is expected to be published later in 1992.

Key implications

10. The following sections identify the implications of EC legislation and related UK regulations specific to IT and general procurement issues that have special significance for IT. The key implications of the various directives fall into these areas:

- Threshold Values, Estimates and Aggregation rules,
- Procedures for Procurement, Publishing Notices, selecting suppliers and awarding contracts,
- Technical specifications and reference to standards.

11. Examples are included at the end of the chapter to illustrate how the various directives apply to different IT procurements and reference is included to the specific Articles of the EC legislation or to the UK regulations where the reader may wish to consult the original document. The full text of every relevant EC directive or UK regulation has not been reproduced but publication details are given at the end of this guide.

Threshold values, estimates & aggregation rules

12. The EC Public Procurement Directives and the IT Standards Decision specify 'thresholds', which set the value of contracts above which they must be applied. However the directives should not simply be ignored for contracts below these limits.

13. In the case of IT standards there may be reasons to follow EC procedures for lower value contracts and indeed the original draft for 87/95/EEC had no threshold. The adopted IT Standards Decision requires that procurements below the threshold must not prejudice use of standards in later procurement which may be above the threshold, by creating a fait accompli (see Article 5.7). So contracts below the thresholds that have implications for future higher value ones must also conform.

14. In the case of Public Procurement Directives the Official Journal can be used to publish contract notices not subject to compulsory advertising (free of charge) provided the value is not less than ECU 100,000 (see 88/295/EEC Article 16). This reduces the need to monitor expenditure during the year to see if the threshold is exceeded.

Contracts below EC thresholds

15. Thresholds apply not just to specific individual contracts but to the total value of all contracts for the same type of procurement awarded in any one year. This is because it is expressly forbidden to break down contracts into smaller ones to
4. The EC directives

The EC directives avoid the thresholds (see 88/295/EEC Article 8.9 & SI 2679 regulation 10). Where contracts contain options, the contract value must be based on the highest possible total inclusion (see SI 2679 Regulation 7(8)). The meaning of the word 'options' is not defined so it is not clear how this effects change controls of the type often written into IT contracts, e.g. for software development. It is possible to argue that such changes are included if the estimate is based on the current understanding of the requirements.

The sterling equivalent

16. Thresholds are expressed in ECU monetary units and the conversion to sterling and other national currencies is made every two years - the current exchange rate should be published in Official Journal in the November before the period to which it relates. The figures for 1992-1993 published on 12/12/91 are ECU 200,000 (£141,431) and ECU 100,000 (£70,716) (See OJ C 91/321 12.12.91 page 6.) Any references to £132,000 and £66,000 were for 1990-91 and should be disregarded. The threshold for GATT bodies that was formerly ECU 134,000 becomes ECU 125,576 or £88,802.

Aggregation Rules

17. There are rules for determining contract values to see if the directives apply. These rules are detailed in the UK regulations (see SI 2679 regulation 7). Similar rules apply under the Services Directive. The following points should be noted:

The directives apply regardless of the method of finance e.g. lease, rental, hire purchase or outright purchase. Under the Services Directive any finance agreement itself is also subject to EC directives (see Article 1(a)iii).

To determine if the directive applies the organisation must estimate the value based on the total value of contract(s) over 12 months or, if the contract is longer than 12 months, then the total value should be used for a fixed term, or based on 48 times the monthly cost for contracts of indefinite duration.

For IT contracts above the ECU 100,000 threshold of the IT Standards Decision there are requirements on the technical specification (see the section dealing with Technical specification, standards & procurement profiles).

The diagram overleaf illustrates the aggregation rules for the Supplies Directive & SI 2679.
Annual Indicative Notices

18. Under the Services Directive, local authorities will (like GATT bodies) be required to publish 'indicative' notices in the OJEC at the start of each financial year stating the value of contracts expected to be awarded for each type of procurement in that year. These are not currently required for local authorities under the Supplies Directive but clearly an authority ought to determine the estimated value in advance each year to know if EC procedures should apply in preference to finding the threshold is exceeded part way through the year. Since the EC has included 'indicative' notices for local authority contracts under the Services Directive, it can be expected that it may be added to the Supplies Directive. An option to do this was not taken before March 1st 1990 (see 88/295/EEC Article 9.1), but it could be reflected in moves to consolidate procurement legislation. A set of proposed amendments to 88/295/EEC being considered by the Advisory Committee for Public Contracts includes this change.

Basis of Estimates

19. Estimates are net of VAT and should be based on the value at the time the Official Journal notice is despatched. Under the recommendation for standardised notices (see para 5) the estimated value is now included in the notice as an optional item. Estimates for recurring expenditure can be based on the previous year's total, suitably adjusted for changes in requirements. For new investments an authority with some form of overall prioritised IT investment programme may find it a good starting point for IT contracts. Regardless of how IT budgets are organised, centralised monitoring seems essential. This is an example where the public procurement directives conflict with trends and pressure to decentralise responsibilities.
Devolved purchasing powers and Discrete Operational Units

20. Where local authorities have a central IT purchasing organisation this can undertake the necessary collection of estimates for IT related contracts but increasing autonomy in departments or DSOs and in schools under Local Management of Schools (LMS) may lead to difficulties in collecting such information. The EC directives refer to aggregation across the whole ‘contracting authority’. In general this is interpreted as being the whole of a local authority in the UK since it operates as a single legal entity. There is some confusion, however, with regard to the autonomy of certain parts within a local authority under various pieces of legislation such as the Education Reform Act 1984 and the Local Government Acts on competitive tendering and DSOs. The point at issue is whether DSOs and schools come under the aggregation rules or whether they are separate operating units. Guidance from HM Treasury defines an exception to aggregation based on a ‘discrete operating unit’ (DOU) where the decision to purchase is devolved to the unit and is taken independently of the rest of the authority and the contract is for the sole purpose of that unit. A typical example of this issue is the application of aggregation to schools under LMS. The UK interpretation is reflected in SI 2679 7(6) and this has been accepted by the EC. The Treasury’s view is that any guidance from the EC will not conflict with the UK regulations since the Commission has also agreed a similar interpretation for the Utilities Directive. Further clarification should be available when the Treasury and DoE guidance notes on SI 2679 are published. For the time being, since opinions differ on whether the European courts would accept the DOU definition in the UK regulations as giving proper effect to the EC Supplies Directive, authorities may wish to apply the wording of the EC Supplies Directive. Any authority which elects to use the DOU approach should retain evidence of how it determined which procurements are covered by the definition as this is clearly an area open to allegations of abuse. Each authority must take its own legal advice on this matter, recognising that the EC directive takes precedence over national legislation, following the ruling by the European Court of Justice in the Marleasing case (C-106/89 13/11/90).

Records and statistics

21. There are two basic reasons for keeping statistics: to demonstrate compliance and to complete reports and returns. The need to demonstrate compliance requires that records are kept of estimated contract values and the basis on which these were made. The actual values of contracts awarded have to be reported to the EC by 31 October every alternate year and to meet this requirement the DoE normally requires input from local authorities by 31 July, although the current requirement to make returns every two years may change. This requires that records be maintained in a file or database, listing type of product, estimated value and relevant EC directive and threshold. This information is likely to be essential to defend any alleged breach of the rules, for example if a contract was estimated to be below the threshold but was above the threshold when awarded. It is essential that IT purchasers interface with other departments of their local authority responsible for the overall statistics so that IT issues can be included in the relevant classifications (see para 49). The DoE defined product classifications for returns in 1991 was based on the NIPRO classification system, but the EC is moving towards a different method and NIPRO will thus need to be changed (see below).
22. All procurements by member states are monitored by the EC and to assist analysis they are seeking to adopt a standard nomenclature. At the present time this is an area of much confusion and change with a number of different schemes in use. These are described briefly below.

23. It is understood from the UK Central Statistical Office that the EC equivalent, EUROSTAT, is striving towards a single scheme for classification of products and services based on the new Classification of Products to Activities (CPA) scheme. Version 1.0 of the CPA was adopted in May 1992. A directive or regulation requiring members to adopt the CPA is expected to follow soon after. The adoption of CPA for procurement is not welcomed in all quarters. There appear to be two major problem areas.

Firstly since the CPA is based on industrial activities rather than the end product, it is not well suited to allow suppliers to identify more readily if they can meet a purchaser's requirements. An example which is not IT related but illustrates the problem concerns railway sleepers which can be made of timber, steel, concrete or plastic. Each has a different CPA classification based on the production process and so a supplier of plastic sleepers would have to monitor notices covering all four types of manufacture process in order to identify potential contracts.

The second problem concerns the level of aggregation and grouping. The CPA code uses six digits but there is also debate about using a four digit level in notices to group products closer to a potential suppliers range. This can introduce other problems: for telecommunications, for example, aggregation at four digits (32.20) brings together television, radio, telephone and telegraphy equipment.

24. Some flexibility is required to get a workable system, but there are concerns that this may be open to abuse by purchasers. There will be further debate and confusion before clear advice can be given on the outcome of the moves to adopt the CPA for public procurement. However there are some changes that have a clearer timescale.

25. The EC Regulation on 'the statistical classification of economic activities in the EC' (see EEC/3037/90 in OJ L293 210.90) requires the adoption of the NACE scheme or a national classification derived therefrom, for all statistics collected after 1st January 1993. Aversion of 'NACE rev. 1' with slight modifications to expand some groups, is likely to become the UK Standard Industrial Classification (UKSIC92) from the end of 1992. The DoE have advised that they will have to follow HM Treasury decisions regarding the change over from NIPRO but the EC regulation only allows one year transition for 'duly substantiated technical or operational reasons' (Article 11). Local authorities would be advised to make preparations to change their classification of statistics to one based on the NACE scheme, or on UKSIC92 as soon as it is published.

26. Existing Nomenclature or classification schemes are listed below:

*Classification of Products to Activities (CPA)*. The EC Advisory Committee on Public Procurement is being asked to consider a nomenclature for the Supplies Directive and it is likely this would be based on the (draft) Community Nomenclature CPA. They are also
considering use of the CPA for all periodic indicative notices (see para 18).

Central Product Classification (CPC). The Services Directive refers to the CPC, (see 92/50/EEC Annex 1A & 1B.) This uses numeric reference codes which subdivide services into various categories eg Computing and related services is CPC (Appendix 1 Reference 8). However with the adoption of the CPA scheme it is now likely that the directive will be changed to the CPA classification for consistency. This may slightly alter the two-tier split between primary and secondary services.

TARIC Common Nomenclature or CN. This is used for customs declarations and other statistical returns (see Article 5 Regulation EEC/2658/87). This comes from a merger of Common Customs Tariff(CCT) and the nomenclature of goods for external trade statistics and statistics of trade between member states (Regulation EEC 1445/72). The intention is to integrate all coding to get a uniform presentation and application of community law. TARIC is a very detailed scheme contained in a four volume set since it is related to customs and tariffs and it is considered unlikely this will be integrated into procurement statistics monitoring.

TED (tenders electronic daily) Subject codes. TED is the database copy of the Official Journal S series and has a list of subject codes to help suppliers identify relevant notices. These cover goods and products and public works. Unfortunately they do not appear to relate directly to the NACE rev.1 classifications - the TED subject code for Office and DP equipment is 3300 but this is NACE activity for medical instruments, watches etc; the TED subject code for Telecoms is 3440, yet the NACE classification 34xx covers Motor Vehicles.

There is reference to ‘standard nomenclature’ for standard descriptions of works, services, and supplies in the EC recommendation on standardised notices 91/561/EEC but so far only public works seem to have been included so it is not possible to see how this relates to IT. (see OJ S 217 N 16.11.91 for annex to 91/561/EEC for details).

National Supplies Vocabulary (NSV). This was developed for the UK health service and is product, rather than activity based. The PISCES procurement package supplied by CERES (see Appendix 1 Reference 12) uses a classification based on NSV. While it is well suited to procurement it is unlikely to correspond well with NACE or CPA and users need to recognise this. However the classifications can be amended and although any aggregation figures would be invalidated if classification changed partially through a year, they could be recalculated from records of individual contracts.

27. Once a single standard has been achieved the aim is that statistics may be collected from published notices but until then the directives require authorities to submit statistics to the EC via the DoE and HM Treasury, detailing the value of contracts awarded.
28. This is not an EC directive requirement but it relates to the Single European Market and all local authority officers responsible for purchasing should be aware of this. From January 1992 central government statistics for imports and exports will come from VAT returns, so it is necessary to complete returns on VAT for Customs and Excise for any purchases from, or sales to, other members of the EC (see VAT information sheet no 1/91 issued 1st June 1991 by HM Customs and Excise).

29. A contract may cover both goods and services. For example equipment (supplies) plus maintenance (services), or an off-the-shelf package (supplies) plus some bespoke tailoring or development (services). Such contracts are to be treated as follows:

Where a contract could be legitimately placed as separate supplies and services contracts, the value of the product element is used to determine if the Supplies Directive threshold is exceeded and, if so, the directive applies to the whole contract.

If the contract cannot be split then legal precedents indicate that the total value is used to determine the threshold. It should be treated as supplies if the product element exceeds 50%. If the value of the services exceeds that of products it will fall within the proposed Services Directive once it is in place. (This advice is based on a ruling by the European Court of Justice 5 December 1989 case C3/88 and Article 2 of the Services Directive 92/50/EEC.) Clarification of the onus of proof of the value of the respective elements has been sought from HM Treasury but none has yet been given. In the interim it seems prudent to ask the supplier or service provider for an indication of the breakdown.

30. Regular contracts, as defined by the GATT agreement, are a series of recurring contracts let to one or more suppliers over a period of time for the procurement of a product or products of the same type. Since aggregation must take account of all ‘similar’ contracts, when the total exceeds the threshold, each individual contract must be advertised even if its estimated value is below the threshold. A global contract covering phased deliveries of each of the individual ones could be advertised at the start, or a framework agreement could be used (see Appendix 1 Reference 2: DoE Circular 6/89 para 28-33). The Supplies Directive states that the length of recurring contracts may not generally exceed three years. (see Article 6.4 (e)). No written guidance seems available on the interpretation of ‘generally’ but a Treasury view is that an excessively long contract that went beyond reasonable commercial practice could be challenged if it did not retain an element of competition. Use of options such as an annual extension or subject to cancellation may offer a means of retaining competition but would need to be declared at the outset and used in estimating the contract value. Under the Services Directive there are rules on renewal or extensions of contracts without recourse to advertising (Article 12.3 (e) & (f)). These exclude any renewal of more than three years after the conclusion (taken to mean the award) of the initial contract and agreements for software licenses or equipment.
maintenance which may require contracts lasting several years to cover the maximum expected life of the system.

Framework agreements

32. The EC has agreed with the Advisory Committee that framework arrangements can be treated as contracts and can be advertised in the Official Journal if their estimated call-off value exceeds the normal thresholds (see DoE Circular 6/89 para 33). They are also included in the contract type options on the standard forms of contract notices. Framework agreements can be particularly useful for purchasing items such as PCs where an authority-wide specification can be agreed but the specific volumes are not clear in advance. The main disadvantage is in ensuring the contract terms keep in line with market prices as price/performance improves and in ensuring the individual call-offs by departments are recorded in the overall statistics. A framework agreement set up by a private agency can also be used as long as the authority’s individual call-off does not exceed the threshold.

Types of products

33. The thresholds apply to a contract for a ‘type’ of product but the definition of ‘type’ is clearly open to interpretation. In relation to IT, all terminals may be of one ‘type’ or can be treated separately as VDU’s and printers. The DoE classification of goods for statistical returns (NIPRO) could be used but it seems more practical to use the need for separate contracts with different suppliers as a basis for determination. If VDU’s are covered by one contract with one supplier and printers by a contract with another then it may be legitimate to treat them as different types. However, local authorities should not try to avoid the legislation artificially. Since in general the procedures are good practice and not dissimilar from Standing Orders that probably require tendering at much lower thresholds, a prudent approach would be to use the EC procedures wherever there is any doubt. Whatever is decided the Supplies Directive is clear that quantities cannot be split up to avoid the thresholds, (88/295/EEC Article 5.6) and the Services Directive goes further and states that the selection of valuation method shall not be chosen with intent to avoid the directive (Article 1.3). If the EC adopts standard nomenclature fully this may provide a useful basis for aggregation of types of products, but contract valuation treatment also depends on whether items are purchased as commodities, or as part of a larger project, or if services are awarded under individual contracts, or as part of a wider contract, like facilities management. For the reasons discussed it is difficult to provide any general recommendation. Provided there is no intention to avoid the threshold and subvert the directives, a common sense approach to each requirement should be possible.

Notices, procedures, supplier selection, tendering & award of contract

34. Each EC Public Procurement Directive defines the information to be published in ‘Contract notices’ in the S series of the Official Journal of the European Community (OJEC) but they are now covered by Recommendation 91/561/EEC and standard forms are available. Notices are published free and a summary is translated into the language of each member and they are published daily. The S series is available to suppliers on subscription or via the Tenders Electronic Daily
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(TED) on-line database. Suppliers need to readily recognise the description of the products required and under the TED database system subject codes enable electronic searches. The subject codes most likely to be relevant for IT are 3300 Office machines and data processing equipment or 3440 Telecommunications equipment. Use of one of these wordings in the description field of the notice may increase the chances of a supplier responding to the notice (see Standing or Approved Lists of suppliers para 40). The DoE now requires a signed copy to be filed recording the date of despatch of any Notice.

Procedures options

35. While the details of various EC Public Procurement Directives vary, they all follow a basic pattern of three types of procedure described below. The following sections discuss the three options in more detail followed by advice on how the tendering procedure should be selected.

OPEN Any interested supplier may request tender details and submit a tender.

RESTRICTED Suppliers must request participation, and are subject to selection procedures before being invited to submit tenders.

NEGOTIATED The contract is awarded after negotiation with one or more suppliers.

Open Procedure

36. This must be used in all cases above the relevant thresholds unless there are grounds for exception based on the EC defined rules. A written report justifying the use of other procedures (restricted or negotiated) must be prepared and can be requested by the EC (see 88/295/EEC Article 6.6 or SI 2679 Regulation 10(8) and 10(9)). Under the Open procedures a notice is published inviting any suppliers to respond to tenders. Some concern has been raised at the cost of supplying tender documents to all who may apply as this could involve a substantial number of requests. It is generally accepted that a reasonable charge can be made to cover the production costs of tender documents. It is also permitted to exclude tenderers under the same criteria laid down for the Restricted procedure (see 88/295/EEC Articles 22 to 24 or SI 2679 Regulations 14 to 17) These allow checks in accordance with specified criteria on economic, financial and technical grounds.

Restricted procedures

37. The Public Procurement Directives recognise two justifications for using this procedure (see 88/295/EEC Article 6.2 or SI 2679 Regulation 10(2)(a)):

Firstly a need to ‘balance contract value and procedural costs’. With the vast numbers of dealers, agents, and Value Added Retailers (VARS) competing to supply IT it is likely that a restricted procedure is required to limit the cost of considering an excessive number of tenders.

The second justification, which is also likely to be applicable to IT, is the ‘specific nature of the products to be procured’. For example when acquiring a mainframe, restricting tender invitations to exclude manufacturers without the ‘Technical Capacity’ to develop and deliver enhancements to their products during the life of the equipment.
38. The procedure for selection of suppliers is defined in the Supplies Directive Article 20 - 24 and Part IV of SI 2679, and covers the information that can be sought from companies who submit requests to participate. (It can also be used to reject suppliers responding to an Open Tender who do not reach the contracting authority's minimum standards). When dealing with IT the procedure can be used to check the extent of the supplier's technical capacity, quality control, conformance testing and test reports from certified laboratories etc, which can be obtained under Article 23 and in particular 23.1 (f) may be significant for IT. Also under Article 24 the contracting authority can invite the supplier to clarify and to supplement documents submitted, provided such information relates to the contract in hand and the matters covered by Articles 20-23 of 88/295/EEC or UK SI 2679 Regulations 14-16. Authorities must comply with any request to treat such information as confidential. The Local Government Act 1988 Part II places restrictions on local authorities regarding 'non commercial contract conditions' which should be reflected in Standing Orders related to contracts and may limit the full use of the EC provisions to request information from suppliers. Attention should also be drawn to the DoE Circular 21/89 14 September 1989.

39. If there are many qualified suppliers for the nature of the contract, the number of suppliers invited to tender can be reduced (see Appendix 1 Reference 3: DoE Circular 6/89 page 8 or reference 2: IPS Guide). However, selection must follow the procedures defined and must be capable of being shown to be equitable. Shortlisting should be done in accordance with the regulations that govern selection of suppliers (see para 38). Suppliers who are not qualified financially and technically to the level required by the contracting authority must be excluded. Suppliers in the UK must not be favoured over others in member states (see UK Regulations SI 2679 12(5)). No minimum number is specified in the Supplies Directive but under the Services Directive there is a minimum number of five service providers specified and the maximum is 20 (see 92/50/EEC Article 27.2). Care should be exercised not to reduce the number to so few that if supplier(s) withdraw there is a danger that only one remains, leaving no competition, or that the tendering process has to be restarted.

40. There is no specific mention of the use of 'standing lists' or 'approved lists' of suppliers in the Supplies Directive. The DoE Circular 6/89 paragraph 25 indicates that use of such lists may continue so it is not inconsistent with the directives to invite known suppliers to participate directly, provided this is non discriminatory. Experience suggests a direct approach to suppliers is advisable in the event that suppliers do not detect notices published in the Official Journal. This is permitted as long as authorities do not provide any more information than the Official Journal notice or precede the date of dispatch of the notice (see 88/295/EEC Article 3.8 (d)). Any notices in national or local press must also comply with these requirements, so it is common practice to refer suppliers to the Official Journal notice for details (see also DoE Circular 6/89 paragraph 59 p.15) regarding inclusion in approved lists.

41. The diagram overleaf illustrates the rules for the selection of suppliers and is based upon the Supplies Directive and SI 2679.
Under the restricted procedure item 8 of the contract notice in the Official Journal would contain such information.

42. With a complex tender such as IT, selected suppliers may be invited to submit 'mini proposals' prior to finalising the Invitation to Tender (ITT), and there may be a further short-listing (see Chapter 3 para 31).
43. The use of the negotiated procedure is only permitted under strict conditions and these can be readily challenged and are expected to be very exceptional. This can be seen from the summary of the conditions below:

(a) When other approaches result in no tenders being offered (in which case a report must be sent to the Commission via HM Treasury - see SI 2679 Regulation 10(7))

(b) Where the product(s) is for research or study.

(c) For technical reasons or to protect the exclusive rights of the supplier.

(d) Due to extreme urgency, caused by unforeseen circumstances, but only if these are not attributable to the authority. Note that SI 2679 omitted this requirement (see Regulation 10(3)(e)) but the Supplies Directive takes precedence over national law (see Article 6.4 (d) para 2).

(e) Deliveries by an original supplier intended as partial replacements or where change of supplier would lead to incompatibility or difficulty in operation and support.

44. Although many IT acquisitions, such as equipment upgrades, are likely to come within the provision as additional deliveries, where a change of supplier would result in incompatibility or disproportionate technical difficulties under the EC Supplies Directive, this should not continue as a general rule for longer than three years (see SI 2679 10.3(f) and in 88/295/EEC Article 6.4(e)). The Supplies Directive came into effect in 1989 so any authority relying on the three year rule will need to reconsider its position by 1992. It seems reasonable for a contract to continue for the economic life of equipment which may exceed three years. Negotiations can take place with more than one supplier to maintain competition and, in fact, under the Services Directive negotiation must be with a minimum of three suppliers (see Article 27.3 of 92/50/EEC). Also it should be recognised that for the supply of goods from a single manufacturer, different agents or dealers can be made to compete for the same equipment using cost, delivery date or support to differentiate them.

45. Many procurement, legal and IT specialists agree that the Restricted procedure is the most relevant for IT purchases. Appendix 2 outlines models for each procedure and shows the sequence of events, including how suppliers may be investigated prior to invitation to tender. It is understood that the UK Government is seeking amendments to the rules on selecting procedures to allow more flexibility in line with the Utilities Directive.

The diagram overleaf highlights the main points but readers are advised to refer to the Directive and Regulations for more details.

46. The time limits can be reduced where compliance with them is rendered impractical for reasons of urgency (see SI 2679 Regulation 12.9). The minimums can be reduced from 37 and 40 to 15 and 10 days respectively, however the time for authorities to send information is then reduced from six to four days and the invitation to tender must be sent by the most rapid means possible. No time limit
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Diagram 3

SELECTION OF PROCEDURES FOR EACH CONTRACT

(Exceptially) is a negotiated procedure justified because:
- tenders under an open or restricted procedure were irregular,
- tenders under an open or restricted procedure are unacceptable,
- there are no tenders under an open or restricted procedure,
- products are made purely for research or development,
- single supplier available for technical artistic or rights,
- extreme urgency for unforeseen external reasons,
- additional deliveries by original supplier are justified?

No

Is restricted procedure justified by a need to relate cost to the contract value or nature of goods?

Yes

Were tenders irregular or unacceptable?

No

Use Open Procedure: Publish OJEC Notice Allow 52 days from despatch for receipt of tenders

Use Restricted Procedure: Publish OJEC Notice allow 37 days for requests to participate. Select tenderers, issue ITT. allow 40 days for receipt of tenders

Use Negotiated Procedure: Publish OJEC Notice, allow 37 days for requests to participate, select suppliers

Negotiate with Suppliers(s)

Publish Award Notice in OJEC, despatch within 48 days to the award of contract. Keep records of procedure, include in statistics

* Can be reduced - see below

** Not required if negotiate with all qualified tenderers

Interpretation of time limits

47. The UK Regulations SI 2679 clarify the meaning of working days in time limits by reference to the Banking and Financial Dealings Holidays Act 1971 and states that any period ending on a non working day must be extended to the next working day (see SI 2679 Regulation 2.3 and note that Article 28 of the Supplies Directive refers to Regulation EEC 1182/71.) The DoE recommend that a
4. The EC directives

certificate of posting is obtained as evidence of the date of dispatch from which the time limits apply.

48. The public procurement directives recognise that the best value for money may not be represented by the lowest tenders and, in this respect, may be at odds with some local authorities’ Standing Orders which expect the lowest tender to be accepted. Where an authority believes other factors such as delivery, support, service, and running costs are relevant to determining the ‘economically most advantageous’ contract, these award criteria should be indicated, if possible, in priority order in the contract notice. It may be difficult to predefine all such criteria within the limited size of the Official Journal notice. The IPS guide for local authorities (Appendix 1 Reference 2) states that the Institute does not accept this is realistic or reasonable. Nevertheless their advice should be followed and the criteria it is intended to use should be listed in the notice or the invitation to tender, in order to protect the authority’s interests. SI 2679 Regulation 20(2) gives examples of such criteria, but it is not an exhaustive list (see para 80).

49. Each authority must keep statistics of contracts awarded and submit returns to the DoE who are responsible for monitoring compliance. The information required includes: number and value of contracts above the EC threshold, subdivided by award procedure, product classification, nationality of supplier, also the total number and value of contracts awarded to each member state and to third (non EC) countries. Reports are required by the July of every alternate year from 1993. In addition to these it is prudent to keep records of dates of actions and the basis of decisions and criteria used in case the procedures are challenged.

50. Many authorities have now recognised the benefits of specialised centralised supplies divisions to handle all significant acquisitions, offsetting the cost against securing better value for money. Other arrangements including public and private sector consortiums or purchase agencies can be used but the EC directives still apply. There are specific rules covering such arrangements. The detailed rules are beyond the scope of this document but in general they aim to prevent such an approach being used to subvert the directives. For example, although an agency may not be a public body any procurement via that agency by a local authority that exceeds the threshold, must comply with EC rules, and it is the local authority’s responsibility to ensure this (see Appendix 1 Reference 3 DoE Circular para 33 p.11).

51. IT investments should be made within the context of an overall strategy and any devolved purchasing power should be combined with a framework of central strategic planning and coordination, in which case the collection of statistics and the provision of advice on procurement methods should not present insurmountable problems. It seems more appropriate to justify central coordination on the basis of the benefits of strategic guidance and control than as a ‘necessary evil’ imposed by the EC, which is unlikely to motivate willing cooperation and may threaten compliance. In any case it will be necessary to coordinate the specification of IT standards that are required to enable various procurements to interwork. It is insufficient to rely on suppliers statements of compliance in general with ‘Open Systems’ or OSI or even GOSIP (Government...
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Open Systems Interconnection Profiles), and authorities will probably require some centralised expertise to validate the suppliers responses and to conduct, assist, or oversee interoperability tests.

52. In all local authorities the requirement for an IT strategy is paramount. This subject is discussed in detail in Chapter 3 and in the Audit Commission publication 'Acquiring IT' (Appendix 1 Reference 1), covering both corporate and departmental IT. The existence of an IT strategy and detailed technical standards is essential for compliance with EC legislation and this must be considered carefully.

53. It is important to recognise that although the IT Standards Decision makes specific requirements which are generally taken to refer simply to OSI, they apply to any interchange of data (see Appendix 1 Reference 8). In addition, the public procurement directives require reference to European specifications or, in their absence, British Standards implementing international specifications, or other British Standards or other standards, across all elements, not just data interchange.

54. Where a local authority has a single IT department the relationship of IT strategy to technical standards or procurement profiles should be straightforward, under the responsibility of the head of IT. Where an authority has separate departmental IT units an internal regulatory framework is essential, so that the corporate IT strategy, technical standards and procurement profiles for the overall authority can be applied consistently across all departments. Not only is this essential to achieve the benefits of the IT strategy (eg interworking of departmental processors), it must also be understood that purchases that undermine the strategy can represent a breach of the directives.

55. The placement of the responsibility to enforce this needs to be carefully considered. Not all auditors will have the technical knowledge required but central IT staff may feel the role conflicts with that of adviser and so be unwilling to undertake the unpopular responsibility. In other disciplines such as finance or personnel the responsibility of enforcement of policy and rules is more generally accepted and IT must not be an exception. In future, with more compulsory competitive tendering of local authority services, it is likely that authorities will be managing a mixture of in-house and external service providers while retaining overall responsibility for finance and policy control. In this environment the need to impose rigid interfaces between the various organisations will be paramount and clearly defined IT standards that are accepted without compromise will be essential to the effective operation of the authority. So the challenge to ensure that internal departments accept imposed technical standards for their IT investments must be faced. A steering group representing the various departments and services may be an acceptable approach, provided it is accountable to the centre for achieving the required level of cooperation and interworking and carries the necessary authority to impose strategy on in-house and external services providers.

56. The invitation to tender or the specification for negotiation must contain a technical specification that complies with the EC legislation. In general
4. The EC directives

compliance is concerned with the way goods are described by reference to standards. The IT Standards Decision is relevant to IT as it requires the reference to standards for interchange of data between systems and gives preference to international standards (see 92/50/EEC Article 5.1).

57. The Supplies Directive covers all other standards, for example safety, noise, programming languages and non exclusive IT ones such as EN 29000 (BS5750) on quality. This directive differs slightly from the IT Standards Decision in the order of preference to be used in the absence of European standards (see Article 7.5 of 88/295/EEC or Regulation 10(7) of SI 2679).

58. Generally European Standards are referenced by EN (Europeene Norme) or ENV (Europeene Norme Varausgabe) for draft or 'pre standards'. Appendix 1 Reference 9 is a useful guide to check what standards exist.

59. An authority could be found to be in default of the EC rules if it produces a technical specification that fails to refer to an existing relevant European Standard or 'common technical specification'. Compliance with the directives requires an up-to-date awareness of all existing EC Standards and common technical specifications to ensure that these are referred to where relevant. Only in the absence of agreed or demonstrable standards can the specification be based on national or other standards or where a precise definition cannot be given other than by reference to brand names, then these can only be used by inclusion of the words 'or equivalent' (see Article 7.6 of 88/295/EEC or Regulation 8(10)(b) of SI 2679). There is a further exception (see Article 7.6 and Regulation 8(10)(a)) where references are justified by the nature of the contract. It seems this can be used without the qualifying words 'or equivalent'. Any derogation must be invoked with extreme caution.

60. In practice, however, authorities do not need to know every standard to which the products might be required to conform. It is generally sufficient to understand those which they are required to specify in their Invitation To Tender (ITT). This will need to include all the standards necessary to fulfil the authority's IT strategy - to provide the required level of future inter-working and conformance to Open Systems, for example. Other standards can be covered by use of general requirements, leaving the supplier to demonstrate conformance with appropriate standards.

61. Appendix 1 Reference 8 is designed to assist in the implementation of the IT Standards Decision and part IV page 31 is particularly useful.

62. Despite the various types of past IT investments it is likely that many authorities will have similar requirements because in general their IT strategy will reflect a move to Open Systems. Many will include the adoption of specific subsets of standards or procurement profiles (eg GOSIP Government Open Systems Interconnection Profiles).

63. Annex 4.2 helps identify the implications of a move to Open Systems and describes the conformance considerations and various standards which exist.
Other EC legislation relating to IT

64. The following sections aim to identify the implications of other EC legislation related to IT that must be recognised by those responsible for procurement and use of IT.

65. Many responsible for IT are also responsible for telecoms, including use of public networks, and such readers should note that the Type Approval Directive 86/361/EEC is repealed with effect from 6 November 1992 by 91/236/EEC (published in OJ L series 128 dated 23.5.91). It covers the establishment of notified bodies to carry out recognised conformance testing and to issue revised labelling of terminal equipment (the 'CE' and 'X' marks).

Legal protection of software directive (91/250/EEC)

66. This directive comes into force on 1st January 1993. It is discussed in an NCC Briefing no 2, by John Morris published in November 1991. He points out some of the inconsistencies between the EC terms and the rigid demands of IBM, Digital, Bull, etc. on reverse engineering. The EC want more freedom to open up access to previously protected code eg system interfaces, to prevent a few powerful suppliers controlling the market. This should lead to some relaxation of standard terms from such suppliers. The protection covers not just the source code but also 'preparatory design material'. In one example this led a software supplier to seek an indemnity from a local authority against any breach of copyright in connection with the authority's input to the design of modifications to a package and so authorities may need to consider any implications for their input to shared developments.

Health and safety for work with display screens (90/270/EEC)

67. This directive applies to work with all workstations put into use after 31st December 1992, and all existing workstations within four years. The broad scope of this directive can be seen by reviewing the definitions contained in Article 2 of the directive:

'Display Screen Equipment: an alphanumeric or graphic display screen regardless of display process involved.' - so it covers all VDU type devices including Plasma and LCD screens etc. although typewriters and certain control consoles are excluded.

'Workstation: an assembly comprising display screen equipment, which may be provided with a keyboard or input device and/or software determining operator/machine interface, optional accessories, peripherals including diskette drive, telephone, modem, printer, document holder, work chair and workdesk or work surface and the immediate work environment' - so note in particular that it covers the desk and chair and environment and not just the display screen.

'Worker: any worker...who habitually uses display screen equipment as a significant part of his normal work' so it excludes casual use. In Articles 4 and 5 the directive lists the minimum requirements, but many are framed in subjective terms and so are open to debate: what constitutes, for example, screens without 'flicker', 'legible' symbols on keys, 'well defined characters', software that is 'suitable for the task' 'easy to use'....etc.?
4. The EC directives

68. Other aspects such as contrast controls, tilt and swivel screens, and separate keyboard, are more straightforward and practical to define and can be included in the technical specifications as most modern equipment will meet these. Indeed some manufacturers are already claiming EC compliance as a market edge for their products. It is also important to consider the replacement of existing workstations, such as the 1980's style VDU displays still used by some staff with fixed screens and poor display quality. It may be worth coordinating an authority wide replacement programme of VDUs together with footrests and document holders and seeking a bulk purchase if there are several of them installed across different departments.

69. Note also that the significant date is when the workstations are put into effect ie come into use, not when they are purchased, which has been mis-reported in some reviews of the directive. Then there are the eyesight tests and environmental issues. Humidity levels, noise and heat and glare are all included and these can be particularly difficult to assess and control. The onus is on the managers within the authority to advise their staff of the risks and measures to reduce them. Repetitive strain injury (RSI), which has been receiving more publicity, and can cause permanent disability, is just one example that needs to be seriously considered. This whole health risk area is surrounded by controversy, particularly aspects such as risks to expectant women.

70. There are new European Standards due in 1992 that define the ergonomics for office work and these are based on ISO 9241 and will supersede BS 7179(1990). Like the EC directive, they cover both hardware and software including issues like ease of use, presentation and dialogues. Tougher UK legislation will be introduced by the end of 1992 and will include proposals to introduce new statutory instruments 'Health and Safety (Display Screen Equipment) Regulations' under the existing Health and Safety at Work (HSW) Act. This proposal together with a guide to the regulations was issued in Spring 1992 by the Health and Safety Executive. These will give both managers and users better guidelines, for example by closer definition of a 'user'. However this is still a subjective area and the new ISO standards should prove a lot more definitive.

71. The key implication for all managers of IT users, not just those in local authorities, is that more effort will need to go into measures to make staff aware of the hazards, the correct organisation of the workplace and the environment and work practices (eg rest periods). In addition there should be regular assessments of risks and remedial action to ensure proper management procedures are being followed. The draft HSE regulations include a very good guide that should help managers identify these requirements. Independent consultants such as CCD Product Design Limited of Weybridge have produced video based training covering the directive itself. This is useful but pre-dates the UK regulations.

72. The Health and Safety issue needs to be kept under review by every authority and requires cooperation between the safety officers and IT officers, perhaps with joint training and awareness sessions for managers and users throughout the authority. The impact of new standards will need to be recognised: The Comite European de Normalisation (CEN) will issue the new multi-part standard EN
29241 on ergonomics of design and use of visual displays (based on the new ISO standard 9241) and the current British Standard BS 7179 will be withdrawn.

73. All officers involved in procurement of any IT systems must be aware of the requirements of this directive to reflect the appropriate standards. This will apply to all systems or new users brought into service after 1st January 1993, and require the replacement of all existing non conforming systems by 1st January 1997. The task of keeping up to date with regulations and standards in this area alone reinforces the need for a central responsibility within each authority to determine appropriate rules within which any devolved IT responsibility must be operated.

74. This proposed directive is part of the EC response the Council of Europe Convention (Treaty 108), the objective of which is to provide protection of personal privacy and remove restrictions on the flow of personal data between member states. This requires that all states comply with a common minimum standard of performance. However the intention is not to reduce the protection offered by existing data protection regulations. The Data Protection Registrar is responsible for representing the UK views on the proposal and he has indicated the need for some extensive changes to the current draft. It is clearly an issue of some controversy and in some cases there are constitutional differences between various members (eg on privacy and human rights), so it may take some time to reach agreement. The precise timing depends on when the Council of Ministers reach a common position on the proposals and the progress with the second reading by the European Parliament (see Appendix II). In a paper written in September 1991, the Data Protection Registrar speculated that a framework directive would be approved in 1993 with UK domestic legislation coming into force in late 1994 or 1995.

75. Therefore at this stage it is difficult to indicate what the precise implications are likely to be, though some of the implications that can be expected are based on current proposals:

- Registration of all systems holding personal information will be retained and possibly extended.
- Subject Access rights may be extended and rights to compensation increased.
- Disclosure of certain information will have to be reported to the individual concerned.
- Trans-border controls of data flow will be required outside the limits of the Community data protection.
- Manual records are likely to be included, even if a sector or case by case approach is accepted (eg Health Records).
- The Private and Public sectors may be subject to different controls.

76. This proposal will extend copyright protection to the contents, including any index, of a database. Database is defined as works or material stored and accessed by electronic means. It excludes the programs used to create or access the information but these would be protected by Directive 91/250/EEC (see para 66).
It defines the author's exclusive rights to update the information and prohibits unfair extraction of information. It may impose compulsory licensing on databases owned by public bodies so may have implications on local authorities who have such databases. It will require new legal remedies to cover extraction of data. The target date is understood to be 1 January 1993.

**Examples of IT procurement**

Identifying relevant EC legislation

The following table is intended to help identify which EC legislation is relevant to various contract types and values.

<table>
<thead>
<tr>
<th>Contract Type</th>
<th>Estimated value (ECU)</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
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<th>8</th>
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<tbody>
<tr>
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<tr>
<td>Services &gt; 200,000</td>
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<tr>
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<td>if services &gt; 50% of total</td>
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</table>

Key to EC legislation relevant to IT and local authorities

1. **IT Standards Decision** 87/95/EEC
2. **Supplies Directive** 88/295/EEC and UK SI 2679
3. **Compliance Directive** 89/665/EEC and UK SI 2679
4. **Health & Safety and Displays** 90/270/EEC
5. **Legal Protection of Software** 91/250/EEC
7. **Proposed Privacy Directive** COM(90) 314
8. **Services Directive** 92/50/EEC

For information on threshold values and estimates see above. Further legislation, such as type approval for connection to public telecoms networks, may also apply to some IT acquisitions. See the examples below.

77. The following examples discuss in more detail how the various directives are likely to apply to different IT procurement requirements. In all cases the method of acquisition includes purchase, lease, rental etc. and the value includes installation costs.

**Acquisition of a 'turnkey' system**

The turnkey system comprises processor, terminals, system and application software. Total value above ECU 100,000.

87/95/EEC applies if the system exchanges information or data with another, so it is prudent to assume it applies to both hardware and software.
Software covers operating systems, telecoms products and relevant applications such as Electronic Mail complying with X400 standards (see 11.5 of CCTA guide).

87/95/EEC will determine how parts of the technical specification are drawn up and the order of preference for standards, and use of derogations.

88/295/EEC covers all technical areas outside of the IT standards on data interchange covered by 87/95/EEC and telecoms terminal equipment approval covered by 83/361/EEC or 91/236/EEC. For IT procurement 88/295/EEC includes areas such as safety, keyboards, noise, graphics, programming languages, operating systems, database, and relevant standards not exclusive to IT, eg quality assurance, electromagnetic emissions etc.

90/270/EEC applies to display screens and to the office environment, desks, chairs, lighting, awareness of health hazards.

91/250/EEC applies to copyright of software and other preparatory design material, and reverse engineering of code.

The proposed Privacy Directive will apply to the registration of systems holding personal data, extending requirements of the UK Data Protection Act, to include related manual data like microfiche.

The Services Directive could apply to the maintenance if this is a separate contract, and to the software if it is a bespoke development (an off-the-shelf package is classed as goods). If supplies and services are combined in one contract, but services are less than half the value of the whole contract, the Supplies Directive applies or visa versa. The Service Directive is particularly likely to apply to FM or other bureau or 'Outsource' arrangements from July 1993.

88/295/EEC or SI 2679 will determine the requirements for contract advertising, supplier rejection, award criteria and award notices. In general the restricted procurement procedures would be most appropriate to restrict tenderers to those competent to deliver such a system.

**Acquisition of upgrade(s) to existing system**
The value is above ECU 100,000. VDU's and software could be covered by relevant directives as above.

If the upgrade affects aspects of exchange of data with other systems then IT Standards Decision 87/95/EEC will apply. If the specification needs to include proprietary standards then derogations may need to be sought on the grounds of operational continuity. These can only be used when within a defined and recorded strategy for transition to international or European standards. Where the upgrade could be anticipated it is perhaps best to include in the original contract an option to allow the call-off of additional items (see Chapter 5), provided a competitive price can be secured. When a new contract is to be awarded then 88/295/EEC or SI 2679 will apply. If the upgrade is specific (eg additional memory), open procurement procedures may be most appropriate. If there really is only one source of supply (eg no plug compatible or second user sources) then
4. The EC directives

negotiated procedures can be considered, but scope for competition will be limited.

Purchase of several PC’s, mid range processors, or software products where total value of each type exceeds ECU 200,000. It may be thought such acquisitions are exempt from the EC Supplies Directive or SI 2679 because each item is below the thresholds. However if the estimated total value is likely to exceed the threshold because of the number of items purchased, then the relevant EC directives must be followed from the outset. If the accumulated total exceeds the threshold during the year subsequent acquisitions are subject to the directive.

Note that where similar purchases are repeated (the directives refer to 'Regular' contracts), HM Treasury interpret this to mean repeated deliveries under one contract or repeated awards of similar contracts.

There are limits on how long or how often this is permitted without readvertising, for example in the case of services a maximum is set of 50% of the original value (Articles 11 3(e) and (f)) and three years from the start of the original contract.

In situations where it is unclear exactly how many items will be required, a 'framework' contract that sets the price (or discount rates) for various volumes can be considered. These are not explicitly referred to in the EC Public Procurement Directives but it has been established that they can be treated as contracts and advertised in the Official Journal if the estimated value exceeds ECU 100,000. Unless the agreement is awarded in accordance with EC rules and the value of call-off by a purchasing authority exceeds the threshold the authority is required to advertise its requirements at that point. Like regular contracts, frameworks are generally limited to three years. However note that over that time, especially with technological advances, the price may cease to represent good value, or the product may be superseded. These problems can be reduced by seeking minimum annual price reductions and clauses in the agreement to allow replacement with higher specification goods.

Future pressures to conform

78. While the European Commission has not yet taken any action against the UK over compliance it is has done so on several occasions with other member states and has raised several questions regarding public procurement practice in the UK. It is generally expected the commission will become more rigorous in its monitoring in future. Where a notice submitted by a purchasing authority does not conform to the EC legislation, the Official Journal has been known to give the authority concerned 48 hours to submit an amendment. If no amendment is supplied within this time then the original notice is still published but a report is submitted to the Commission for investigation.

79. It is also understood that the French government has started to monitor other member state's compliance with procurement regulations.

80. Finally IT suppliers are increasingly aware of the new remedies open to them under SI 2679. While no actual cases have been filed so far, the threat of court action is known to have been used to influence some authorities decisions on IT
standards. The DTI's 'A Guide to Public Purchasing' (Appendix 1 Reference 13 page 14) spells out the rights of suppliers who fail to win public contracts. They identify possible infringements as:

- failure to advertise a contract
- failure to observe the time limits
- discrimination
- use of unfair criteria
- use of criteria not specified in the notice

81. The DTI asks suppliers to contact the Compliance Unit if they believe there has been a breach of the public procurement rules. It is important, therefore, that authorities can clearly demonstrate that they have complied with the legislation by retaining records of actions and key documents in case a supplier indicates it intends to start proceedings.
Annex 4.1

The Cooperative Procedure for EC 'Single market' legislation
Annex 4.2

Standards & conformance

A.1 When systems are purchased separately with the intention of integrating them using Open Systems standards, as opposed to purchasing from a single supplier or plug compatible manufacturer who emulates proprietary standards this aspect of procurement becomes critical to the ongoing compatibility of systems. It is likely that specification of standards and establishing the conformance of products is beyond the technical capacity of all but the larger local authorities or those with experienced IT staff and it is unlikely to be tested adequately by traditional acceptance testing procedures. It may be considered more economically advantageous to seek a single supplier or 'one stop shop' to source as many of the components as possible rather than try to manage the compatibility of interface cards to mother-boards and gateway products to operating systems, but if the supplier controls the standards he may use proprietary ones at the expense of the authority's future potential to integrate with other suppliers or to change suppliers. In any case the authority cannot delegate the responsibility for conformance to IT standards to a third party. Exceptions or 'Derogations' are only permitted on specific grounds which all need to be documented and, in the case of justification on grounds of compatibility with existing equipment, there needs to be a defined and recorded strategy for migration to European Standards within a determined period (see regulation 8(5) of SI 2679 or article 7.3 and 7.4 of 88/295/EEC). Therefore independent evidence of conformance testing and certification is essential to systems integration regardless of the number of suppliers. The whole question of conformance testing is discussed in more detail below.

A.2 The following sections try to indicate the standards areas that authorities should be considering, but detailed consideration is beyond the scope of this guide, and authorities are advised to determine their own requirements rather than simply rely on this section. In general the EC directives are seeking to move from systems based on vendor-specific or proprietary standards to systems that are based on more open ones, or Open Systems. Before there can be any discussion on the IT standards related to Open Systems, a definition is needed. From the purchaser's point of view, the definition should be concerned with increasing the value of investments and in protecting those investments in future. The following definition is derived from the DTI Open Systems Technology Transfer (OSTT) Programme which was devised for the private sector:

Characteristics of Open Systems

(i) Products implemented to internationally agreed standards, ideally de jure, but de facto standards may need to be considered. To be appropriate, de facto standards must be widely accepted and available in a wide base of independent implementations;

be supported on a range of different hardware;
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licences must be available to all; and must have international recognition.

ii) Standards must be non-exclusive, non proprietary and vendor-independent. This requires that:

an agreed definition is available publicly;

the specification is not owned or controlled by a single vendor or group with a vested commercial interest; and

restrictions are not imposed on its use.

iii) Applications can be moved as necessary between systems of different makes and sizes. Software and data should be portable, i.e. able to run with minimal change on different makes of hardware from different vendors and on different sized computers. In addition the personal skills of the end users should be portable (this is generally taken to mean a consistent user interface)

iv) Usable information can be exchanged when required between different systems. This ability is not simply the transport of data between systems but that the data is structured in a meaningful way so that applications can work together.

Practical considerations regarding Open Systems standards

A.3 The above definition raises practical difficulties with some of the currently available products. Some key points are discussed below:

PC DOS. The 'openness' of the PC DOS operating system is taken for granted in terms of off-the-shelf software and portability. This is an example of a proprietary standard which while by its wide adoption has become a de facto standard, it falls short of the essential characteristic of Openness because it remains proprietary. Nevertheless DOS probably needs to form a part of many organisations' IT strategies alongside Open Systems components. Under the EC legislation there should be a strategy to move across to non proprietary standards. It may be some time, however, before there is an equivalent which compares favourably with DOS on costs, so a derogation on cost may be appropriate.

Application Portability - UNIX and POSIX. Where versions of UNIX conform to the internationally agreed POSIX standards for portability they can form an acceptable starting point for migration to Open Systems, although the UNIX interface standard itself is not vendor-independent. Authorities should specify conformance with POSIX rather than a proprietary brand of UNIX in technical specifications.

Transmission Control Protocol and Internet Protocol (TCP/IP) This is an example of an industry accepted standard which has some characteristics of Openness. It is certainly widely available across different vendors' hardware of all sizes. Currently it is the dominant means of proven communication between UNIX platforms and some
non UNIX based systems, but the EC and US Government are committed to move to OSI and authorities must treat TCP/IP with caution, despite claims by suppliers that it could get adopted as an international standard in future. There appear to be areas where TCP/IP is relevant as a short term solution: UNIX database/4GL’s and systems and network management where products with good functionality appear limited to TCP/IP and related SNMP standards. Authorities must not view these as strategic long term options and should avoid products that do not offer migration to OSI (see CCTA IS Notice no 27 'Towards Open Systems, The CCTA Migration to OSI Programme’). TCP/IP does not meet the requirements of the EC legislation and can only be specified with a justified derogation and strategy for migration to OSI.

**Graphical User Interface (GUI) standards.** This area is related to portability of applications and retaining a consistent 'look and feel'. A number of emerging standards have different degrees of market acceptance and none are yet internationally agreed, so there is a difficult choice to make. Pending agreement on international standards which are probably some years away, organisations need to select the most appropriate to current needs. Alternatives include various products like MOTIF and OPEN LOOK.

**X-Windows** This is not yet ratified by ISO but has considerable industry weight and is not controlled by a single supplier. It is therefore considered by many as a valid Open Systems standard and it could be used by local authorities.

**Added Value Features and extensions.** Products that go beyond agreed standards by means of proprietary extensions to give ‘added value’ must be treated with caution as there are risks that these could limit the portability of software or the ability to inter-work with other systems. The value of such features must be carefully assessed when considering supplier and product selection. Any subsequent use of such facilities must be controlled with care to avoid being locked in to a single supplier or product line.

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**IT infrastructures**

A.4 IT procurements should be thought of as building blocks that complement past investments and provide foundations for the future. This requires some form of IT infrastructure or framework that allows this process to be coordinated. The infrastructure must be defined in terms of the standards to which the components must conform. To extend the building analogy, this could be the size of the bricks and thickness of the mortar The infrastructure can be broken down into key areas:

- Basic Operating System
- Data management
- Data structures
- User interfaces
- Network infrastructure

A.5 With a traditional single supplier system, the standards within each area are of little concern in the purchasing process. As organisations seek more flexibility and improved cost effectiveness from greater freedom of choice and increased competition then the standards adopted by an organisation must be defined in each infrastructure area. This allows the task to be broken down into more manageable parts and for a phased or migration approach to be adopted.
Key standards for inter-working

A.6 At the present time it is becoming possible to acquire products that conform to certain key standards which can enable authorities to realise the benefits of Open Systems particularly in the areas of inter-working and application portability. As standards develop and products become available further areas will be covered. These sections seek to indicate the key standards in the areas currently covered and touch on development in other areas.

A.7 Open Systems Interconnection (OSI) is a set of internationally agreed and accepted standards to enable systems to communicate and inter-work in a uniform way, irrespective of the physical connections used. The OSI standards conform to a seven layer model in which the lower layers (1-4) are concerned with the generic problems of the 'transport' of data between two systems while the upper layers (5-7) are related to specific 'application services'.

A.8 Transport services are generally synonymous with different types of network: Local Area Networks (LAN) or Wide Area Networks (WAN), or as network services like packet switching (X25) or ISDN. These can all be defined using OSI terms or standards that are internationally recognised and allow products to be supplied that can be linked together.

A.9 Application services can similarly be grouped into terms or sets of standards that perform different functions, either at a basic services level or at a more specific application level. Examples of the former include:

- File Transfer Access and Management (FTAM)
- Virtual Terminal (VT)
- Message Oriented Text Interchange System (MOTIS) (x400)
- Directory (x500)
- Job Transfer and Manipulation (JTM)
- Distributed Transaction Processing (TP)
- Distributed Office Applications (DOA)

More specific examples include:

- Office Document Architecture (ODA)
- Standardised General Markup Language (SGML)
- Electronic Data Interchange for Administration Commerce and Transport (EDIFACT)

In addition there are standards for management of systems:

- Common Management Information Services (CMIS)
- Common Management Information Protocols (CMIP)
- Systems Management Overview (model for SMF and SMI)

A. 10 Profiles are functional sets or 'stacks' of standards that are defined by interest groups to meet specific requirements. Profiles reduce the large permutations of options possible within the defined standards to a subset or profile that can them be implemented by suppliers in the knowledge that products that comply with the profile are more likely to inter-work successfully. As far as the UK and local government is concerned, advantage can be taken of the work of central government in developing the Government Open Systems Interconnection Profile (GOSIP). There are generally four broad areas of profiles, each with a corresponding letter:

- F - Formats and methods of representation
- A - Stacks for Application services
4. The EC directives Annex 4.2

T - Stacks for Transport services
S - Support Services

Key standards for applications portability

A. 11 The portability of applications (from one processor to another) is primarily concerned with the interfaces between the application and the platform or environment in which it is running. This platform includes the operating system and related hardware and could include related services like database management and communication. The desirability of applications portability has led to the definition of the POSIX set of standards by the IEEE (1003) and these have been taken up by ISO. They are derived from the proprietary operating system UNIX but are intended to be independent of the underlying platform and could be supported on a wide range of systems, not just those derived from UNIX. However the closeness to UNIX means virtually all UNIX suppliers can make the changes necessary to conform to POSIX if they choose to. So far, one POSIX standard has been fully approved and it only covers applications written in the 'C' language. Other POSIX standards in development include: Utilities Verification testing, Real time extensions, Trusted system extensions, Networking Systems administration, Open Systems Guidelines

Key standards for data management

A. 12 Standards for data management cover the areas of Database Access Languages, Data Dictionary and Distributed operations, and include: Network Definition Language (NDL), Structured Query Language (SQL), Information Resource Dictionary System (IRDS) and Remote database access.

Key standards for user interfaces

A. 13 Windowing techniques are relatively new and no international standards have yet been agreed, but graphical standards exist for applications interface, graphics transfer between systems and for device interfaces including the following: Graphics Kernel System (GKS), Programmers Hierarchical Interactive Graphics System (PHIGS), Computer Graphics Metafile (CGM) and Computer Graphics Interface (CGI)

Other standards

A.14 Security, in terms of access control, is an important area particularly with Open Systems and wider access. OSI standards cover this requirement under IS 7498 part 2 which defines the security mechanisms of the various layers and security services generally, including authentication, access control, encryption. Quality management covering the entire organisation from marketing to manufacture, distribution, and after sales service, can be covered by the ISO 9001 set of standards or the European equivalent EN29000. There are specific applications of quality management systems to IT areas like software development under the Department of Trade and Industry (DTI) TickIT scheme.

ESTABLISHING CONFORMANCE TO STANDARDS

The requirement for product testing

A. 15 The EC drive towards open systems and products based on common technical specifications, European or International Standards, is dependant on procurement processes being able to ascertain that products do conform to the standards required and will inter-work satisfactorily. The move from a market dominated by proprietary standards to one of multi-vendor 'plug and go'
flexibility and choice depends on establishing such conformance. The UK Government OSI Profiles (GOSIP) Procurement handbook (GOSIP/PROC/5 8/91 Annex T) identifies the need for product testing to provide a basis for contractual agreement and to give confidence that a product will actually inter-work effectively with other similarly tested products, both current and future, under a variety of operational conditions.

A. 16 It must be recognised that simply demanding conformance to standards in a technical specification is insufficient to give adequate confidence. Hard evidence of testing is needed. Normal acceptance tests conducted by the customer are inadequate for this purpose for two major reasons: firstly, many standards are concerned with communications and safeguards against problems or errors which cannot be readily reproduced in a normal environment and secondly, the main interest in procurement is not just communications in today's environment but in new, as yet undefined, systems in the future.

**Conformance testing**

A. 17 Conformance tests are designed to test a product against a published standard in order to determine the degree of conformance with the standard, sub-profile and options claimed by the supplier. Conformance testing does not assure inter-working of any two products but it is unlikely to be successful using a product that does not conform. The ISO standard 9646 defines a conformance testing methodology and framework to ensure that conformance tests are based on tightly defined methods, give objective results, under approved procedures that are thorough reproducible and fair, so that the test results can be used to provide certification of products, and can be relied upon by purchasers. The European Committee for IT Testing and Certification (ECITC) is working to establish the harmonisation of testing and certification schemes within Europe and EFTA countries.

A. 18 There are a number of organisations and consortiums of testing laboratories offering testing services to IT suppliers. These services are based on standard test specifications, the same or equivalent tools, the same test procedure and the same reporting mechanisms. Other organisations including the Corporation for Open Systems (COS) and Standards Promotion and Application Group (SPAG) have similar aims, and there is some prospect of world wide harmonisation via the Technical Level Feeders Forum (TLFF). Some suppliers may offer purchasers the results of their own testing or consortium branding of their products. While these have similar aims they may lack the independence of the third party testing, and the integrity of certified laboratories.

A.19 It is important to appreciate that the availability of conformance testing is still limited to established and widely used standards. This is in part a natural consequence of making the laboratories (like the NCC Open Systems) self financing so that they can only offer test services for which the demand is adequate to ensure they will be viable. The Networking Centre (TNC), which used to offer OSI test services, is no longer in operation. While 'technically impossible to establish satisfactory conformance' is a possible derogation under EC legislation (see SI 2679 regulation 8(4)(b), any authority relying on this would need to be confident that it could not be challenged, for example by proof of the existence of a relevant test service somewhere in Europe. Improvements in this situation are in the hands of the customers who by their insistence on seeing test
reports will motivate suppliers to make more use of test services. So it is a classic case of chicken and egg.

A.20 There are now significant areas where tests are available for local authorities to start to take advantage of them, and put pressure on suppliers to test their products. In the UK the NCC and BT offer testing services to European and US requirements. The NCC is 'accredited' by the National Measurement Accreditation Service (NAMAS) for many of its testing services, so they are mutually recognised by other centres especially in Europe. For the United States COS has similar licensing criteria. Test results from laboratories with test services approved under either scheme should represent a trustworthy judgement of conformance.

A.21 The NCC is primarily concerned with upper level testing but can arrange lower level tests with EUROLAB in France. The POSIX (ISO 9945-1) service was officially launched on May 6th 1992.

### GOVERNMENT OSI PROFILES (UK GOSIP)

<table>
<thead>
<tr>
<th>GOSIP A Application</th>
<th>FTAM (ISO 8571)</th>
<th>available</th>
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<tbody>
<tr>
<td></td>
<td>MHS '84 (x400)</td>
<td>available</td>
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<tr>
<td></td>
<td>MHS '88 (x400)</td>
<td>due in summer 1992</td>
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<td></td>
<td>Directory Services (x500)</td>
<td>due in summer 1992</td>
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<tr>
<td></td>
<td>Terminal Support</td>
<td>not available - work in progress</td>
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<tr>
<th>GOSIP T Transport</th>
<th>LAN: Ethernet 802 - 3</th>
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<tr>
<td></td>
<td>Token Ring 802 - 5</td>
<td>not available</td>
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<tr>
<td></td>
<td>FDDI</td>
<td>not available</td>
</tr>
<tr>
<td></td>
<td>WAN: X25</td>
<td>available</td>
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<tr>
<td></td>
<td>Transport Protocols</td>
<td>available</td>
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<table>
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<tr>
<th>GOSIP F Format</th>
<th>ODA and ODIF (ISO 8613)</th>
<th>available</th>
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<tr>
<td></td>
<td>EDI and EDIFACT (ISO 9735)</td>
<td>under development</td>
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<tr>
<th>GOSIP S Support Services</th>
<th>Addressing</th>
<th>Not available</th>
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<tr>
<td></td>
<td>OSI Management CMIP (ISO 9596)</td>
<td>ongoing project to 1993</td>
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<tr>
<td></td>
<td>Security</td>
<td>Not available</td>
</tr>
</tbody>
</table>

Currently GOSIP test services are available for GOSIP 3.0, 3.1 and 4.0 (although GOSIP 4 has been published for some time, few suppliers have products on the market).
OPEN SYSTEMS INTERCONNECTION (OSI) Conformance Test services available:

- OSI - Transport from NCC
- Session from NCC
- FTAM from NCC and BT
- MHS'84 (X400) from NCC and BT
- CLNP (connectionless mode network protocol) plus access to lower layer test services from NCC

Non-OSI conformance testing available:

- COBOL, FORTRAN, ADA compilers from NCC
- POSIX (European and US) from NCC
- XPG testing from NCC
- ODA (Open Document Architecture) from NCC
- GKS (Graphical Kernel System) from NCC
- Pascal and C Compilers from BSI from NCC

Interoperability testing

A.22 This differs from conformance testing in that in place of a test engine monitoring the behaviour of one product under test, two products are tested working in an operational mode. In United States the COS has introduced their COS mark for ‘approved’ products and this is awarded to products that have demonstrated inter-working with other suppliers’ products. In Europe SPAG has a new initiative ‘Process to Support Interoperability’ or PSI - a code of conduct to ensure vendors develop products with a higher chance of inter-working and PSI is involved in development of tests suites. EurOSeNet is one of many forums for multi vendor cooperation with practical demonstrations. However, these are based on specific products and claims of general ‘vendor to vendor’ inter-working may not relate to the actual products that a supplier has proposed to meet requirements. NCC offers interoperability testers as aids to integration and fault finding for purchasers.

Acceptance testing

A.23 Acceptance Testing is still important as this checks the specific versions and installation options for the products implemented in the authority’s own environment and should not be ignored in any IT procurement, even if conformance test reports and interoperability demonstrations have been favourable.

Implication for IT procurement procedures

A.24 The services offered by Testing Laboratories like the NCC can be used in various aspects of procurement including: staff briefings, preparation of Operational Requirements (OR) documentation, preparation of instructions to suppliers, evaluation of supplier's responses, acceptance test planning and interpretation. These services, together with conformance test reports, can be used for:

Short-listing When short-listing suppliers or in the criteria for rejection of suppliers (see Part IV of SI 2679), it should be possible to request relevant
conformance test reports from the supplier, preferably from an accredited laboratory.

*Technical Specification Validation* When using GOSIP profiles in the technical specification the supplier should be asked to complete the relevant Protocol Implementation Conformance Statement (PICS) supplied with the GOSIP handbook. The supplier should tailor his completion of the PICS to the mandatory features and options which the authority indicated are required. A conformance test report can then be used to see if the product conforms to the features claimed by the supplier.

*Interoperability tests* If integration is an essential requirement, interoperability testing or demonstrations should be sought. Testing laboratories can offer tools and consultancy and advice in this area.

*Final acceptance and payments* Acceptance testing should be carried out on the specific products proposed, to further improve confidence. Tools and advice are also available from testing laboratories. An example of a tool would be the OSI monitors from NCC. These are able to analyse and decode the OSI upper layers in real time and work on PC or SUN workstations.

*In case of dispute* The Open Systems Testing Consortium (OSTC) recognition agreement requires that laboratories concerned will investigate any dispute. So while testing does not guarantee products will inter-work, if problems do arise the third party organisation who conformance tested the product may be a useful ally or arbitrator in case of disputed faults, or an ‘expert witness’ in a legal case.

**Contacts and reference material on product testing**


A.26 NCC Open Systems can supply details of their test products and services. Contact: Judith Sutton on 061-228-6333

A.27 The UK signatory to ECITC is the British Standards Institute (BSI) within BSI DISC is the organisation responsible for IT standardisation. Contact: The DISC testing and certification group, BSI/DISC, 2 Park Street, London W1A2BS tel 071-629-9000
5. IT contracts - a legal view

The need for a contract

1. A contract is made whenever one party offers to supply something for a price and the other party accepts. It does not have to be in writing and so whenever an organisation buys IT it will be entering into a contract.

2. The terms of that contract do matter and so should be clearly stated in writing. Acquiring information technology can be a fraught business and problems may arise if not enough thought goes into specifying what is wanted and drawing up the contract. The purchaser may find it has contracted to buy the individual components for a ‘system’ but with no contractual commitment that they will communicate with each other - or find after contracting that the system needs additional highly expensive items but the budget for purchasing the system has been exhausted.

3. IT procurement can be a risky enterprise. It involves acquiring a complex bundle of products and services, possibly not all supplied by the same source, which need to be knit together to meet a purpose which must continue to be met for a number of years and must continue to be managed contractually. Suppliers do not underestimate this problem; long ago they ceased supplying on the basis of fitness for purpose (that is to say they stopped warranting that the IT they supplied would meet the purpose for which the purchaser was buying it) and now sell only by description. Buyers can find too that IT procurement does not live up to expectations, particularly where leading edge technology or bespoke development is concerned.

What is a low risk contract?

4. Two examples might be:

   the purchase of a small stand-alone system, which the purchaser has observed extensively in full use elsewhere and is satisfied on detailed inspection will meet its requirements; or

   the purchase of a stand-alone PC or low value off-the-shelf applications.

5. Once there is a need to link equipment and software packages together or to write new software then complexities can arise but thorough contractual negotiation can identify potential problems and reduce (but never entirely eliminate) risks.

6. Quite apart from the practical need for a clear contractual framework, there are two sets of legal rules which have to be followed: EC Directives and Standing Orders (discussed further in Chapters 4 and 6 respectively). The Supplies Directive has now handed down in secondary legislation The Supplies Regulations 1991. If these rules are not observed, there is a risk of legal challenge which could seriously delay the acquisition process and could result in a court order either suspending the contract process or awarding damages to a disappointed supplier. In summary, contractual negotiation is the most precise method available for evaluating the contents of a supplier’s proposal and risks to
the purchaser. The relevant legal or IT procurement specialist resource may be scarce and expensive and it may be that the value of the procurement does not seem to be high enough to warrant that degree of input but it is important to assess the scale of the risk. The purchaser may feel sufficiently comfortable in relying on a supplier's good name to resolve any difficulties. This should not be underestimated; reputable suppliers do take their reputations seriously and will say (and mean it) that the contract terms do not matter to them as much as their desire not to have highly dissatisfied customers. This is however an uncertain factor in the equation since no supplier will commit itself in advance to bail out a procurement which has gone wrong.

7. Its most important function is to match expectations. The purchaser and supplier then both know what is to be supplied for what price and their respective responsibilities. Suppliers often complain that purchasers underestimate the burden that lies on the purchaser in implementing any IT procurement. Purchasers often complain that they have been led to believe that implementation will be straightforward. It is that kind of unacknowledged risk or cost that causes both purchasers and suppliers unnecessary problems.

8. It enhances the chances of implementation rolling out smoothly. It is a rare IT implementation that is trouble-free. There are almost always problems and it is better to identify these at an early stage when there is goodwill between the parties and to decide how those problems will be handled if they occur, rather than to leave them to be discussed when acrimony and bitterness have come into the picture.

9. It takes care of post-implementation needs. A proper set of contractual documents will take into account not only hardware and software requirements but consultancy and training needs and more important the ongoing maintenance requirements for hardware and software. It is vital that this service is set up correctly so that the full value of the investment can be realised over the succeeding years.

10. It is a foundation for negotiation if the implementation does not proceed as expected. If significant problems occur, then both parties will (possibly without acknowledging this to each other) look at the contract terms to determine the respective strength of their negotiating positions. If the contract clearly defines what is to be supplied to what quality by what date, the purchaser can be more forceful in demanding a proper solution to any problem.

11. It provides a long-stop protection (the basis of litigation or other disputes resolutions procedures) if all goes wrong.

12. Almost always suppliers sell by description, usually by reference to the product description prepared by the supplier. If a purchaser contracts on that basis, that is all it has a right to expect.

13. Entire agreement clause: This states that only the contents of the written contract have contractual effect. This means that any representations made by any salesmen orally or in any external document (such as a proposal) do not form part
of the contract. So if a salesman advises that he is sure that his company’s Office System will fit in very well with a purchaser’s requirements and its current peripherals and printers in use, but it turns out in fact that the buyer’s entire office administration has to be reorganised and the peripherals mothballed, the purchaser may have no claim under the contract. It may be that a legal argument could be mounted that any such representation - even if not made deliberately - amounted to a misrepresentation entitling the purchaser to have the contract set aside or to receive compensation (under the Misrepresentations Act 1967). Alternatively the purchaser might argue that the representation gave rise to a separate ‘collateral’ contract (running alongside the main contract); essentially the purchaser agreed to enter into the main contract in return for the representation made by the salesman about the product. The supplier could then be held liable under the collateral contract in respect of the representation. However, a purchaser should not rest content with the possibility of raising legal arguments later in the day if all goes wrong. This is not a safe and straightforward option. The purchaser will be on much stronger ground, if a complaint needs to be pursued, if care has been taken before purchasing to ensure that any necessary assurances are included in the contract in clear terms. If the supplier’s terms include an entire agreement clause, should the purchaser seek to have it deleted ? Not necessarily so. Such a clause need not be regarded as simply a devious move by a supplier to nullify all the representations a salesman makes. It can turn out to be a trap for an unwary purchaser but, properly used by mature contracting parties, it serves to focus everyone's attention on defining clearly what is to be supplied. As a tool promoting certainty, it can be used safely and to the advantage of both supplier and purchaser.

14. There is never an undertaking to have a system up and running by a certain date and rarely is there a guarantee to deliver a piece of kit by a specified time. Again, if a purchaser makes clear to a salesman that a certain deadline is of vital importance and the salesman assures the purchaser that this deadline can be met, the purchaser will have no right to complain if this has not been included in the contract and there is an entire agreement clause.

15. Generally, suppliers do not offer performance standards for a system. There may be some technical information about hardware power but this type of detail does not usually give a purchaser the sort of performance assurances that it needs - will the system support a specified number of users and produce certain basic response times? In order to terminate a contract for fundamental breach a purchaser would have to demonstrate not just that the performance was poorer than expected but that it had not been supplied the type of goods for which it had contracted - that it had not been supplied with a computer but a meaningless set of electronic gadgetry. Suppliers’ software licences sometimes purport to restrict purchasers’ freedom to make copies of software and to disassemble the code. The EC Software Directive strengthens the purchaser’s position in this respect. Licensees are now empowered to make such copies as are necessary for normal operational use and for security. Purchasers are also allowed to examine programs to the extent necessary to achieve operability with an independently created program.
16. Suppliers' contracts usually limit suppliers' responsibilities quite severely. Typically they accept responsibilities that they cannot avoid at law (liability for death or personal injury) and as little other responsibility as possible. A supplier may offer to repair certain defective hardware items within a specified period or to remedy certain defects in software, again within a specified period. These 'warranties' are intended to limit the purchaser's remedies. A supplier may accept in addition liability for direct damage to property. (This is generally done to demonstrate a measure of 'reasonableness' on the part of the supplier, so that if a court was asked to rule on the legitimacy of the clause limiting the supplier's liability, it might find it harder to strike down the clause on the grounds that it was an unreasonable standard term - see further below.) Typically all other responsibility under the contract or in negligence will be excluded. Indirect loss (consequential, economic loss) is usually excluded. Often a supplier will limit to property its liability for direct loss. This may not be the most significant aspect of direct loss which a purchaser suffers if the computer implementation goes awry. So if a purchaser is able to terminate the contract for fundamental breach, and then tries to claim for all the direct loss of staff time (in letting the first contract and dealing with its abortive implementation), extra maintenance costs on old systems etc, it might find that such a limitation of liability clause would bar this claim. In addition, suppliers often seek to exclude liability for misrepresentation (and in respect of terms as to the 'merchantability' and 'fitness for purpose' of the product that might otherwise be implied into the contract by law). There is legislation which protects consumers from unfair contract terms, but it must be doubtful that a local government purchaser would count as a consumer in these circumstances. It may be possible to attack these clauses if they are unreasonable and the purchaser has accepted the supplier's standard terms and conditions but this is not necessarily straightforward. Again the best course of action is to examine the contract terms carefully and amend rather than seek to rely on legal arguments to improve the position later in the event of a dispute.

17. A reasonable compromise as to the types of loss that can lawfully be limited or excluded might be: Accept exclusion of indirect (consequential) loss and agree a figure limiting liability for direct loss, bearing in mind both the value of the contract to the supplier and the risks to the purchaser of the deal going awry. (What loss arises if the purchaser's computer suite burns down or other software is corrupted unintentionally by a virus?) Such an approach promotes certainty for both sides. Certainty as to obligations encourages the supplier to price the contract correctly and meet its contractual obligations.

18. A common feature of suppliers' terms and conditions is that the hardware and software are supplied as two separate contracts. The contracts are not usually linked. This means that the purchaser has contracted for hardware which functions in accordance with the supplier's product description and software which functions in accordance with its product description. There is usually no contractual guarantee that the hardware and software work together, that they are a system. Meanwhile, this is what the purchaser thinks it has bought. This type of contract is really a disservice to both parties, since it leaves unresolved the main issue and just invites a highly acrimonious dispute.
19. An unconsidered acceptance of unreconstructed suppliers' terms and conditions is likely to cause problems for the buyer. An untypical situation may be:

An organisation may take a lot of care in deciding to set aside budget for an IT procurement.

It may be anxious to press on fast because its old system is wearing out.

It may, perhaps as a result of the urgency, fall into buying on the basis of a supplier's proposal which is full of warm but vague assurances and representations from the salesman.

The organisation signs the supplier's terms and conditions, thinking it has bought a system but in fact it has contracted for certain specified items of hardware and certain, not necessarily related, software products.

The components are then delivered late and the supplier and purchaser struggle for a long time to make them work together.

They eventually come to the conclusion that the peripherals which had been expected to work with the new system have to be abandoned and that eventually the functions of the new system can be made to operate but the response times are so appalling that users complain loudly.

The problems stagger on in an unsatisfactory fashion for 12 months and subsequently it turns out that the company's American parent company has decided 'to rationalise its product line' and has assigned all its contracts relating to this new software product to the Cut-and-Run Computer Company. The Cut-and-Run Computer Company promptly exercises its rights under the software maintenance contract to terminate the software maintenance contract by giving two months' notice. It does not however wish to terminate the hardware maintenance contract which still has another five years to run.

20. Fortunately few suppliers are as unscrupulous as the Cut-and-Run Computer Company. Most are keen to keep their customers happy and maintain their customer base. A reputable supplier may well prefer to put in extra help to overcome the problem. But this is not a comfortable position for a purchaser to be in - dependent on goodwill and favours with a limited negotiating position.

21. However, one main point of the Cut-and-Run example is that not all problems are soluble and, unless these matters are laid bare in contractual negotiation, it can happen that no-one, purchaser or supplier, in good faith realises the problems at the outset. This is particularly a risk where leading edge technology is being supplied. In those circumstances a supplier may be unwilling to try to fix the problem.

22. A supplier will also be unwilling to put a large amount of resources into solving a problem which it may not regard as its responsibility, especially when it does not have a contractual obligation to do so.

23. The answer must be yes for a number of reasons. First of all it is in no-one's interest for there to be a one-sided contract. It is much better that both parties know of their respective obligations and benefits and that the contract is properly priced and structured accordingly. The current climate in the market place is also
making it more difficult for suppliers to refuse to negotiate. It is now beginning to matter that they have a bad name in this respect. There is also increasing pressure from the EC Supplies Directive/Regulations (and proposed Services Directive) for equal treatment of suppliers. Accepting substantially different contract terms from one supplier amounts to unequal treatment of its competitors. Local authorities and other public sector bodies will shortly have to face up to this problem; one way forward is to negotiate a single set of contract terms with shortlisted suppliers, put those out to final tender, and refuse to accept any further amendments. This ensures that all contractors are treated equally. It also means that no supplier’s terms could be used for the purpose (see para 54 below). What is needed is sufficient maturity within the industry between purchasers and suppliers for the emergence of broadly acceptable terms and conditions.

24. Shrink Wrap Licence conditions represent a particular problem. Here the general procedure is that a notice on the package alerts the purchaser to contractual terms and conditions contained within. The purchaser is warned that if it opens the package it will be deemed to have accepted those contract terms. It is not clear that this is contractually effective but it is best to beware. These are almost always drawn in the most restrictive terms. An extreme example of this type of licence and its risks was recently disclosed by the circulation of ‘an Aids information disk’. This arrived by mailshot to IT professionals who were warned to read the licence terms before using the disk. However, people inserted the disk first and subsequently found that it contained a virus to be activated unless a licence fee was paid in accordance with the licence conditions. The moral of the story applies to all IT contracts - read now or pay later.

25. The first pre-contractual stage is to define the organisation’s business requirements. When those have been done, these should be transformed into a technical specification of requirements enclosed in the invitation to tender. It is not sensible for a purchaser to invite a favoured supplier to define the purchaser’s specification for it; this is simply inviting the supplier to assess the organisation’s needs and write a specification in a way which produces a predetermined solution - the offering of the supplier. Technical help is also needed to assess suppliers’ proposals submitted in response to the invitation to tender and to produce a final specification which sets out as clearly as possible what the supplier will supply. A vague or ambiguous specification is about as much use as no specification.

26. An experienced IT legal specialist can help focus the negotiating process if called in early enough in the procurement cycle. Such a resource is usually a small fraction of the total procurement cost and should be regarded as a form of insurance. The advice of an in-house IT specialist or advice from some external procurement consultants devoted to local government can be cost-effective. IT law is a growing specialism within legal private practice but will not be found in all firms, especially provincial firms. Check that the nominated lawyer does specialise in IT work but they are, however, expensive and a quote should be secured in advance. (A quote should be secured from any consultants; lawyers are reluctant to quote a fixed fee and usually charge on a hourly basis. The charge is related to the seniority of the lawyer involved. Sometimes a percentage charge is added on top to reflect the difficulty or value of the matter.)
5. IT contracts - a legal view

27. Another possible avenue is to use some of the precedents that are available (for example the IPS Model Conditions, the AMA Contract Conditions, precedents contained in the back of Morgan and Steadman Computer Contracts published by Longmans). It is however unwise simply to copy a model contract; a person experienced in drafting and negotiating contracts needs to consider to what extent that contract should be adapted for the procurement in hand. Use of a bad or an incomplete precedent can cause its own problems.

28. A contract can rarely be short and simple and indeed it is more difficult to draft an effective short contract than a long one. However it is important to focus on the commercial reality and identify the main risks which must be covered. A voluminous contract is not a substitute for a properly drafted contract which identifies the main issues and deals with them.

Contents of an IT contract

29. There are many different types of IT contracts - for hardware and software, either separately or in combination, maintenance for hardware and software, the hire of staff, the writing of bespoke software or providing other services such as facilities management. A contract for the purchase of a system (that is hardware and software working in combination) provides good examples of the things that need to be covered.

The main terms that need to be included in a system supply contract.

30. The contractor's prime duty

30. The contractor shall provide the product/system to meet the requirements of the specification. The specification is a key document which must be part of the contract and which must define the functional requirements of the system and its performance requirements. Any representations made by the supplier whether in its proposal or orally by its salesmen, must be included in the specification.

Implementation plan

31. Careful attention should be paid to the implementation plan which should set out the series of events for satisfactory completion of the installation of the product or system. It should deal with the responsibilities which lie on the purchaser as well as the supplier and specify the dates by which these are to be performed. It should also specify the dates of acceptance tests and performance payments. (See below).

32. The supplier should be asked to deliver the required goods in accordance with the implementation plan. This should set out the supplier's obligations, the times they are to be performed and also the obligations on the purchaser, to avoid arguments later. Suppliers may be reluctant to guarantee contractually delivery dates (that is, making those times 'of the essence' of the contract, breach of which gives the purchaser the right to terminate) but an implementation plan does two things: first of all it helps to match the expectations of the supplier and the purchaser and to make it clear to the supplier that the purchaser is serious about the delivery dates; secondly, it provides a springboard for action in the face of delay - the purchaser can serve a notice requiring the supplier to deliver the goods within a specified (reasonable) period, failure to comply with which could be treated as failure to deliver in accordance with the contract.
33. It may be possible to persuade the supplier to accept some liability for late delivery in the form of payment of liquidated damages for failure to deliver by a specified completion date, provided the supplier is given a sufficient time buffer. Liquidated damages must be a genuine pre-estimate of the loss which the purchaser will suffer; an estimate can be made even if it is not possible precisely to quantify those damages. However, the clause must not in fact constitute a penalty, a sword of Damocles over the supplier’s head, or it will be void. Such a clause, however, does help to focus the supplier's attention on the contract. Factors which could be considered in estimating such losses might be extra maintenance charges on the system which is being replaced, lost staff time, loss of income or necessity to borrow caused directly by failure to deliver eg a Community Charge/Council Tax system on time, etc. Local authorities cannot usually show loss of profits which have been suffered because the system has not been installed in time.

34. The implementation plan should also include test procedures. These should be specified in more detail in other clauses in the contract and linked to payment. Tests could be considered to check that the functions actually work, that the system is reliable over a period (it achieves a certain number of consecutive days clear run or that down time does not exceed a certain percentage over a specified period) and full load tests to test whether the hardware, in conjunction with the software, is capable of meeting specified response times for a specified number of concurrent users or transactions. Suppliers fight shy of full load tests but can be persuaded to accept them if the tests are not unreasonable. The purchaser should not be seeking to test that the system delivers the absolute split second response but that it does not for example deliver response times of 15 seconds where a response time of two seconds would normally be expected. Ideally the full load test should be done when the system is up and running with live data and real users; this may not be possible and, as a substitute, it is possible to simulate full load tests. The danger is that the simulations may not be completely realistic. The contract should reserve final acceptance of the system until it has been possible to conduct these tests in a live situation.

Payment terms
35. The more money that can be linked, as provisional performance payments, to satisfactory completion of deliveries of items useful in themselves, the better. Thus link performance payments to testing and acceptance procedures. Consider provision for a bonus for more-than-satisfactory performance - delivery and satisfactory running ahead of completion targets. Given the problems of securing successful installation of any computer system, this should not be regarded as a luxury. It may actually serve to reduce the cost to the authority in wasted and frustrated staff effort. There is a great danger when procuring IT that the budget is trimmed in certain respects (for example, necessary project management which may not seem necessary when the supplier and purchasers are all hoping for an easy implementation) so that more money can be spent on the hardware. This can be false economy.

Project Management
36. This is sometimes forgotten in a contract. It is a vital ingredient for successful implementation. If there are clear procedures and responsibilities on both parties
to manage the implementation, there is a higher chance that the implementation will proceed as planned. At the least, the authority should require the supplier to provide a fully qualified and experienced project manager, not to be replaced except by an equally qualified person who has been fully briefed. The authority's project manager should also be specified; this should be someone who controls sufficient budget and has sufficient authority to agree to necessary changes as the implementation proceeds. A supplier might actually agree to name a particular project manager; if a supplier's representative has been particularly impressive during the procurement process, an authority might wish to try for this to preserve its confidence that the implementation will go as smoothly as the procurement process implied. Of course, any naming of a project manager would have to be subject to a procedure for changing that person with consent, such consent not to be unreasonably withheld (for example in the case of that person's change of employment and a suitable successor being offered).

**Change control**

37. This is the IT name for a variations clause. The purchaser or supplier may find in the course of implementation that there is a better way to achieve a particular result than that laid down in the specification; or it may transpire that the specification was ambiguous, with the purchaser meaning one thing and the supplier understanding a different requirement. There are three ways of dealing with this: have no contractual procedure and simply deal with it informally (which stores up argument when it comes to payment); have no contractual procedure and end up in a deadlock; have a contractual procedure whereby the purchaser asks the supplier for a quotation, the supplier furnishes this, stating the nature of the work to be done and consequential adjustments to the contract terms; and the work is not to be varied unless the purchaser accepts the supplier's quotation.

**Warranties and conditions**

38. There is a crucial distinction between a condition, breach of which entitles the innocent party to terminate, and a warranty, which does not give rise to a right to terminate, simply to the right to sue for damages. Those requirements which amount to the key components of the system should be defined as conditions such that it is clear that the purchaser can terminate because this is not the system that it contracted for. Other matters can be treated as warranties - this is the system that was contracted for but it was not completely satisfactory and so the purchaser should be entitled to compensation. Usually suppliers only offer warranties and those in respect of limited matters. Warranties and conditions in this context should be distinguished from warranty periods which are usually a means by which a supplier limits its obligations - namely that it will remedy certain defects which occur within a certain specified 'warranty' period. It is sometimes helpful to define the conditions as a separate list of conditions - events of default - which allow termination forthwith. These might cover:

- assignment of most of the supplier's assets devoted to the business relating to the contract;
- failure to meet performance levels specified within a month of going live;
- that the description of the system is a complete statement of all the components necessary to produce a live and working system meeting the requirements of the specification (so that the purchaser does not
find it needs a particularly expensive form of computer table or platform to hold the hardware for example). Alternatively this might be covered adequately as a warranty.

39. A purchaser may wish to seek warranties to the following matters:

- warranties as to compatibility between components or with other peripherals, or adherence to a specified level in the EC rules as to OSI, and to any development plans that have been extracted from the contractor;
- warranties that the system components will perform the functions at the specified response times for a certain number of concurrent users/transactions for a certain period of years after acceptance, in accordance with information from the purchaser estimating growth needs for the new system. (The last warranty is designed to prevent a supplier winning on the basis of a low priced, under configured, system, which does not have the necessary room for growth);
- warranty that the supplier has the right to license to the purchaser the software comprised in the system (this warranty might be defined instead as a contract condition);
- warranty that the supplier should use good quality materials and apply the best professional techniques and standards and execute the contract with the care, skill and diligence required in accordance with the best computing practice.

**Restrictions on assignment and sub-contracting**

40. If there are no restrictions in the contract as to assignment or sub-contracting, the supplier is free to assign the contract to anyone it likes and to sub-contract the whole of the work. This is not usually a satisfactory position for a purchaser. (A supplier's terms and conditions will usually restrict assignment by the purchaser. The omission of a similar restriction on a supplier is easy to overlook.). There are many ways of dealing with this. One way is to restrict the supplier's rights to do either without the previous written consent of the purchaser (save for minor or incidental matters of sub-contracting). Allowing a supplier freedom to assign in a software maintenance contract should be regarded as completely unacceptable. What can then happen is that the supplier decides 'to rationalise its product line' (that is, ditch the piece of software on which the purchaser has come to depend) and assign the product to its sole competitor. This leaves the purchaser with very little choice but to accept the upgrade path to that competitor's own software.

41. The purchaser's freedom to assign may also be restricted (particularly if the supplier has to accept restrictions). This can be of particular disadvantage in connection with software licences. The purchaser needs to negotiate any necessary rights to deal with, for example, privatisation of units within the authority, opting out of schools and any facilities management arrangements. A right to assign 'subject to the supplier's written consent', even if such consent is not to be refused unreasonably, may be insufficient.

**Disputes procedures**

42. There are three choices in considering whether to establish a contractual regime: One way is to proceed straight to the courts; a common alternative is to specify arbitration. The main difference is that arbitration is private but does not have the thorough set of rules that apply to court proceedings and so provides
more scope for an unscrupulous defender to delay and frustrate the proceedings. Additionally, the services of a High Court judge (but who may or may not be very familiar with IT disputes) come free but those of an arbitrator do not. Another alternative is to provide for a technical disputes procedure by which technical disputes are referred to an expert whose decision is final and binding. This procedure avoids arbitration but allows for court proceedings for other matters. It is thought by some experts to be a quick, effective (and cost-effective) first line of defence.

**Prevention of corruption and other technical clauses**
43. These can be overlooked, particularly the need to include a prevention of corruption clause which most authority's standing orders require to be inserted in written contracts. Other, less technical, matters that may need to be covered are to restrict poaching of staff by the other side and to protect confidentiality of all the authority's information, including personal information and data as defined in the Data Protection Act 1984.

**Limitation of liability**
44. Ensure that any limitation of liability clause proposed by a supplier does not undermine necessary safeguards for the purchaser. (See above - para 16 and 17)

**Termination**
45. Contracts often contain a clause giving a right to terminate if the supplier gets into business difficulties or for failure to remedy a remediable breach of contract within a specified period. In addition specify in this clause termination conditions in respect of major defaults which allow termination forthwith (in particular failure to meet minimum performance levels in live use, within a specified period). Consider also including here rights to terminate for failure to deliver the system by a specified (perhaps 'long stop') completion date (which may be linked to a liquidated damages clause).

**Liquidation protection**
46. It can be disastrous if a supplier goes into liquidation midway through an implementation. In these circumstances the contract could reserve a right to the purchaser to vest the title to the hardware in itself and for an automatic licence to be granted in respect of any software, the purchaser paying a reasonable sum for the exercise of these rights.

**Documentation**
47. The standard of documentation which suppliers produce can vary enormously. It can be worth specifying the documentation which the purchaser expects to be supplied and specifying that all copies should be properly bound up. It is also useful to clarify whether the purchaser has any right to copy that documentation or whether the copies will only be supplied by the supplier at a (reasonable) fee.

**Intellectual property rights indemnity**
48. It is usual for a supplier to indemnify the purchaser against actions for the infringement of the intellectual property rights of any third party, which may be made against the purchaser for using the system. This clause should be scrutinised carefully; suppliers often seek to limit their indemnity obligations,
perhaps to the infringement of UK patent and copyright. Obviously there are wider possibilities than these to be guarded against.

**Maintenance**

49. Third party maintenance can be found for hardware items. The same is not yet true of software items on the whole. If the cost of the purchase is to be written off over a period of years, consider securing a guaranteed maintenance period for software. Generally hardware suppliers like guaranteed maintenance periods because this amounts to guaranteed cashflow for a number of years. Software suppliers do not like giving such assurances and prefer to retain the freedom to ‘stabilise’ products - which means to stop maintaining them. It is not unusual for a software maintenance contract to provide simply for one year's maintenance. This should not be regarded as sufficient protection.

50. A purchaser also needs to be aware of obligations, within a software licence or maintenance agreement, to take upgrades of software, perhaps as a precondition of continued maintenance. The question of compatibility with other software and hardware may also be relevant.

**ESCROW arrangements**

51. Usually software is provided in object code form. The software supplier generally retains the source code in order to protect its commercial investment. This is one reason why it is difficult to find third party software maintenance. What happens if the software house goes into liquidation or simply ceases maintaining the product? Without effective maintenance, a software product very quickly becomes useless. One protection that can be built in in these circumstances is, on the initial purchase, to require escrow arrangements to be established. This is a means by which the software house deposits the source code of the product with an independent third party and keeps it up-to-date. If the software house goes into liquidation the third party releases the source code to the customer. Escrow arrangements can also provide for a similar procedure where a software house fails to maintain the product. The details of escrow arrangements vary and the escrow agreement needs to be read carefully to ensure that it provides adequate protection for a customer.

52. The National Computing Centre provides independent escrow arrangements. Some suppliers dislike escrow arrangements for commercial reasons; it ought to be possible in these circumstances for a supplier to devise a reasonable protection for a legitimate purchaser concern.

53. However the existence of escrow arrangements may not be a complete protection. There may be practical problems in enforcing an escrow agreement. The purchaser may find the deposited software has not been kept up to date. There may also be complications if the intellectual property rights have been sold to another software house or company.

**Negotiation of contracts**

54. Negotiation of the contract terms should not be left until after the specification and the price have been agreed. By then the purchaser's negotiating power will
have evaporated largely. Consideration should be given as to how and when to negotiate the contract terms so that the requirements of the EC Supplies Directive/Regulations - and perhaps by July 93 the EC Services Directive - (where applicable) are met (that is to say, for purchases exceeding £141,431 in a single purchase or aggregated annual value). One way may be to negotiate a single set of contract terms with shortlisted suppliers, put those out to tender, and refuse to accept any further amendments. This ensures that all contractors are treated equally but does increase the amount of legal work needed. The important thing is to develop a procurement contract negotiation strategy which treats all suppliers equally within the framework established by the EC rules.

Renewing Contracts

55. The question of upgrade (if it can be defined satisfactorily) should be included in the original contract terms to preserve as much freedom of manoeuvre as possible under the EC Supplies Directive/Regulations (and Services Directive). It may be possible to negotiate an upgrade with the original supplier using the negotiated rather than the open or restricted tendering procedure. This is less complicated for a purchaser but the precise wording of the Directive/Regulations has to be considered in each case to be satisfied that the facts of the upgrade fall within the tightly drawn terms of the exception. Thought should also be given to making long term contracts for services (which run on until terminated at the option of the customer - and supplier).

Ending Contracts

56. Litigation is a last resort in specialised computer matters and will cost about twice as much as ordinary litigation because of the complex evidential questions that arise. It is therefore important to give great attention to drafting the contract to ensure that the implementation process is well-defined and to ensure that the circumstances in which the purchaser is entitled to terminate are clear. If possible, draft a liquidated damages clause to cover the purchaser's direct loss in the event of termination. Maintain legal control in the event of difficulty. If a contract begins to go wrong and the purchaser acquiesces in the face of a breach of contract by the supplier, he may lose his rights to take action subsequently. (However compromises offered in the context of negotiations in good faith to resolve a dispute should be safe.) It is better to draft a supplementary agreement recording the extent of the breach and the new contractual obligations which the supplier is accepting in consequence. This may however be difficult to organise in the context of delicate negotiations. The main point is to ensure that all sides remain clear about the nature of the obligations which a supplier is accepting.

Unitary supplier

57. It reduces problems if one supplier takes responsibility for delivering all the contractual requirements. These requirements are best incorporated into one contract document. If there are separate contract documents for hardware and software supplies, ensure they are linked (e.g. that the supplier undertakes to deliver a live and working system comprising the hardware and the software). If there are separate hardware and software suppliers, then think through the implications for compatibility during the installation and implementation of the system and during its continuing life. Who will take responsibility for ensuring that the hardware and software work together, continue to work together and work with any telecommunications links?
**Bonds**

58. Some local authorities' Standing Orders require bonds to be taken wherever the authority pays for goods or services before receiving the whole of those goods or services (unless the Treasurer gives an exemption). Including such a standing order addresses the particularly risky nature of IT procurement and the need to protect the authority's risk to some extent. Usually bonds are limited to 10% of the contract price and the cost of the bond is perhaps one or two percent of that sum. It is usually cheaper if the authority takes out the bond itself. It can take some time to secure a bond and if a bond is to be taken, this needs to be brought into the procurement process. Sometimes a supplier will pay for this bond but the cost may well fall upon the authority. It is a form of insurance policy. In a particularly risky case, the authority might choose to secure a 100% bonding of the IT procurement. A 10% bond might well not cover monies that the authority had paid out by way of stage payments and perhaps should be regarded simply as some protection to cover the costs of re-letting the contract. The authority’s risk can be managed in other ways, eg if stage payments are linked to deliveries of items useful in themselves - for example a supplier is paid a certain sum on completion of a phase of an installation amounting to a useful part of the system which can be used in a freestanding way if necessary. An authority might wish to bond the contract in conjunction with stage payments, to cover the costs of re-letting the contract if the supplier breaches his obligations.

59. Bonds, and their relation to evaluation of competing tenders, can be complicated in the context of compulsory competitive tendering.
Annex 5.1

Checklist of ten key contractual questions

1. Does the contract specification identify clearly at least the essential requirements in terms of functions and performance?
   If you have missed something, you may not be able to complain. If you do not have a specification and the components fulfil their individual product description (if any) you will find it difficult to complain.

2. Is the supplier contractually bound to deliver the specification?
   If you are forced to rely on the common law which allows a party to terminate for fundamental breach of contract, you will have to show, for example, that the supplier has not delivered a computer system. This is hard to determine. When is a computer system not a computer system but a box of meaningless electronic circuitry?

3. Have you considered what type of tests are needed to demonstrate that the system meets your minimum requirements and that it is right to pay the supplier?
   If there are no proper testing and acceptance procedures specified, you are liable to pay on delivery.

4. Have you decided what requirements are to be conditions (breach of which entitles you to terminate the contract) and what are to be warranties?
   For breach of warranty you cannot terminate the contract but can only sue for damages, unless you can show that this is not a computer system (fundamental breach); you are entitled to compensation only for breach of a warranty if this is the computer system that you ordered, although an imperfect version.

5. Have you an adequate variation clause (change and control procedure)? Have you allowed for the specification to evolve, for ambiguities to be ironed out?
   If there is no procedure, neither party can unilaterally change the terms of the contract. It can be done by agreement only. There is also the risk that unpriced variations are ordered.

6. Have you established the timetable for performance of the contract and for payment?
   If not, the implementation may be chaotic and lead to mutual recriminations. The supplier's obligation is to deliver within a reasonable period (when is that?).

7. Have you considered what you wish to do about delay, when you wish to be able to terminate? Has the supplier agreed to accept liability for delay by means of liquidated damages?
If you have not, then you must introduce a time requirement in the face of unreasonable delay. This may be difficult and will probably lead to arguments about what is a reasonable delivery period. If you terminate the contract, you may find yourself accused of fundamental breach on the basis that you had no right to terminate the contract because the delay was not unreasonable. If you succeed in the argument that you did have the right to terminate, then you may find it difficult to show what loss you have suffered and may face arguments about whether the cost of staff time can be claimed as a head of damages.

8. Can the supplier avoid delivering the obligations personally? Have you restricted his right to assign the contract? Does that matter to you? Has the supplier complete freedom to sub-contract?

You may have contracted with a reputable supplier and then find that the obligations are to be fulfilled by someone in whom you have less confidence.

9. Does your termination clause allow you to terminate in the event of business difficulties, failure to remedy remediable breaches of contract, breach of termination conditions, failure to deliver past your final completion date?

If not, you will have to argue that a default amounts to a fundamental breach (this is not a computer system) or an anticipatory breach (there is no way that the supplier could deliver a proper computer system).

10. Have you any escrow arrangements?

If not, you may be completely at the mercy of events, without any possibility of legal recourse.
6. Standing Orders

Purpose of Standing Orders

1. Standing Orders and Financial Regulations provide a framework for authorities to run their business activities in an orderly and secure manner. They usually prescribe arrangements for such activities as budget-making, the approval of capital expenditure and contract negotiation. Although there is no general requirement for authorities to adopt Standing Orders and Financial Regulations, authorities have accepted the value of and need for such procedural rules which, amongst other things:

- promote long term planning;
- encourage an attitude of economy, efficiency and effectiveness in the application of the authority’s resources;
- demonstrate the protection of public funds; and
- minimise the opportunity for corruption and unfair competition.

2. There is a specific obligation upon local authorities, however, to establish standing orders in respect of contracts. That is they 'shall make standing orders with respect to the making by them or on their behalf of contracts for the supply of goods or materials or for the execution of works' (Section 135 Subsection 2 Local Government Act 1972). Furthermore, such Standing Orders 'made by a local authority with respect to contracts for the supply of goods or materials or for the execution of works shall include provision for securing competition for such contracts and for regulating the manner in which tenders are invited but may exempt from any such provision contracts for a price below that specified in standing orders and may authorise the local authority to exempt any contract from any such provision when the local authority are satisfied that the exemption is justified by special circumstances.' (Subsection 3).

3. Standing Orders are thus required to control the letting of contracts to secure fair competition and to regulate the manner in which tenders are invited. They are, therefore, essential pre-requisites for ensuring that all contracts are made in accordance with local authority policy and that they are seen to promote value for money. They should also ensure that all contracts are fair and do not favour any one contractor. Unfortunately these two factors may possibly be mutually exclusive in the area of IT procurement.

4. It is accepted that local government must be seen to be operating 'above board' and that all reasonable precautions should be taken to ensure that there is no impropriety. However local government officers are increasingly charged with the responsibility to act in a competitive manner. If they are expected to contract on strict guidelines with no scope for negotiation it is difficult to see how they can successfully operate in a competitive environment. Whilst procedures must, of course, include the need to ensure honesty of staff they should allow staff to negotiate contracts for the best advantage of the local authority.
Present practices

5. The Audit Commission's paper *Acquiring IT* reported a wide variance in the range of practices being undertaken:

(a) strict adherence to the traditional view of open tender;

(b) restricted tenders - normally to the primary suppliers or to a limited number of software suppliers;

(c) single tenders; and

(d) hybrids - whereby the local authority undertakes an open or restricted tender and then proceeds to negotiate further and/or invite quotations and not formal contracts.

6. The situation is further complicated by the high level of competition currently experienced in the computer market. This has meant that prices can be extremely volatile and a change in the marketing methods of some of the computer suppliers has resulted. Certain practices have therefore emerged which either challenge the normal view of openness or require that standing orders are waived in the interest of value for money. Some suppliers, for example, see the tender document purely as a starting point for negotiations and therefore quote costs far higher than their final negotiated figures. Others have stated that the open tender arrangements incur high costs both for the local authority and its suppliers and that single tenders will lead to lower costs.

7. Whatever approach is undertaken it is important that the authority is seen to be fair to all suppliers and that individual suppliers cannot complain that they have been adversely affected. Yet there is also a need to ensure that local authorities secure value for money from their acquisitions and obtain the best IT facilities overall. This is especially true where the authority's experience in dealing with computing contracts may be limited.

8. In a survey conducted during late 1991 authorities were asked whether their Standing Orders had been amended in the last three years to address the needs of IT procurement. Only 10% of respondents said they had made any such changes and over half said that they had suspended Standing Orders for procurements exceeding £50,000.

9. This suggests that Standing Orders are becoming less relevant to IT procurement and so their perceived advantages are being eroded. Clearly if authorities are to seek the protection of Standing Orders then they need to be assured that they will provide the necessary protection.

10. It is important, therefore, that Standing Orders or Financial Regulations take account of the particular characteristics of IT procurement and refer to:

- the obligations placed upon local authorities by the EC Directives with particular attention being given to open systems;
- the presence of a corporate IT strategy and the need to conform to it - or a clear statement of why it is being avoided;
6. Standing Orders

the role of the head of IT in the procurement of IT by all departments within the authority;
approval being granted for informal contact and for negotiation subject to documentary evidence being retained of all such discussions and outcomes;
consideration for members to participate in any strategic discussions.

11. Authorities should avoid suspending Standing Orders and thereby lose the protection they afford and endeavour to amend their Standing Orders to reflect current and future IT procurement needs.
7. Financing issues

Introduction
1. This chapter discusses the financing options available to local authorities in the procurement of hardware and software items. The legal, accounting and financial implications of each option are then discussed.

2. The procurement of hardware, whether mainframe, minis, servers, micros, printers or peripherals, does have distinct implications that makes its financing different from that of vehicles or buildings. The latter group has a fairly predictable usable life span, whilst the former group’s usable life cannot be predicted with any level of certainty.

Hardware
3. The usable life span of any hardware item is dependent on:
   - release of new technology and whether the procured item can be directly upgraded to make available the new/better facilities;
   - compatibility of item with new technological environments;
   - whether it satisfies or complies with a newly adopted industry/legal requirement eg OSI; and
   - whether its initially defined upgradeable path is still a viable option, bearing in mind the availability of new technology.

4. Since all these parameters are outside the control of local authorities, the choice of financing must reflect on balance the most cost effective way in which IT can be enabled to continue to provide appropriate services to the authorities.

Software
5. Software is a more intangible product than hardware and so it may be helpful to discuss its nature and implications before proceeding with the methods of procurement. There are four groups of software that have to be in place to enable any IT department to provide the cost effective, relevant, accurate and timely information required to run the local authority. There are differences in financing the acquisition of each of these groups, and for some there are other costs as well as legal implications to be aware of.

Group 1: System Software
6. This is the basic set of commands that order the way the computer functions. Probably the most widely known is DOS, the micro operating system which has now been in use for some years. As far as mainframes are concerned, the more commonly available are ICL’s VME, IBM’s MVS, BULL’s GCOS and MDIS’ REALITY. There is now an escalation of UNIX products as this emerges as a popular operating system for mid-range systems.

7. The acquisition of this software is invariably included as part of the overall hardware cost. No software is fully comprehensive, nor is there any that is totally easy to use and so third party suppliers provide a range of support/additional items to help make these ‘base products’ more usable, more comprehensive or both.

Group 2: Data Management Tools
8. These are substantial cost items and comprise the set of commands that enable
The Acquisition of IT

the IT department to organise, hold and generate reports from the data it holds. Examples are IBM's DB2, IMS and ICL's IDMS. The main issues here are the initial cost, the period for which the supplier undertakes to support the version supplied and the availability of the source code in case the supplier goes into liquidation. There is a range of tools from third party suppliers and the contracts covering these must reflect the comments made in respect to the supporting tools of systems software.

Group 3 : Programming Languages
9. Popular examples are Cobol, PL/1 and Dbase. Previously, suppliers targeted their products to work on specific equipment but, with the advent of open systems and UNIX, the newly emerging fourth and fifth generation languages (4GLs and 5GLs) are aimed at multiple environments. Because they work on more than one manufacturer's box they are said to be 'portable'. These languages have the greatest number of third party supplied modules to enhance their usage and improve their efficiency. Hence when budgeting for any one of these base languages, it is useful to be aware of their complementary tools, so as to budget for them also.

Group 4: Application Packages
10. With the escalating costs of in-house development, third party written application packages are proving more popular in local authorities. The 'interfacing' of such products with the authority's other systems is important and the buyer needs to establish such issues as:

- whether future legislative changes can be included in new versions and at what cost;
- responsibility for designing, testing and implementing interfaces to existing applications and if this is the supplier's responsibility, what will be the cost;
- responsibility for installing, testing and implementing the application and what input is expected from the authority;
- the number of users who will require training and for how long the training will last;
- responsibility for test data and the procedures for customer acceptance;
- the resource needed for identifying and loading of data; and
- guarantees of performance and the financial penalties for non performance.

11. When procuring software, greater care must be taken to check the present and continuing viability of the supplier and its policy towards the product. The following issues could well clarify the contractual and financial implications:

- Site licence/named machine: insist on a clause that allows the authority to use the item on a replacement machine at a different location (if it has relocated the IT department) without having to renegotiate the contract or incur additional costs.
- Contractual support period: the supplier must at least undertake to support the version being procured for a minimum period of 10 years. In case it goes into liquidation the source code must be freely available to the authority.
Acceptance tests: the supplier must state clearly the conditions under which the product will be deemed as accepted. The authority can only accept the product when it has performed as stipulated by the conditions laid down in the ITT and has been signed off.

Annual maintenance licence: local authorities must tie the annual increases in maintenance licences to the rate of inflation (RPI), or at worst to the Computer Economics Survey rates (CES). Any open ended issues should be resisted.

Non-leasing methods of financing

Outright purchase

Definition

12. This method of acquisition is used by an authority allocating a capital or revenue budget for the item. This could come from an annual revenue budget, capital allocation or accumulated reserves/funds. As with any other item purchased in everyday life, the ownership, maintenance and final disposal responsibilities rest with the authority.

13. Implications to consider include:
   - Usable life of the item.
   - Loss of investment by not using the money in an alternative way.
   - Depreciation period (as per CIPFA guidelines).
   - Availability of cash and the authority's intentions to use the equipment beyond its normal economic life.

Period (for depreciation calculation purposes)

14. The period usually covered is the projected useful life of the item.

Costs

15. The cost of acquiring through revenue is the cost of the item plus the loss of interest had the capital been invested.

Relevant legislation

16. This is counted as revenue or capital spending depending upon how it is financed. The main constraint at the present time is whether this method can be accommodated within the local authority's credit approval limits for that financial year if the money is to be borrowed. The Services Directive, when effective in July 1993, may well, however, require tendering of funding options.

Advantages

17. There are no complications if the authority decides to terminate the purchase agreement due to failure to deliver to specification. It has total ownership with no hidden or nasty financial or legal surprises when upgrades, swap outs or changes in length of the usage period are contemplated.

18. If standards or strategies change there are no additional legal or financial implications to consider except those of the authority. All costs are known at each commitment stage and hence can be budgeted for completely.
Disadvantages
19. New announcements, releases, new standards or changes in business patterns could result in premature obsolescence.

20. Even where the item runs its full usable life, disposal income cannot be predicted with any level of accuracy.

Potential Concerns
21. All purchases must be timed to maximise discounts.

22. If funded from revenue this is likely to cause severe fluctuations in the budgetary cycle. For this reason, smaller purchases are more likely to be acquired outright.

Loans or debts Definition
23. This is raising a loan to acquire the item/equipment from a third party. Ownership totally rests with the authority hence maintenance, insurance and disposal are its responsibility.

Period
24. This is negotiable depending on:
   - size of loan required;
   - rate of repayment ability;
   - period over which the authority will prefer to pay.

Costs
25. The cost to the authority is the cost of loan plus the interest on the capital over the repayment period.

Range of items supported
26. Single major purchases or a group of similar life span items.

Relevant legislation
27. Capital controls and limits imposed by central government on credit limits.

Advantages, disadvantages and potential concerns
28. See outright purchase.

Hire Purchase Definition
29. An agreement over a fixed period of time after which the title of the goods pass to the authority at no charge. This counts as capital spending and this method is not widely used by local authorities.

Fixed Term Rental
30. Rental over a fixed period where notices required for termination are typically for periods up to two years.

Rental Contracts with Purchase Options
31. This is treated as a finance lease. Rent is for a defined period which terminates with outright purchase. This option is useful for trial before purchase.

Short term rental Definition
32. With this option, a manufacturer, supplier or finance house rents out the
required item for a relatively short period, usually six months or so, typically as an interim solution during a migration or under such similar circumstances. The shorter periods are generally associated with hardware and peripherals like printers and communication equipment. This will also apply to software if it is required for a defined short period.

**Period**

33. Any convenient period can be negotiated depending on requirements.

**Costs**

34. The agreed rentals are relatively higher than finance or operating lease rentals because of the shorter periods involved.

**Range of items supported**

35. Usually single major items like hardware and software packages that are required only for a bridging period.

**Relevant legislation**

36. This counts as revenue spending and is controlled only by ability of the authority to meet, out of revenue, the rent payments during the agreed period.

**Advantages**

37. This provides the authority with the ability to satisfy its interim requirements without being burdened with full ownership of items required only in the short term or continuing the funding of items no longer required. This option is usually wholly revenue financed.

**Disadvantages**

38. If the interim period extends beyond the planned, then the continuing payments of 'higher' rents could impact on the ability to finance the permanent solution. It is prudent to budget/allow for a slightly longer time scale to ensure one does not incur higher or unplanned additional costs.

**Potential concerns**

39. Small items on short term rentals can often easily be overlooked and may well be retained and paid for unnecessarily.

**Leasing**

**Definition**

40. A leasing or finance company raises the capital and purchases the required item and then makes it available to interested users. Alternatively, leasing could result from one of the following:

   - Novation
   - Sale and lease back
   - Lease and then sub-lease.

41. *Novation* is when the original purchaser is the local authority who acquires the item at a discount that is not available to the lessor. The authority then novates the purchase agreement to the lessor and then leases that same item back at rents based on the discounted purchase price. The agreed rents therefore are lower than had the lessor done the initial purchasing.
42. **Sale and lease back.** The equipment being owned by the authority is sold to the lessor and leased back and used by the authority as a lessee. This occurs frequently when new equipment is planned. The old procured equipment could be sold and leased back over a defined period until the new equipment arrives. This does improve cash flow.

43. Lease and sub-lease occurs where a lease agreement has been concluded with the primary lessee. The item is then leased by the primary lessee to a secondary lessee allowed by the initial contract.

**Period**

44. Lease period ranges from one year onwards. Normally two to five years or longer for more expensive equipment is contracted for. The agreed period is dependent on the authority's assessment of how long it requires the use of the particular item. The first agreed period is termed the primary lease, an agreement on further usage beyond the primary period is termed a secondary lease. Repayments are by instalments monthly, quarterly, half yearly, or annually in advance or in arrears.

**Types of lease**

45. There are two major types of leases used by local authorities to acquire IT facilities: operating lease and finance leases.

**Operating lease**

**Definition**

46. This is a lease agreement over a fixed period of time where the ownership of the equipment permanently remains with the leasing company. The rental charged to the lessee does not recover all of the cost of the equipment. The following requirements must be met:

- the asset must not transfer to the authority at the end of the lease term
- the renewal rent is at full open market value
- the value of the asset does not accrue to the authority
- at the end of the lease the value of the item is at least 10% of its value at the start of the lease. (The projection of this residual value must be made before the lease commences).

**Period**

47. The lease period ranges from one year onwards. Normally the contracts are for two to five years or longer for more expensive items. The leased period should be dependent on the authority's assessment of how long it will require the use of the items. Repayments are by instalments monthly, quarterly, half yearly, or annually in advance or in arrears depending on the agreement entered into.

**Costs**

48. The costs and incomes are made up as follows:

- Lessor income = Tax allowances + lease payments + disposal price or secondary leases.
- The cost to the lessee (the authority) = sum of total rent payments

**Relevant legislation/directives**

49. This counts as revenue spending and the relevant legislation/directives are SSAP21 and SI 351 (1987).
Advantages
50. The advantages of Operating Leases are:
   - no major initial capital outlay on behalf of the authority;
   - the authority is also relieved of the risk of an item becoming obsolete and hence losing residual market value;
   - most leases allow for item upgrades or swapping of newer for older equipment at newly negotiated ‘higher’ rents;
   - other services could be provided by the lessor in addition to this lease such as software financing;
   - lease payments can be tailored to budget spending and there is no responsibility for disposing of old equipment;
   - there is the choice to lease new or second user equipment depending on the range of rents that can be afforded;

Disadvantages
51. The disadvantages of Operating Leases are:
   - There is the danger of the leasing company going into liquidation and the rescuing company or receivers might then reclaim the equipment or renegotiate higher rents.
   - Another danger is where the original lease has been sold on but the rental payments made by the authority are not passed on to the new lessor. If the original leasing company goes into liquidation, the continued use of the item could be jeopardised. Similarly the authority may find that its rights to upgrade or terminate early are in a side agreement with, and only binding on, the (now dead) original leasing company. It will then be locked into a long and inflexible lease.
   - The lessor’s viability is a major consideration within any leasing negotiation. The cheapest is not the safest.
   - A further problem arises if the lease is entered into before testing is completed (perhaps to find stage payments due before final testing and acceptance). If the equipment or system fails final tests and the purchaser wishes to terminate its relationship with the supplier, it may find itself unable to terminate the leases without incurring penalties for early termination. It may be unable to pass on such losses to the supplier.
   - Since the equipment is not owned by the authority, any enhancement can only be done with the lessor’s full agreement.

Potential Concerns
52. It is not uncommon for leasing companies to use initial leases as loss leaders with higher rentals to follow for upgrades, swap outs or second leases.

53. It is important to check the small print of the leasing contract and ensure that all vague terms are clarified and agreed in writing particularly for early termination, upgrades and swap outs.

54. Ensure the notice period in the lease gives the authority the right of termination at the end of the primary lease and not from the end of it. If a three year lease only allows the termination period notice of 6 months to start at the end of the three year period then in practice the initial lease is for three and a half years. It
must also be borne in mind that it is the item's useful life to the authority that should govern the lease term and not the financing method.

55. Some leases offer 'to provide an option to expand or upgrade with no additional capital expenditure'. This may be offered by a manufacturer or supplier providing the finance. The authority by signing such an agreement may be locking itself into that manufacturer or the finance company's products. The authority should take independent advice as to the manufacturer's ability to fulfil such standards as Open Systems and other new requirements.

**Leasing second-hand equipment**

56. If the decision is made to lease second-hand equipment, care must be taken to ensure it has the relevant manufacturer's up-to-date warranty of maintenance for the whole period of the proposed lease. If not, then there could be unacceptable levels of unavailability during the agreed lease period.

**Finance lease**

57. If any of the following conditions are satisfied under a leasing arrangement then the lease is a finance lease:
   - property in the asset does pass to the authority at the end of the lease;
   - or
   - provision is made for an extension of the lease at less than market rates; or
   - the value of the asset at the expiry of the lease does accrue directly or indirectly to the authority; or
   - the termination value (further defined as the value of the asset at the expiry date, as estimated by the authority at the commencement of the lease) is less than 10% of the value of the asset at the commencement of the lease.

58. This is a lease agreement over a finite period of time at an agreed rent after which the lessee may enjoy continued use of the equipment for a nominal annual charge although title of goods still remains with the lessor. SSAP21 requires all finance lease assets to be declared in the authority's annual accounts. This counts as capital spending.

59. In the past, leasing companies charged 1% of the initial cost or peppercorn rent but now 5-10% of the original purchase price is commonplace. Hence one should check what the follow-on rents are before signing.

60. Rents are generally fixed on monthly, quarterly or annual basis. Some companies offer variable rates linked to the bank base rate. In the case of a fixed rate finance lease, there is a calculated risk as to whether the bank rates go up or down.

61. The issues raised on period, costs, relevant legislation, advantages, disadvantages and potential concerns are similar to those discussed under operating leases.
Leasing issues

62. If leasing is the preferred option an assessment of the authority's present position will help optimise the use of its resources. The questions to be considered are:

What leases does the authority already have in place?
What are its current plans?
What are its future plans?

63. The next step is to produce a list of current leases broken into type of leases and types of items e.g. printers, processors, disks, communications equipment, software applications, system software and others. Add the current requirements into each category using quotations from interested suppliers, the published interest rates and the residual value tables generally available. This will define the revenue costs and the capital outflow. The decision on the type and period of lease will then depend on the authority's own policy/strategy for each item group and its ability to meet those aggregated costs.

64. The current lease commitments will need continual review because in some cases:

It will prove worthwhile to cancel some of the present agreements and enter into new ones if the market value of particular items falls. This is more likely with operating leases.

Due to the fluctuations of interest rates in the past few years it might prove financially prudent to cancel and re-negotiate at least some of the existing contracts.

Cancellation and termination charges need regular review so as to understand future obligations. In this review process, items can be dealt with singly or as part of a group of items covering the same period that has been placed with the same lessor.

65. The checklist below helps in identifying all leased items for the review process. Legal advice should be sought to interpret complicated documents with multiple implications.

1. Items/Equipment
2. Lessor
3. Lease start date
4. Lease end date
5. Termination notice date
6. Item required until
7. Lease time
8. Lease payment and frequency
9. Follow on payments
10. Lease interest rates
11. Cost of item
12. Total repayments
13. Current market value
15. Lease termination cost
16. Acceptable conditions as agreed
17. Leasing Company/viability of present and future leases
The Acquisition of IT

18. Lessee
19. Any relevant observations

66. As competition increases, the participants in the leasing market have become more and more creative. The offerings are couched in more tortuous language which, if not fully analysed, could lead to either hidden higher costs not planned for, or dissatisfaction with the services provided. The legal, financial and IT officers need to work together to understand and optimise the use of the authority's resources in this area. Some of these offers will now be discussed.

Flexible and exchangeable leases (including upgrading options).

67. Authorities must weigh up the relative longer term advantages and disadvantages of such agreements against the apparent short term benefits. These agreements will normally state when the equipment can be exchanged or upgraded but no costs are stipulated at the initial signing stage. Such leases can contain traps:

'cost of upgrade will reflect market value'. The practical outcome might be the authority being forced to accept higher costs of the upgrade because termination costs are rather prohibitive.

'the lessee may after a finite period exchange the present equipment for another equipment of equal or greater value'. In practice this often translates into swapping one item for another from the same manufacturer. Were the lessee's requirements to be reduced in terms of capacity, then the required replacement could cost less than the original. In some cases the lessee may take additional equipment that is surplus to requirements.

'With no penalty or terminating charges'. A leasing company might agree a rent for a three year lease and present the lessee with a five year lease document with the above clause. A 'no charge' or termination clause may be acceptable until the five year lease contract is assigned to another leasing company who then becomes the head lessor. The lessee must make the head lessor fully aware of all such side agreements as the original lease document may include a commitment to a five year period.

'The lessee may upgrade his/her equipment without increasing lease payments'. The implication of this clause is a longer lease period than originally planned. Authorities should ensure that this will not result in the operating lease becoming a finance lease.

68. There should be clarity on all the legal and financial implications before entering into any agreement. The checklist below highlights the financial issues to be considered:

1. Lease period
2. Item lease price
3. Item cost
4. Item trade in value
5. Amount to be leased
6. Lease rentals per month, per quarter, and per annum
7. Interest rates
8. Receivable value
9. Total rental payments
7. Finacing Issues

10. Balloon/peppercorn/follow on commitments at the end of the first term
11. Discount rate allowed for early termination
12. Percentage of sales proceeds rebated when equipment sold at end of lease or early termination.

69. Suppliers' terms are always drafted for the benefit of suppliers. Lease conditions are extremely complicated and reflect the needs of the financier who funds the purchase not those of the actual user of the equipment. The financier ensures that it has all those rights it needs against the manufacturer (eg. warranties which are not otherwise passed on). The following points should help avoid potential hazards:

1. What is the lease period?
2. What is the firm term of the lease?
3. Is the lease period longer than the firm term?
4. If yes, who pays the balance?
5. What is the notice period required for termination? (in weeks).
6. Who is the lessor? (Check for restrictions or non restrictions regarding sub leases, and assignments for both lessees and lessors).
7. Is there a secondary period at fixed costs?
8. What is the cost at the end of the fixed term even if the equipment is maintained?
9. Who owns the equipment if I upgrade?
10. Can there realistically be more than one owner for my machine and subsequent upgrades?
11. What happens if I terminate early? [Cost of liquidated damages - sale of equipment by lessor].
12. If I wish to exchange equipment can I change supplier?
13. If I upgrade or exchange equipment am I forced to use original lessor?
14. If I am forced to use the original lessor, how can I assure a competitive rate?
15. Do I have to buy equipment of equal or greater valuer if I exchange?
16. Are upgrade and exchange options available at a known cost?
17. Is the route preserved to make the original supplier remedy any defects in the equipment?
18. Is the final document identical to the draft that was submitted, analysed and agreed?

Terminating the lease

70. Understanding the termination clause is fundamental to preventing the incurring of costs because dates are missed. Some astute lessees give notice on the day of signature of the lease. That way there are no problems with missed dates or the need to review the lease continuously. There are only two issues here: the termination date and the cost of termination. Clarification is always useful prior to entry into the lease agreement and the following could be used as a check list:

1. What is the notice period?
2. Do I have any rights to dispose of the equipment?
3. Can I sub-lease the equipment, if so to whom?
4. If I am effecting a termination must I stay with the existing lessor at whatever rate they wish to charge, or can I change lessor?
5. How are the net sales proceeds calculated?
6. If I cannot sell the equipment, but I am offered a rebate of own rentals when the equipment is sold, how is this calculated?
71. Some lessees allow their termination costs to be rolled in with the new lease, hence resulting in an agreement that means higher rents.

72. If a machine that has been upgraded more than once and the lessor of the original equipment is different from the owner of the upgrade, there could be a problem on the expiry of the lease. It might be difficult or costly to downgrade in order to return the equipment as originally leased. The solution is to make sure in the original contract that if future quotations for upgrades are not acceptable for whatever reason, then the authority is allowed to use alternative sources and hence be entitled a proportion of the disposable income.

73. Early termination will inevitably require a penalty payment and authorities should determine the nature of such payments and seek to avoid burdensome penalties.
Annex 7.1

Reasons for considering alternative methods of financing

CAPITAL SPENDING LIMITS
1990 Regulations
Service priorities

COST CONTROL/SAVINGS
Payment Period
Residual Investment
Interest Rates

FUTURE FLEXIBILITY
Gross Rates
Upgrade Paths
Supplier Choices

Main Financing Options

OUTRIGHT CASH PURCHASE
From Annual Revenue Budget
From Accumulated Reserves/Fund

LEASE
Repayment of costs plus interest
Finance Lease (Fully paid up)
Operating lease (90% of cost)

RENTAL
Short term, renewable contract
Total revenue payments = cost to the authority

LOAN/DEBT
Fixed term repayments (unsecured).

Purchase

Legal Title  Is held by the local authority.
Tax Advantage. No.
1990 Regulations Classifies as capital expenditure.
Rentals Not applicable.
Sources Reserves/Funds. Annual Reserves Budget.
Advantages No/extra contractual complications or higher cost problems.

Hire Purchase

Legal Title Transfers to the local authority
Tax based No.
1990 Regulations Classified as capital.
Rentals High because of the tax shelter or residual value.
### Renting

<table>
<thead>
<tr>
<th>Sources</th>
<th>Suppliers, Finance Companies.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Title</td>
<td>Remains with the renting company.</td>
</tr>
<tr>
<td>Tax Based</td>
<td>No.</td>
</tr>
<tr>
<td>Relevant Regulations</td>
<td>None.</td>
</tr>
<tr>
<td>Rentals</td>
<td>Relatively high.</td>
</tr>
<tr>
<td>Sources</td>
<td>Manufacturers/Suppliers, Specialist Computer Leasing Companies.</td>
</tr>
</tbody>
</table>

### Finance lease

| Legal Title | Remains with leasing company at all times. |
| Tax Based | Yes. |
| 1990 Regulations | Classifies this option as capital. |
| Rentals | Relatively high because it is a full payout lease. |
| Sources | Finance Companies/Banks. |

### Operating Lease

| Legal Title | Remains with the leasing company at all times. |
| Tax Based | Yes. |
| 1990 Regulations | If all conditions are satisfied then it is exempt from classification as capital. It then can be treated as revenue. |
| SI 351 | Residual value at the end of the firm terms must not be less than 10% of original value to qualify. |
| Rentals | Relatively low because of residual value. |
| Sources | Manufacturers and Suppliers, Specialist Computer Brokers, Finance Companies/Banks. |

## LEGISLATION AFFECTING THE FINANCING OF IT PROCUREMENT

| SSAP 21 | Accounting for leases and hire purchase contracts. |
| The Local Government and Housing Act 1989 | Section 48 |
| 1990 Regulations | The Local Authorities (Capital Finance) Regulations 1990 SI 432 and SI 351. |
8. Facilities Management

REASONS FOR CHOOSING FM

1. The reasons most often cited for adopting FM are:
   - the increasing pressure upon local authorities to be more innovative in controlling or reducing costs, in making efficiency savings and in controlling budgets;
   - the anticipation of CCT being extended to computing services in local government;
   - the competition for scarce capital resources;
   - a desire to separate the strategic thinking from the management and operations of computing;
   - an opportunity for the authority to be seen as a 'service enabler' rather than 'service provider';
   - problems in recruiting and retaining staff;
   - a wish to move to Open Systems and a need to reduce the dependence upon the mainframe;
   - a desire to avoid using internal resources on continued maintenance of old mainframe-based systems and to free development resources to concentrate upon new technologies;
   - an opportunity to avoid having to dispose of excess IT capacity; and
   - improvements in operational cover and in the disaster recovery facilities.

2. A major factor which appears to be affecting the growth in the FM market is the move from large mainframe computers to networks and smaller but powerful processors, often referred to as 'downsizing', which can improve the price/performance ratio. One effect seems to have been the move of the traditional suppliers of large mainframes into the IT services sector (which includes consultancy, project management and system implementation) to replace lost business, and consequent pressure by them on local authorities to adopt FM. Another factor affecting the market is the attraction, availability and adoption of Open Systems which lend themselves to departmental computing and networking. Local authorities may perhaps be better able to take advantage of such developments, including downsizing, if they are able to hive off the central mainframe computing activities of the organisation by utilising FM.
3. The most cited arguments for and against FM are:

<table>
<thead>
<tr>
<th>FOR</th>
<th>AGAINST</th>
</tr>
</thead>
<tbody>
<tr>
<td>Achieve a better return on IT investment</td>
<td>True costs may be hidden in complex contracts or in restrictions of service provision</td>
</tr>
<tr>
<td>Avoids staff recruitment and retention problems</td>
<td>Quality of staff out of organisation's control</td>
</tr>
<tr>
<td>Avoids necessity to cope with hardware acquisitions</td>
<td>Organisation may be left without any hardware when FM contract ends</td>
</tr>
<tr>
<td>Avoids being locked into hardware supplier</td>
<td>May be locked in by FM company's choice of supplier</td>
</tr>
<tr>
<td>Provides opportunity to separate mainframe computing from departmental computing</td>
<td>May be conflict between FM supplier's approach and organisation's users' needs</td>
</tr>
</tbody>
</table>

Planning the move to FM

4. Various factors will force a fast pace in moving to FM: staff morale falling, the IT service already collapsing, and/or member pressure. Despite these pressures it is important for the long term well-being of the authority that the right contract terms are put in place and sufficient time is given for discussions with users. FM should be done with an open mind. It must not be just a question of deciding which FM supplier to choose - but whether or not the benefits of a particular proposal outweigh the risks. The first step is to evaluate the strengths and weaknesses of the current operation and to determine what is needed before making any commitment to FM.

5. Most risks are avoidable and a key issue is determining what level of IT is passed to FM. Each level involves an element of increased risk and this must be assessed carefully and these (and other risks) covered in the contract as far as possible. The hierarchy of risks might be analysed as follows:

**Operations only**

Represents the lowest level of risk provided the contract allows the customer the opportunity to recreate an in-house service (eg by recruiting staff of the FM supplier) or switch reasonably easily to a new supplier. Requiring local delivery of service provides greater direct control and reduces the FM risk, particularly if steps are taken to increase the portability of applications. At its most basic, FM for operations has focused on mainframe services. Different issues arise if departmental systems are also to be included where it can be difficult to define the boundaries between user and support responsibilities. They have been excluded from a number of FM contracts because they often require little technical support and may be associated with software packages as 'turnkey' solutions. The supplier may provide most hardware and software support and users may not be willing to pay or fill the need for additional services from an FM supplier.
8. Facilities Management

Application software
This means increased dependence on the FM supplier. There is a danger of being locked into the range of applications the FM supplier wishes to provide.

Strategic direction
The more FM encroaches on strategic IT management, defining business goals and directions and top level IT system requirements, the less capable a customer will be to determine these matters for itself from an independent viewpoint. (It will also be wise to take into account the loss of IT staff who may be good at defining business goals and strategy.)

Contractual issues

6. A fundamental danger lies in commencing the FM service before all licences of software (and also leases of equipment) have been assigned. Licensors can be reluctant to cooperate and may demand a large 'management fee' as a condition of transfer. Transferring licences can be a costly and difficult process and this could in fact wipe out or seriously diminish the savings offered by an FM proposal. If transfers have not been settled prior to the start of service then the purchaser and FM supplier could face injunction proceedings and so the authority should avoid getting into this position. It would also be unwise for a purchaser to commence the FM service before the contract and SLAs have been defined. It is more difficult to achieve the latter - but not impossible.

7. When FM is first being considered there may be insufficient documentation and processes in place for a contract to be written at the level of detail necessary to ensure it will deliver what is required. While it may be difficult to put the detail in place quickly, the unsettling effect of FM deliberations on existing staff may mean that delay is damaging. Good management should, however, be able to overcome the short-term problems but it will be much harder to recover from the consequences of agreeing in haste to an inadequate contract. The planning, effort and elapsed time involved in achieving a satisfactory FM contract should not be underestimated.

8. At the other end of the process, there is still little experience of what happens when an FM contract comes up for review and re-tendering and there are many aspects which need to be thought through in the long term if the contract is to be successful. The first FM supplier to an authority will normally take over most of the in-house staff supplying the IT service - the 'knowledge base' moves to the FM supplier and there may therefore be few problems of transition. The same is not likely to apply to a move from one FM supplier to another and the authority needs to consider the consequences - handover of media and documentation, for example. The potential for future competition may in fact be reduced.

9. During the contract there are many issues, not least of which is that the customer's requirements often change in an unpredictable way - for example, some early FM contracts were developed in a climate where a reduction of mainframe requirements appeared inconceivable, only to be overtaken by technological change. Performance is a fundamental area, and there may often be a gap between the warm assurances of a potential supplier during the FM
procurement process and the performance guarantees that the FM supplier is prepared to see written into the contract; ensuring that these guarantees are not only present but are also monitored and enforced will be a continuing challenge throughout the contract. One further example: there can be problems with intellectual property rights in software - the software may have been the authority's originally, but how are the changes to it made by the FM supplier to be regarded?

10. Definition of FM contract terms should play a pivotal role in evaluating and negotiating FM proposals. Far from being a subsidiary matter that can be left to the lawyers to pick up later, the definition of contractual terms is the most precise and practical way of analysing the merits and demerits of individual proposals and indeed for defining the wisdom of FM. The customer should therefore invite tenders on the basis of a draft contract and begin preparation of SLAs as soon as possible.

11. The shape of each contract will depend on what is to be included in FM but there are a number of key areas which should be covered to protect customers:

**Term of Contract**
If open ended (terminate on 12 month's notice) then it is not caught by EC procurement rules until the customer wishes to change the supplier.

**Service Specification**
This should be defined in as much detail as possible while leaving an element of flexibility so that the specification still describes the service adequately as it changes over time (this is not easy). Consideration should be given to the resources the customer now controls and which may be needed for expansion of any IT services not included in the FM contract (eg space in computer room for more mini-computers). Short/medium term needs should be assessed - eg what applications the customer might wish to run in the near future.

**Additional Services**
It is hard to predict future needs precisely and user requirements can change quite rapidly. The contract must therefore provide some flexible but clear rules for ordering and costing changes to the service. If the FM supplier is not constrained in some way, but is free as to how it fixes charges for additional services, the customer may find that its FM service (initially quoted at a low charge) may turn out to be very expensive when it wishes to introduce additional requirements.

If the customer is also transferring applications then it needs to consider how to avoid simply being locked into the goods and services which the FM supplier is interested in supplying.

**Quality - Service Level obligations and rebates**
There are many ways of defining quality. SLAs linked to performance standards which can be tested objectively (eg using software to monitor response times, service availability etc) can be useful. Drafting SLAs is a technical and time-consuming job and needs to be done in detail. Doing so reduces the risks of problems post-implementation and clarifies user expectations. To some extent it makes those expectations more realistic and reassures users that the FM supplier does intend to provide a quality service.
Failure to meet performance standards can be linked to the payment of rebates of charges or liquidated damages. This also helps to concentrate the supplier’s mind on the problem.

**Termination**

Termination conditions are a useful adjunct to more normal conditions about rights to terminate arising from business difficulties or because of breach of contract not remedied. The latter, for example, may not put the customer in a strong enough position if the service deteriorates but then recovers on a number of occasions. So, to supplement those rights, the customer might reserve the right to terminate (and/or to send in an independent inspector at the FM supplier’s expense) if, for example, performance standards are not met on a defined number of occasions in a specified period.

The reality of course is that termination is a most undesirable outcome for a customer - only to be contemplated ‘in extremis’ if the customer can reconstruct an in-house service or effectively transfer to another FM supplier. It is akin to a disaster recovery scenario but, without adequate rights, the customer is perched rather precariously over a large barrel.

**Consequences of Termination**

What protections are built into the contract in this respect will determine whether a customer has the practical choice of terminating. The customer needs to consider what rights it needs in order to be able to reconstruct or transfer service provision. Thus in an FM contract where applications are not being transferred, the authority should provide a procedure for recovering or purchasing hardware by imposing an obligation on the FM supplier to ensure the transfer of licences/leases and to give assistance as needed; and by giving the customer the right to offer jobs to the staff of the FM supplier who have been providing the service to the customer.

**Technical issues**

12. There are a number of technical clauses that need particular care:

- those restraining assignment and sub-contracting are important given the volatility of the industry. The contract could deem there to be an unlawful (in the absence of consent) assignment if the FM supplier disposes of a substantial part of its assets, devoted to FM, or of its shares. In practice a customer may have little practical choice but to consent to a take-over or a management buyout, but effective contractual rights strengthen its negotiating position;
- confidentiality of customer information and data (especially given the requirements of the Data Protection Act);
- security of systems etc;
- audit arrangements;
- how far ‘force majeure’ type clauses should be allowed (given the importance of continuity of service for the customer);
- reporting;
- limitation of liability by the FM supplier needs to be considered carefully in respect of its effect on the customer and on other clauses in the contract;
intellectual property rights indemnities;
staff poaching (given the close relationship which will develop between FM supplier and customer).

13. Chapter 5 offers general advice and a number of guidelines on IT contracts, the importance of which cannot be over-emphasised. But the full range of issues to be considered in FM is wide and beyond the scope of this publication - an authority proposing to use FM would be well advised to obtain specialist advice which can be tailored to the particular circumstances of the authority concerned. It would also be helpful to refer to the Code of Practice produced by the Computing Services Association for its members engaged in the FM business.
9. Responsibilities of parties

Introduction

1. One way of encouraging people to take up their responsibilities is to motivate them by raising their awareness of the importance of their contribution. This chapter attempts to do this and concentrates mainly on user (or departmental client) responsibilities. Other chapters, such as Chapter 7 'Financing issues' and Chapter 5 'IT Contracts - A Legal View' deal in detail with the financial and legal issues respectively.

Who holds which responsibilities?

2. At the centre of the process must be the customer for the procurement who must be clear about what it is intended to achieve and who must lead the planning and implementation for the project and maintain control over the whole process. More detail on the user's role and the involvement of departmental management and staff is given later, but first, this chapter deals with the other parties who should put the IT procurement infrastructure in place. The extent of everyone's involvement will depend on the size and relative importance of the purchase.

Strategy

3. At the strategic level there is a need for involvement, understanding and awareness by elected members and chief officers so that the IT procurement strategy is integrated with overall service and budget planning and monitoring processes. The criteria for how much procurement reaches committee level should be included in the strategy along with appropriate justification, approval and review mechanisms. Contract award and post-award procedures are becoming more important bearing in mind EC and CCT implications.

Corporate guidance

4. At officer level practical guidance on the strategy needs to made available to potential procurers. This will probably be more detailed than the procurement strategy and will include additional checking processes below committee level. It may be drawn together by IT or a corporate IT steering group (or both). It should take into account compliance with other authority policies such as those in standing orders, financial regulations, contract compliance, equal opportunities, environmental and health and safety policies. To be successful, the guidance should be approved by the corporate management team and published widely. The right guidance, correctly explained, will be a help to potential purchasers rather than a hindrance - as indeed this guide will be useful and one of the source materials used in drawing up local guidance.

Financial advice

5. Specific advice should be sought from the finance function over how the procurement is to be paid for and the implications of the method of payment favoured. The head of finance should take responsibility for making appropriate financial advice and services for IT procurement available. Depending on the culture of the authority, many financial decisions may be completely delegated to departments as long as they are within approved budgets and follow guidance issued in financial regulations. It is unwise to enter into financing agreements without proper advice. For example, it is the authority's responsibility to satisfy
The Acquisition of IT

6. Consideration should be given to putting general financing agreements in place for the acquisition of IT to avoid individual purchasers having to make their own arrangements. This can lead to better value and safer lease agreements. On the other hand, individual purchasers may want more freedom over the timing and supplier of the finance. It is necessary to find viable, competitive funders and to get appropriate conditions and write off periods for IT systems. On some occasions outright purchase through capital or non recurring revenue will be best but, more often, spreading the cost over an appropriate period is more important due to financial constraints. However, services subject to CCT may well wish to purchase outright to improve their flexibility when competing against external service providers.

Legal Advice

7. As early as possible advice should be sought from the authority's solicitor. Standing Orders as well as EC directives specify procedures that must be followed in the acquisition of goods, supplies and services. The authority's solicitor should also ensure that advice and services are on offer perhaps by having standard terms and conditions suitable for IT available for use as well as negotiating from a starting point of the authority's usual contract or the supplier's contract.

8. Specifying the terms and conditions for the procurement at the outset will save time. The alternative is to get held up at a later stage while both parties' lawyers start from scratch or to be effectively forced to use a supplier's contract when it is not in the authority's best interests. By specifying terms at the beginning as part of the tender the authority is more likely to succeed in getting potential suppliers to accept its terms. In some situations, under EC Directives, it is imperative that all suppliers are equally treated over contract terms. Consultation with the solicitors is just as important in later stages when final discussions on the contract take place and award and post-award procedures have to be followed.

IT Advice

9. The IT function needs to offer appropriate advice to departmental procurers and may also be later involved in the provision of the service or system being procured. IT responsibilities are likely to include coordinating the authority's IS plans, planning IT infrastructure, procedures for project justification, approval and review and standards and methods. This will involve offering skills in business analysis, specification, quality assurance, project and contract management as well as IS procurement processes. There should also be the provision of awareness and skills training for management and departments and support for departmental client functions.

10. The head of IT will want to be sure that the procurement is in line with the IT strategy and that any support necessary will be available when required or will be separately funded. There are many issues within an IT strategy and they should be published by the IT department so that procurement can be planned with these strategies in mind. However, some aspects of IT (such as the current network
standard's version numbers or who is offering the best PC prices) change so rapidly that published guidelines are not practical and details should be checked with IT for each procurement.

11. Departmental IT is generally growing rapidly and IT strategies should recognise that many developments can proceed on their own with minimal IT involvement as long as there are guidelines to follow. The exchange and sharing of electronic information is increasingly needed so that the adoption of standards for data and file transfer, and compliance with them, is becomingly increasingly important.

**Central Purchasing**

12. Many authorities will have a central purchasing function who handle a wide range of purchases for the authority. In general the purchasing department will coordinate or set up common purchasing arrangements, obtain quotations and information on options. Use of central purchasing can support any corporate approaches that exist to procurement and enable the pursuit of common savings on advertising, discounts and by the regular reviews of prices. The purchasing department may evaluate proposals and tenders, perhaps including preliminary questionnaires and shortlisting and arrange for delivery. Purchasing skills include tender negotiations and dealing with award and post-award procedures and debriefing of unsuccessful tenderers.

13. The purchasing department may coordinate or arrange ‘call off’ orders for individual customers from a corporate contract for frequently purchased items. This enables the best prices to be offered by bringing together departments’ purchases and attracting discounts and saves individual customers from having to carry out or repeat all procurement tasks themselves.

**User responsibilities**

14. The user commissioning the work will need to demonstrate that the project fits in with their own department's IS plans. Therefore such plans should exist! There is a growing need for a formal definition of a departmental IT client function, whether carried out by full-time departmental staff or as a part of their duties by departmental management. Departmental clients need to be influential in the derivation of corporate IT plans as well as supporting their own customers in their individual procurement.

15. Within the department, the managers acquiring systems and/or specialist IT staff will need to be able to plan and manage procurement. This will involve justification of projects, including benefits criteria. The project must be designed, i.e. service specifications, budgeting, terms and conditions for the procurement and evaluation and review criteria must derived (and used ?). Liaison with the IT, legal, finance, audit and purchasing departments needs to be initiated and maintained. The effects, if any, on existing systems and contract needs to be established for the department itself, as well as the effects on corporate systems and on other departments. EC and, in the future, IT CCT implications must be assessed and potential suppliers need to be identified. Depending on the type and value of the contract, EC Directives and the authority's own standing orders may dictate the way procurement documentation is issued and suppliers evaluated, shortlisted and a final choice made. Final clarification, contract signing and
post-award procedures follow and then the implementation, which involves
different but equally important tasks and skills, begins!

16. Before beginning an IS procurement the user should be clear about what the
project is intended to achieve and how it will proceed. This can be illustrated by
considering the following headings and what resources the procurement will need
to succeed:

- how do projects get started?
- how are projects approved?
- in what ways are IT projects the same as other projects?
- in what ways are IT projects different?
- skills required

**How do projects get started?**

17. Common starting points are new legislation and the replacement of old
systems. The formal review of service provision or quality initiatives are
increasingly common in local government and provide catalysts for change.

18. There are also ideas from members, new staff, professional bodies and so on.
While generally speaking use of IT should follow on from consideration of how
business objectives are to be met, the opportunities presented by advances in
technology and systems should also be periodically considered.

**How are projects approved?**

19. Depending on the authority's culture, standing orders and the level of
expenditure anticipated formal approval may be needed from committee or
informal approval from committee or group leaders. Depending on the size and
type of procurement approvals may be needed at officer level from:

- Chief officers group or the corporate management team
- The chief officer of the individual department
- The departmental management team
- Local management
- Finance
- Solicitor
- Audit
- Central Purchasing
- IT department and
- Staff, Personnel, trade unions or employees' representatives.

20. Approval may only be needed once for the whole project or a series of
approvals may be needed at different stages. If the project is to be successfully
managed and kept to timescale then it is important to allow for the necessary
approval(s) in the original plan.

**In what ways are IT projects the same as any other project?**

21. In many ways IT projects are the same as any other project and must be treated
as such. For example, the involvement, where appropriate, of the service
committee, the chief officer, management team etc.

22. As in other areas of work where outside (or inside) service providers are used it
can be observed that there is more to making the project succeed than leaving it to
the specialist provider. IT is no different. Users must not believe any assurances
that if they sign on the dotted line the rest of the work will be taken care of. People sometimes tend to place more trust than is appropriate in external providers (‘they do it for a living so they must be competent’), in-house IT departments (‘they work for the council so they must be on our side’) and/or their own departmental IT staff (‘they work directly for me so they are bound to know what I want’). Despite everybody’s best endeavour things can, and probably will, go wrong. Users must not be afraid to ask apparently silly or naive questions. These often elicit the most illuminating answers.

23. IT projects must also comply with normal council policies and procedures. Standing Orders must be complied with as must financial regulations. Audit trails and financial controls must be present in appropriate systems. Security, privacy and data protection must be considered. If the authority has an equal opportunities policy then has this been catered for in the monitoring statistics or other appropriate ways? Green issues increasingly feature in council policies. Whatever policies the authority has must have been properly considered for IT projects too.

24. The project will be costing the authority real money, even if this does not become apparent until after a year-end recharge. Most authorities are moving, or have moved, away from after-the-event computer recharges, over which departments have little control, to clearer departmental IT budgeting at the outset and regular IT invoicing. This clearly shifts responsibility for control over any escalating IT costs to departments. If a supplier refuses to deliver any more software until more money is paid for additional work then this can lead to real budgetary problems.

25. Should the procurement timetable fall behind, then investigation will uncover many of the same reasons for delay as in any other work, for example loose specifications, an impractical timescale, and relaxed or inadequate monitoring in the early stages leading to delays that cannot easily be made good.

**How are IT projects different?**

26. For various reasons people have very high expectations of what IT projects should achieve. This is partly because of the impressive IT advertising that assails them from newsagents’ shelves, circulars received at work and now even on television commercials. Of course turning these expectations into real systems used by real people is another matter.

27. There has also been a tremendous rate of change in the industry which is still continuing. This can make long term planning difficult. There is a risk that the new system will appear antiquated by the time it is implemented. However, one can only plan for what is achievable at the time and be comforted by the fact that the system is at least working in the here and now.

28. Lay people who are involved in IT projects often suffer from an incomplete (albeit growing) experience of introducing systems and by limits on their knowledge of and vocabulary of the subject. This can lead to specification and communications difficulties. The customer will gradually learn the required vocabulary (which is often smaller than it may appear at first) and learn to
recognise when the internal or external supplier is simply using language as a, perhaps subconscious, means to control the customer.

29. People are often worried about their ability to handle apparently complex and technical IT projects. While this can be true, system users should not be put off. Firstly, managers are used to dealing with complex problems in other areas, often not in a subject area with which they are already familiar. Secondly, technical expertise is rarely required for project management and where it is one can only take advice and make judgements in the same way as for other unfamiliar subject areas.

30. At the outset of an IT project one frequent problem is that there seems to be too much choice. System handbooks display a vast choice of systems. However, by the time the systems have been assessed against specifications, budget and other criteria, there often seems little choice left!

31. Technical compatibility issues can be one of the constraining factors in choosing a system. Rarely do users start off in a 'green field' situation. The authority may already have invested in equipment that it wants to better utilise. Systems invariably need to exchange data with other systems and should also be capable of fitting into the authority’s telecommunications infrastructure. While many authorities are making strides towards ‘open systems’ it will be some years before technical compatibility problems eventually disappear.

Skills Required

Time and Commitment

32. Often the main challenge is simply setting aside the time for specification, planning, and monitoring of the project. Another frequent problem is getting the commitment needed from others, such as chief officers and management teams, in order to obtain and apply the necessary resources. In order to properly progress the project it is usually best if one of more officers are seconded to the task of project management. For a significant project this should be on a full-time basis. For smaller projects it should still be quite clear what proportion of the officer’s time is intended to be devoted to the task.

Negotiating

33. Negotiating is likely to be a significant activity. As well as negotiations over specification, finance and contracts, there are negotiations with the people who will be using the systems on a day to day basis. If at the outset the workforce have not understood and accepted what is taking place then the system is likely to be late or unsuccessful. Negotiations with suppliers will be equally important in ensuring that the authority is getting what it needs at a price it can afford.

Specification

34. In the ideal situation clear, unambiguous specifications are drawn up in advance. There are frequently practical constraints that prevent this happening. The argument is often put, when acquiring computer packages, that the specification will depend on what is on offer in the market place. Users may want to use early demonstrations to gather information on what systems generally need to do. It is vitally important that before procurement begins in earnest there is a set specification distinguishing, if necessary, between mandatory and desirable items. EC Directives and, in the future, CCT regulations may well apply to the
procurement in which case strict rules on specification and evaluation may have to be followed.

**Financial Management**

35. Good financial management is increasingly important because of the emphasis on value for money, devolved budgeting and the financial difficulties facing many authorities. Yet for many IT projects the real cost of the project is seriously underestimated because of unfamiliarity with IT project budget profiles or an unwillingness to declare the full cost of the proposal. The on-going costs to the revenue budget for hardware and software maintenance, new releases of software and refresher training are often not considered. Price increases do not necessarily follow inflation or the RPI with software costs tending to increase above them and hardware maintenance costs currently being very competitive.

36. The value of the contract(s) to be let will determine whether or not some EC Directives have to be complied with. The procurement may genuinely involve several contracts over an extended period. Even if these fall below EC thresholds on an individual basis, the procurement may be challenged if one supplier wins several related contracts taking the value of the business related to the procurement over an EC threshold. The full cost of the project must be determined in advance so that an accurate prediction of the contract value(s) can be made.

37. **Costs should include:-**

   - Catering for the whole system life cycle including year end
   - Software - (third party and in-house), systems and applications software (packages, interfaces and additional programs).
   - Implementation services
   - Local hardware - terminals, printers and so on.
   - Central hardware - disc space, memory etc.
   - Telecommunications - wiring, carrier services etc.
   - Electrical and any building work
   - Consultancy, overtime, temporary staff or other arrangements for project management, data input and conversion, acceptance testing etc.
   - Documentation
   - Training
   - Miscellaneous items such as ergonomic furniture, glare guards, security copy cartridges or laser printer consumables.
   - Upgrades to existing systems (local and central hardware, software and communications) necessary because of the new system perhaps in order to maintain existing service levels despite increased traffic

38. For all the above, the initial costs and the recurring costs should be known and budgeted for as appropriate. It should be established on what basis the suppliers will vary their charges (for maintenance, rental and so on) both within the initial contract term and after its end.
39. The final challenge, and one frequently forgotten or avoided, is taking time to evaluate - during and after the project - progress and the successes and failures of the procurement.

Conclusion

40. Throughout most IT procurement the customer needs to remain the central controlling figure supported by specialist advisors. There will be specialist IT procurement for corporate hardware and systems software that remain the domain of the IT department. However, it is the growing area of departmental acquisitions of local equipment and applications software that most needs attention. While the customer must take responsibility for specifying, justifying, progressing the project and so on this cannot be done without an effective procurement infrastructure devised by IT, legal, finance, audit and purchasing; influenced by departments and approved by chief officers and elected members. Customers need to appreciate the way IT can, if badly handled, risk their reputation and finances and yet, if properly handled can transform their services and improve value for money.
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Appendix 1

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Appendix 2

EXAMPLES OF TENDERING PROCEDURES

Restricted

Open

Negotiated
Restricted Tender

Project initialisation

Review market
Identify needs
Plan project
Identify budget
Prepare benefits statement

Prepare Statement of Requirements
Decide on award criteria
Decide on type of contract

Advertise in OJEC and/or local/national press and possibly direct contact with known suppliers

Statement of Requirements sent to respondents including draft contract and requirement for 'mini' proposal

Receipt of 'mini' proposal
Discussions with suppliers
Shortlist suppliers
Full OR sent including mandatory contract conditions to shortlisted suppliers

Evaluation of product
Finalise contract
Product trials

Final clarifications
Final evaluation
Award contract
Advertise award in OJEC
Record contract for statistical return
Produce justification for use of restrictive tendering
Open Tender

Project initiation

Review market
Identify needs
Plan project
Identify budget
Prepare benefits statement

Prepare full Statement of Requirements
Decide on award criteria
Decide on type of contract

Advertise in EEC Journal and/or local/national press and possibly direct contact with known suppliers

Develop evaluation

Full OR and draft contract sent to responding suppliers

Receipt of responses

Evaluation of product
Negotiate final contract
Product trials

Final negotiations

Final evaluation

Award contract

Advertise award in OJEC
Negotiated Tender

Project initialisation

Review market

Identify needs

Plan project

Identify budget

Prepare benefits statement

Prepare Statement of Requirements

Decide on type of contract

Direct contact with known suppliers

Develop evaluation

Full OR sent including draft contract to supplier(s)

Evaluation of product

Negotiate final contract

Product trials

Final negotiations

Final evaluation

Award contract

Advertise award in OJEC

Record contract for statistical return

Produce justification for use of negotiated tender