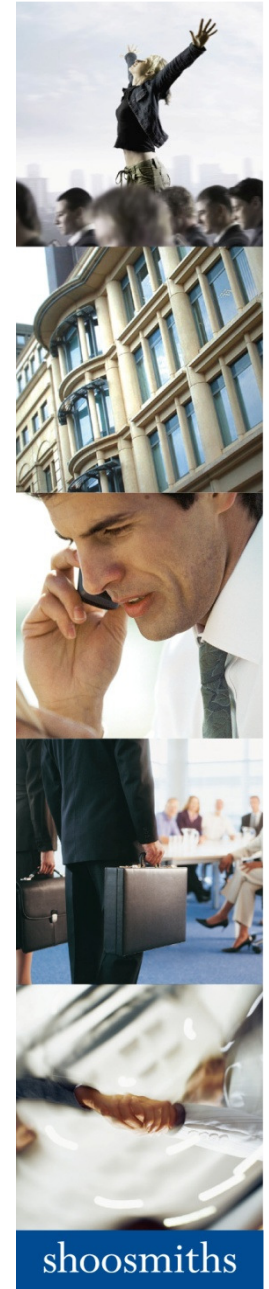


Outline (1)

The first session

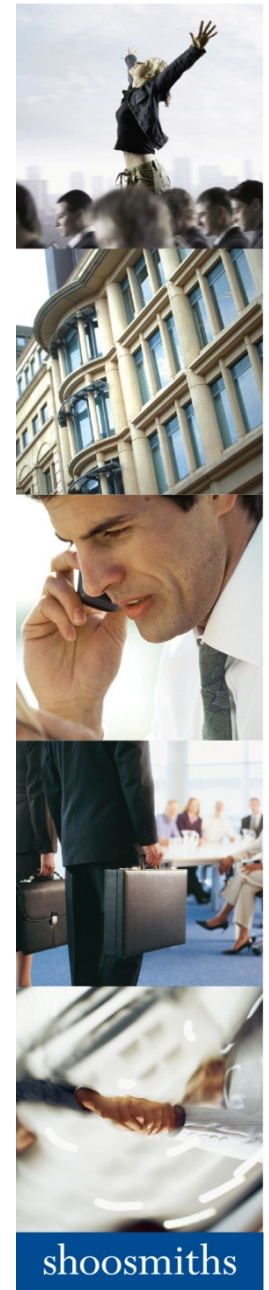
- Common mistakes bidders notice
- Why are bidders challenging? What are they after?
- Why are the remedies rules changing?
- When are they changing?



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Outline (2)

- New standstill (“Alcatel”) provisions
- New limitation periods
- When can a contract be “torn up”?
- What happens then?
- When can you be fined?
- Framework call-offs, Part B services and below thresholds
- Summing up...

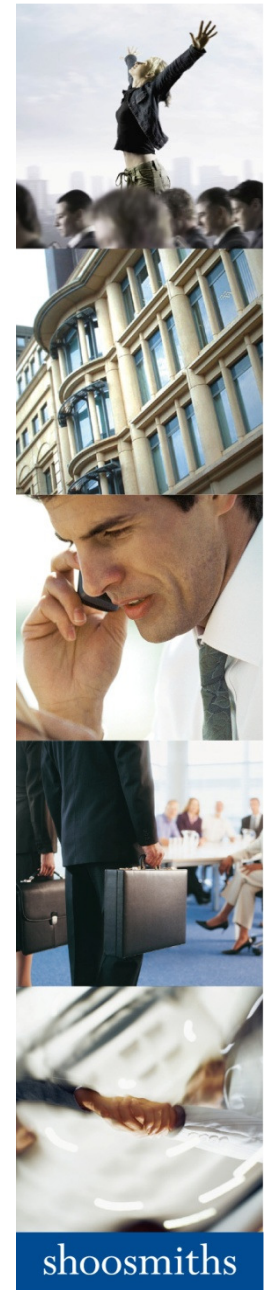


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Outline (3)

The second session...(briefly)

- The position on award criteria: “cards on the table”
- Framework agreements
- Development agreements after the Roanne case

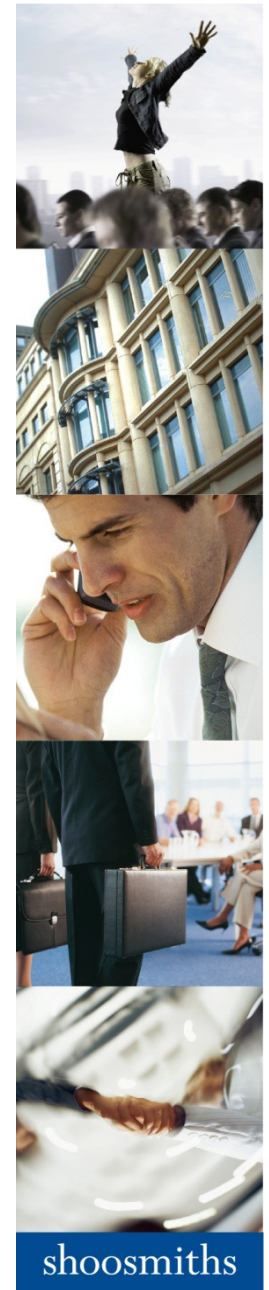


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Case Studies

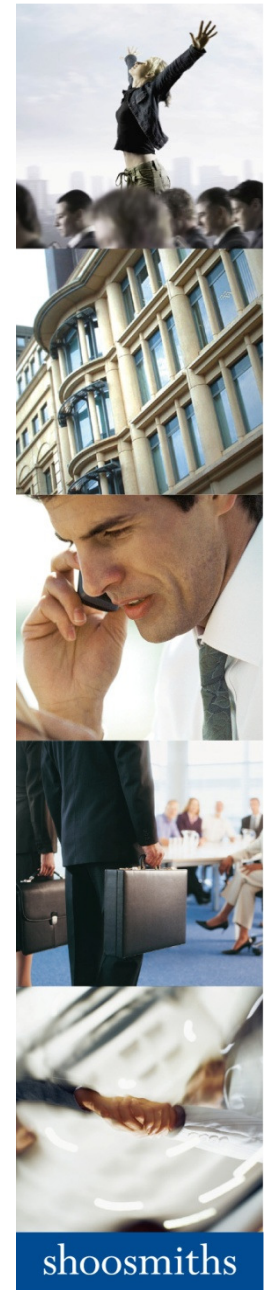
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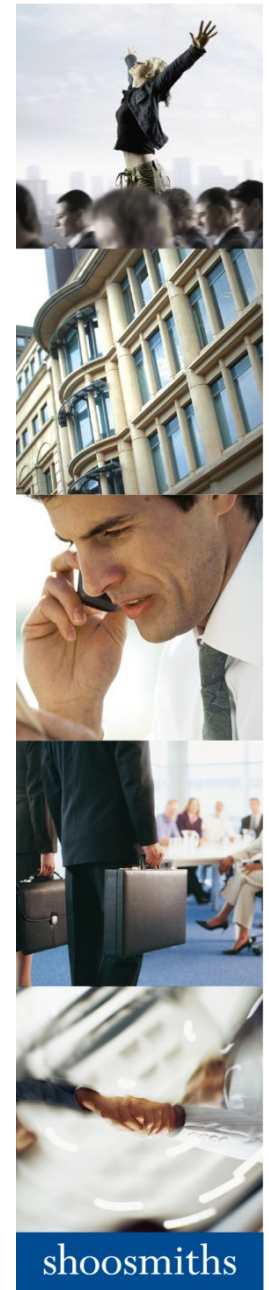
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Common mistakes



Top 5 mistakes

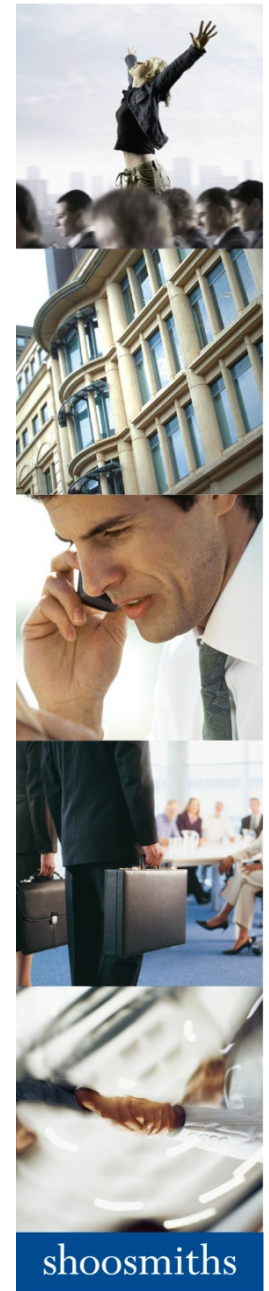
- Mixing up selection and award
- Award criteria and weightings
- End stages of competitive dialogue
- Frameworks:
 - Illegal access
 - Illegal call-off, including amends to terms
- Moving goalposts, renegotiating
- “Negotiating” in restricted procedure



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Current position...

Why are bidders challenging and what are they after?



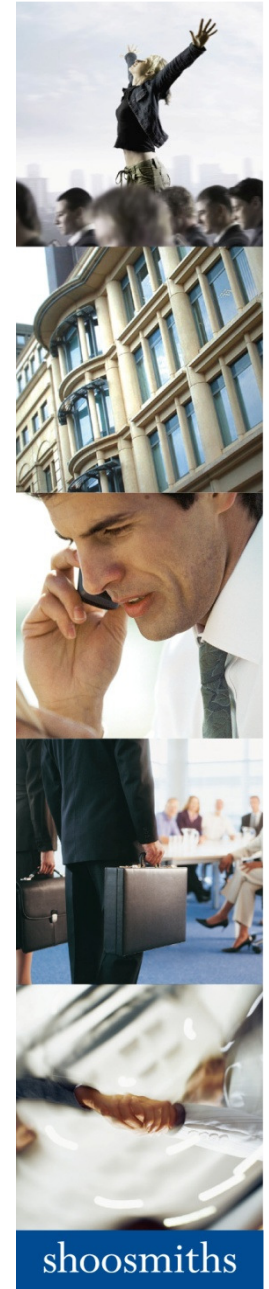
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Why are bidders challenging?

- Recession
- Greater knowledge
- More feeling of “formality”
- Less fear of “rocking the boat”



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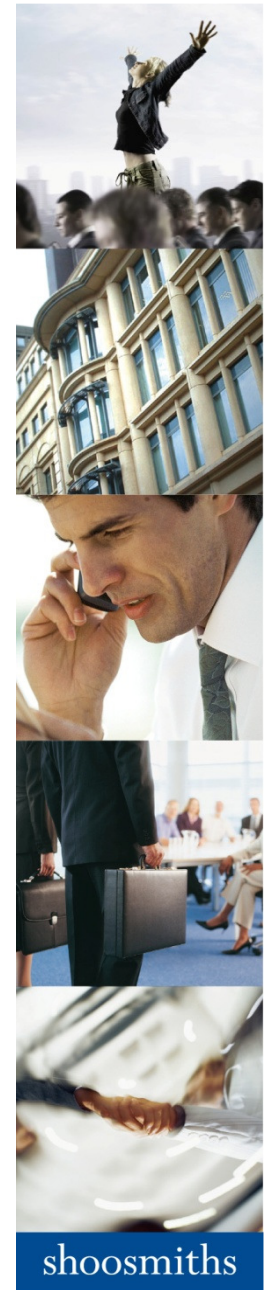
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Bidder tactics

- Nasty letter
- Threatened legal action
- Exploiting uncertainty
- Ultimate aim, currently?
 - Pre-conclusion
 - Post-conclusion

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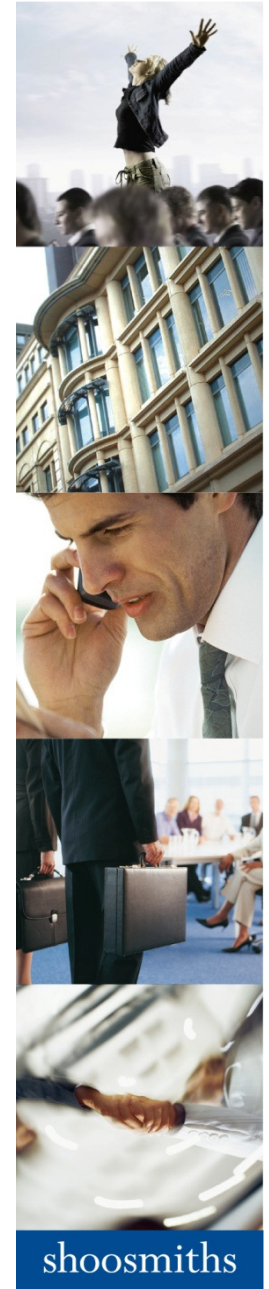
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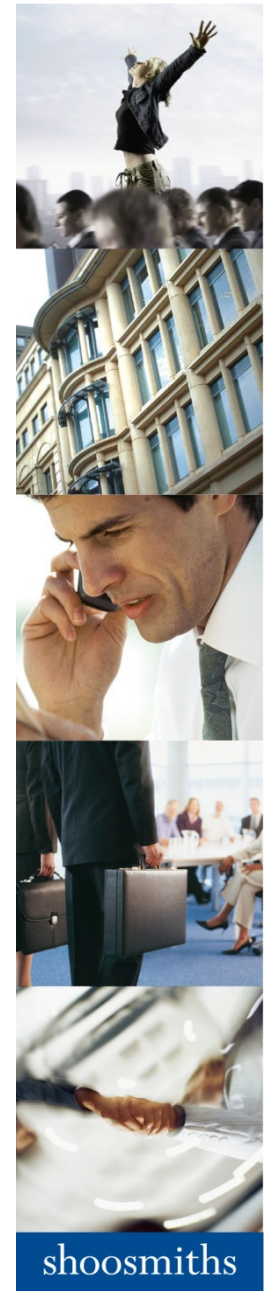
Defence tactics

- Getting it right in the first place
- What are they after?
- Are they well advised?
- Will they go the distance?
- Can you safely call their bluff?



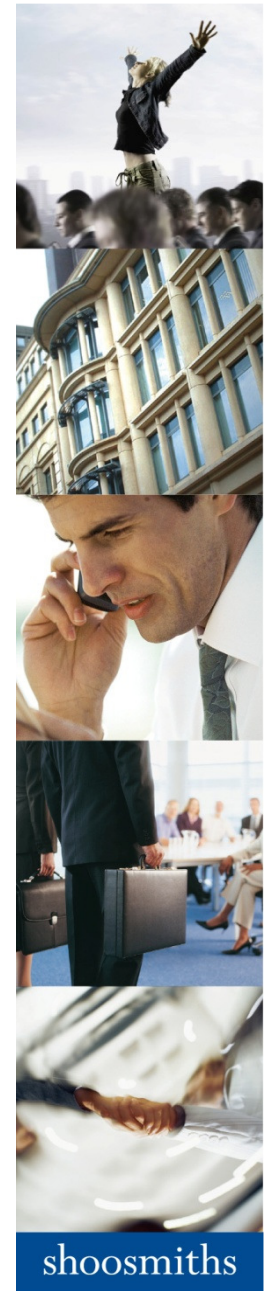
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Why are the Rules changing, and when?



Changes – why, and when?

- Commission fear...
 - Lack of teeth
 - Alcatel period
 - Many cases in some countries, very few in others
 - “Race to contract”



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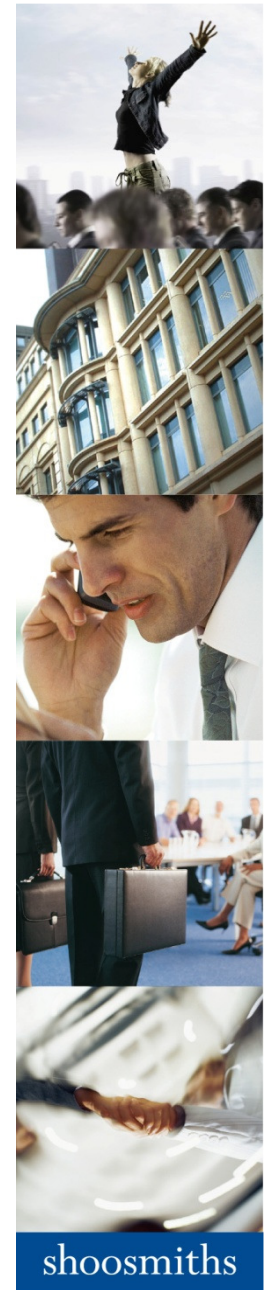
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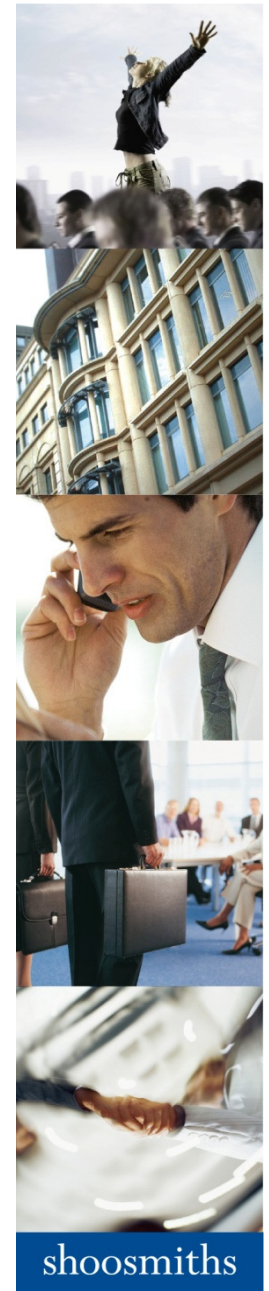
When?

- Response
 - Remedies Directive 2007/66/EC
 - Final Regs published 12 October
 - Will be implemented on 20 December 2009
- Transitional...
 - New rules apply to “new” processes after 20 Dec
 - What about framework call-offs?



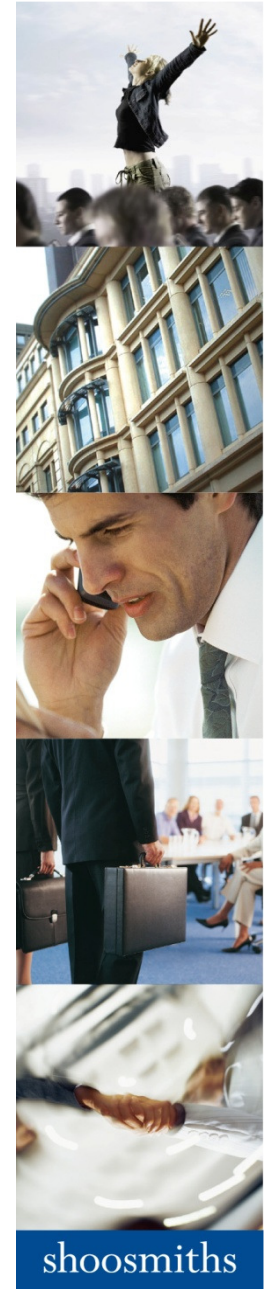
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Changes to standstill provisions



Standstill (“Alcatel”) provisions

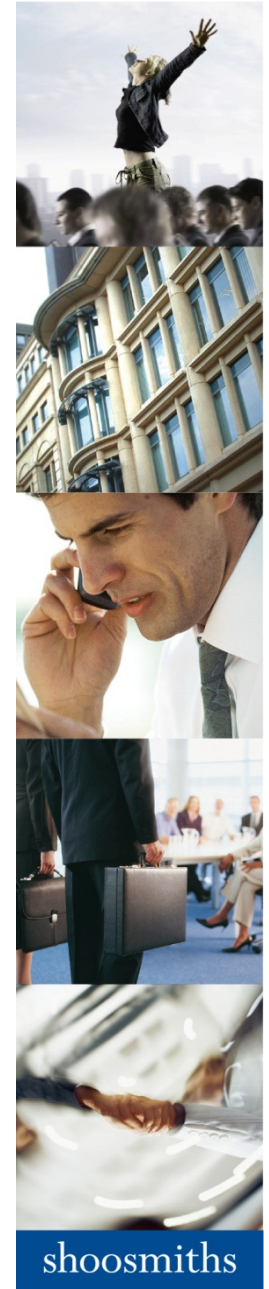
- Only a few changes.
- Send Reg 32(1) notice, must include:
 - Award criteria
 - Name of winner and score
 - Receiving bidder’s score
 - Summary of reasons
 - Summary of standstill period rules.



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Standstill provisions (2)

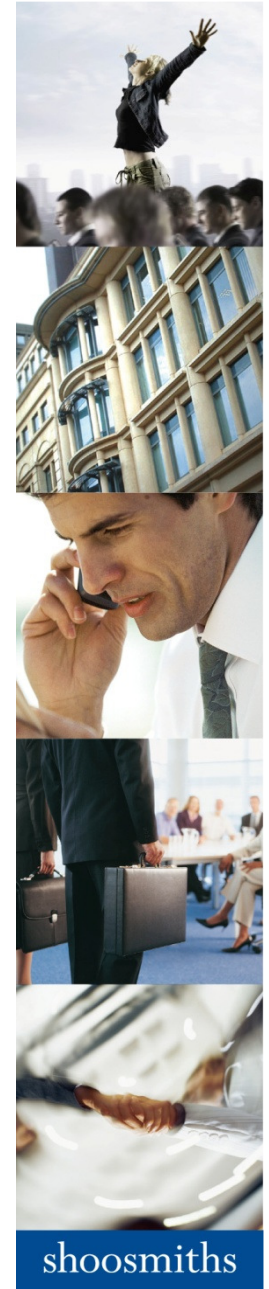
- Additional information request in writing by midnight of second working day following sending of notice? (Reg 32(4) notice)...
 - Send reasons 3 working days before end of standstill period
 - If later, can't conclude contract until at least three days after info is provided



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Standstill provisions (3)

- Can't conclude contract until...
 - Midnight at end of 10th (calendar) day following “relevant sending date” [if sent electronically]
 - Midnight at end of 15th (calendar) day following “relevant sending date” [if sent otherwise]
- Cannot conclude if legal proceedings are issued (Reg 47G)

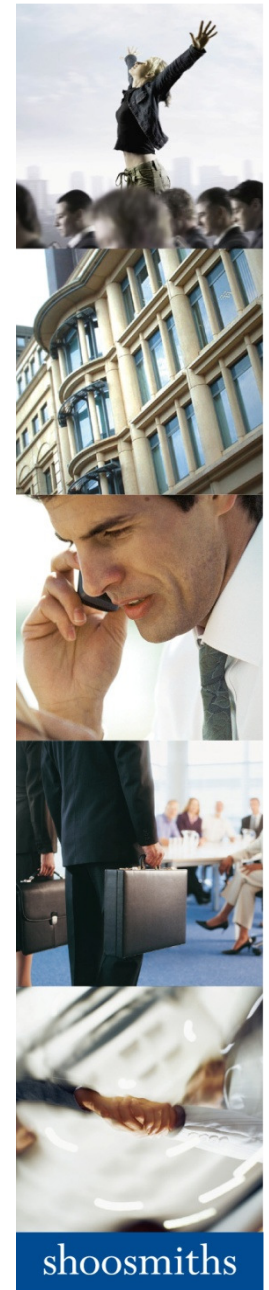


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Standstill provisions (4)

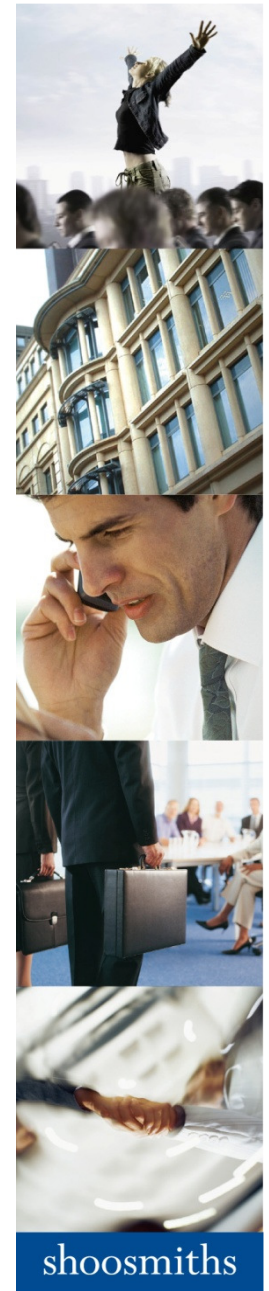
- Note, no mandatory standstill for:
 - Part B contracts
 - Where no OJEU notice required
 - Framework call offs

- But for each, note “choice” later.



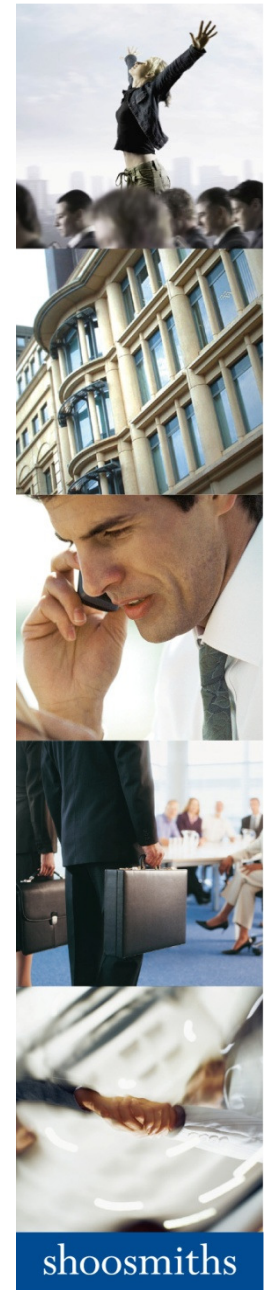
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New limitation periods



Limitation periods

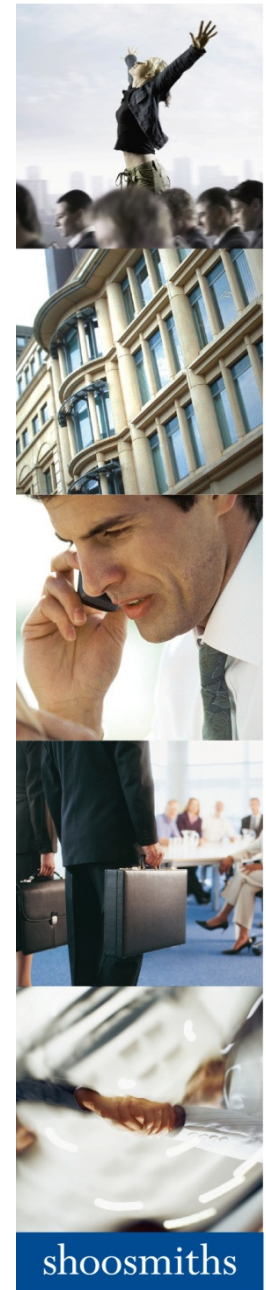
- Currently
 - “Promptly and in any event within three months from when grounds for bringing proceedings first arose”
- Change...
 - “Promptly” never to mean <10-15 days



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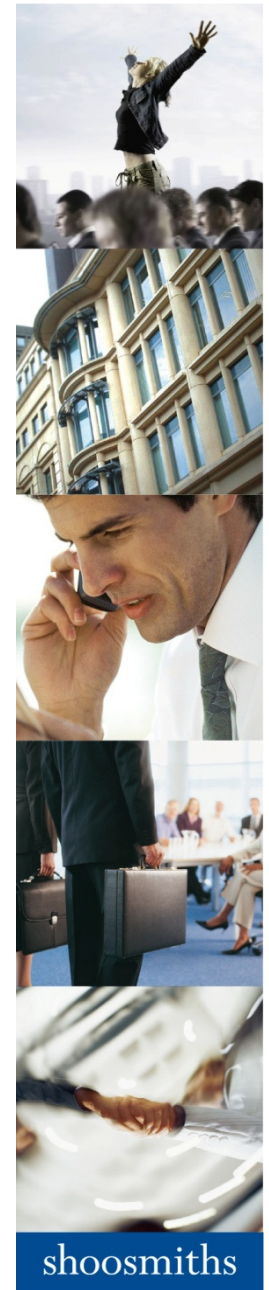
Limitation periods (2)

- Special limitation period for “ineffectiveness”:
 - Where award noticed published, and includes justification of why contract was not “OJEU” in first place, 30 days after award notice
 - Where there was a tender, and all bidders were told, 30 days after the date on which they were told
 - Otherwise, 6 months from contract conclusion



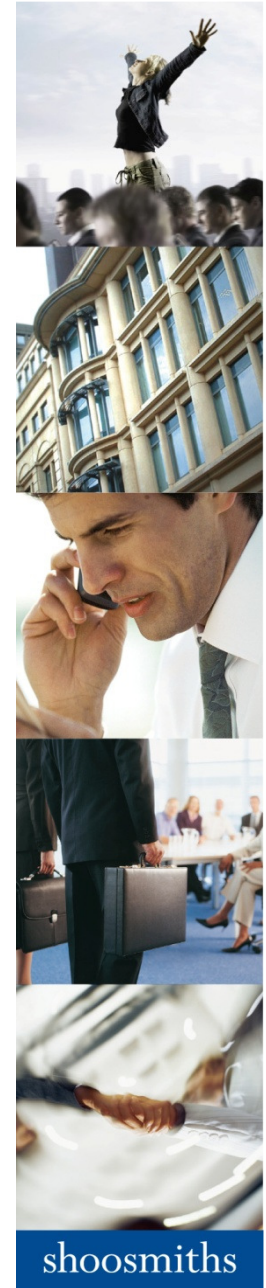
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When can a contract be “torn up”?



“Ineffectiveness” generally

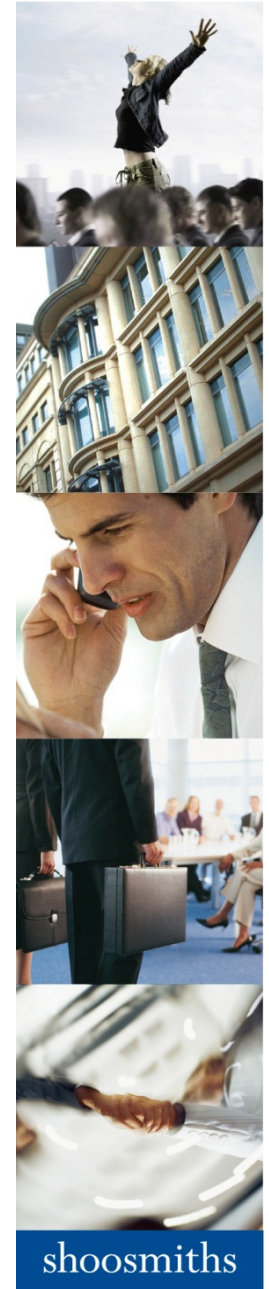
- Significant change
- Court obliged to declare ineffective where...
- One of the three “grounds” apply,
 - Where OJEU notice required
 - Award during standstill period
 - Framework call-offs
- **UNLESS** “public interest” exception applies



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Ground #1 : Reg.47K(1)

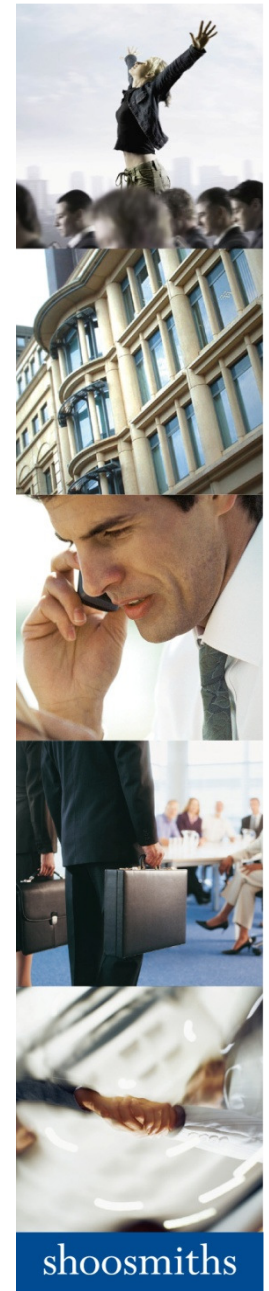
- Award without an OJEU contract notice, where there should have been one.
- Does not apply if...
 - CA believes no notice required (e.g. Part B, £, exception)
 - CA has published “voluntary transparency” notice
 - AND contract not signed for 10 days.
- Aim?



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Ground #2 : Reg.47K(5)

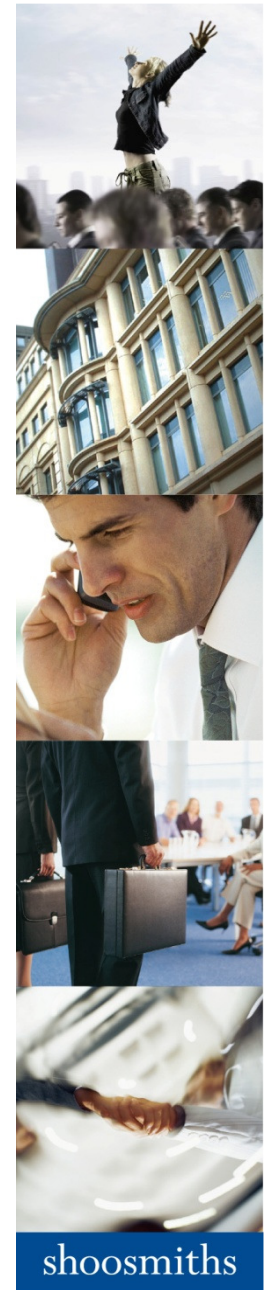
- Signing during standstill period, where:
 - Other, substantive, breach of the Rules
 - Causes bidder serious harm
- Aim?



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Ground #3 : Reg.47K(6)

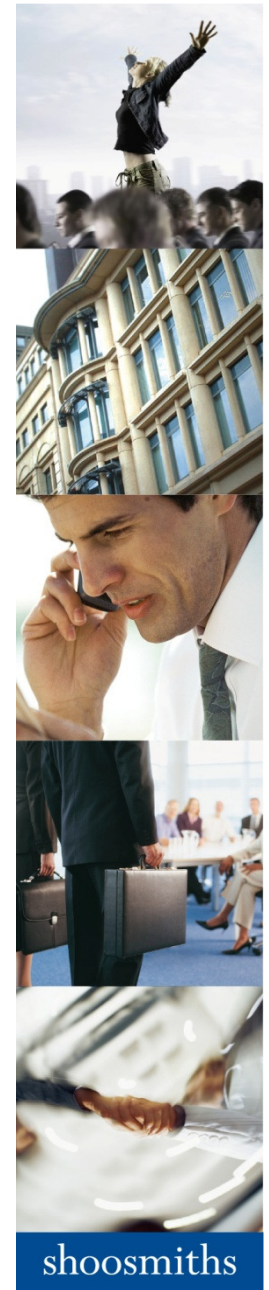
- Call-off under framework where:
 - Call-off illegal (flawed competition, or changes)
 - Value of call-off over advertising thresholds
 - UNLESS
- CA has run a voluntary standstill period.



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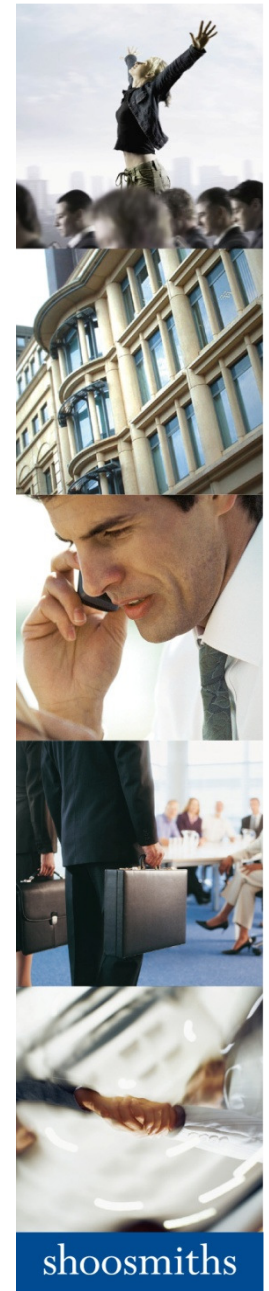
Public interest exception

- Court discretion where “over-riding reasons in general interest”.
- Economic interests generally not included, unless “exceptional”.
- Where Court exercises discretion, it must
 - Shorten the contract and / or
 - Fine the contracting authority



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What happens if the Court “tears up” the contract?



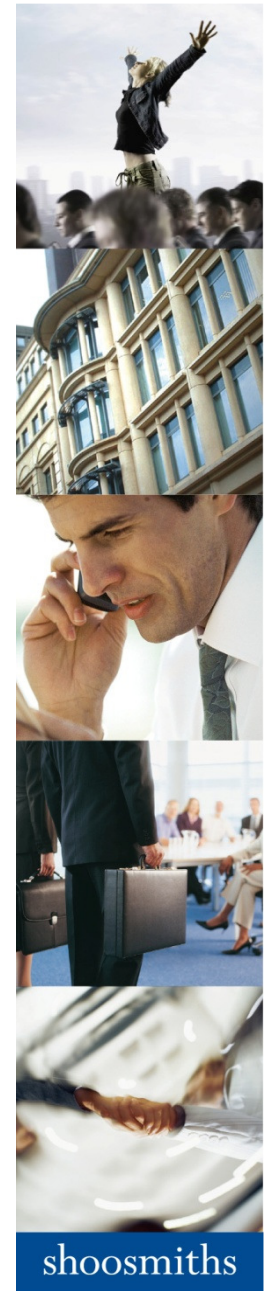
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What happens then?

- Three issues:
 - Existing contract
 - Procuring a new contract
 - Fines



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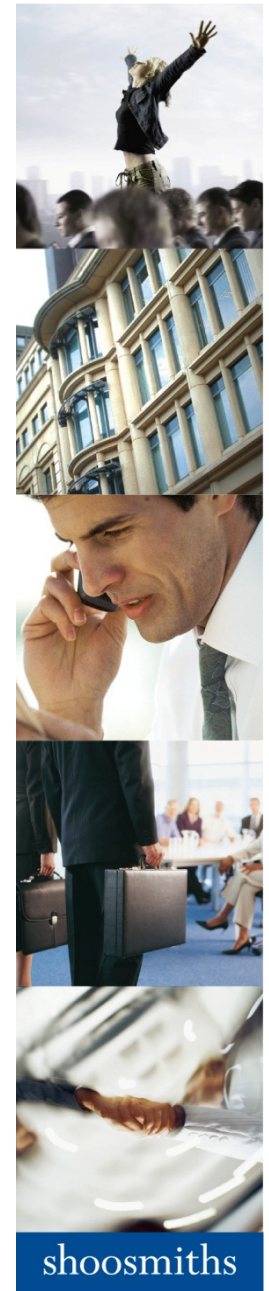
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Contract issues

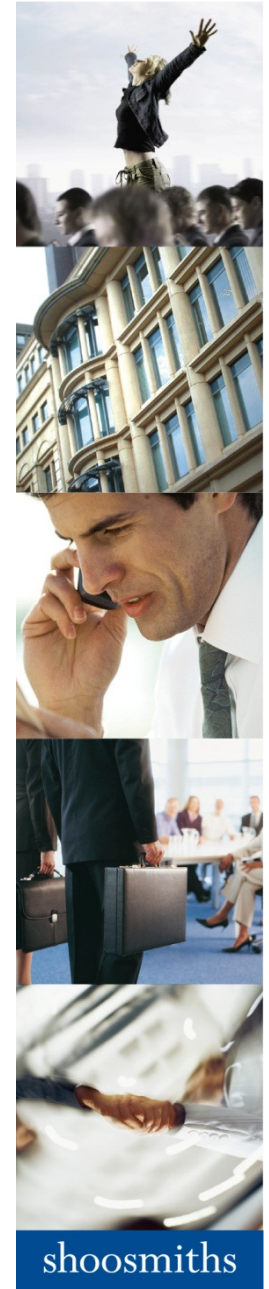
- Ineffectiveness “prospective”.
- Court discretion over:
 - Who gets paid what
 - Work already done? Funds already committed?
 - Extension to allow re-procurement?
- Must have regard to “pre-nuptial” agreement



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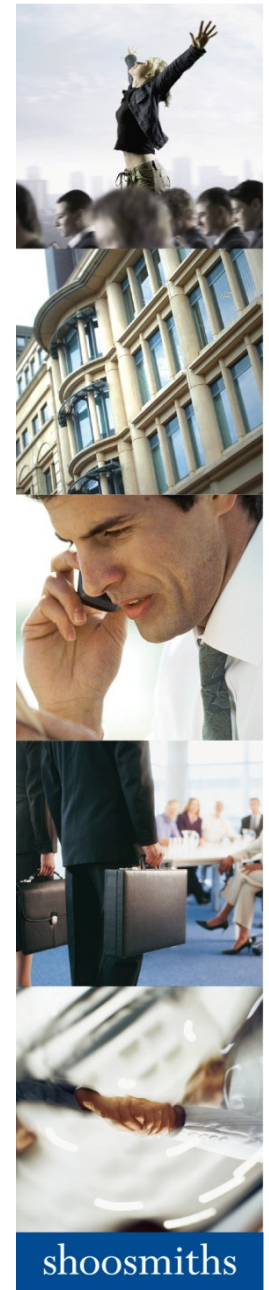
Fines / contract shortening

- Where :
 - “over-riding interest” exception; or
 - CA has concluded during standstill period, but no substantive breach
- Then Court must:
 - Impose “dissuasive” fine on CA; and / or
 - Reduce the contract term.



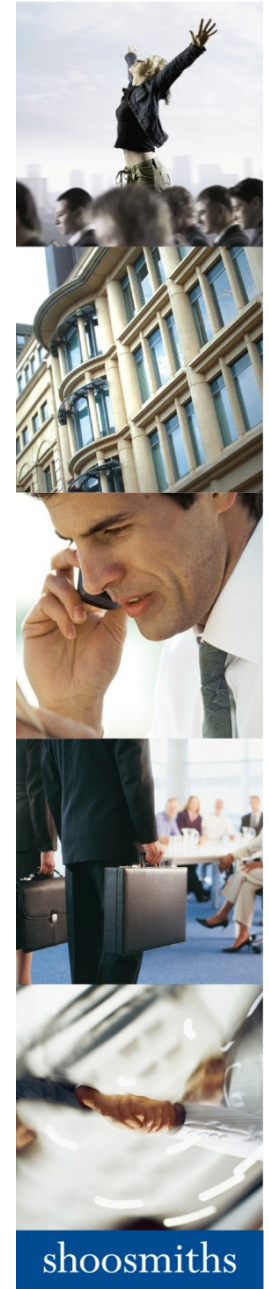
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Clarifying a few points



Frameworks

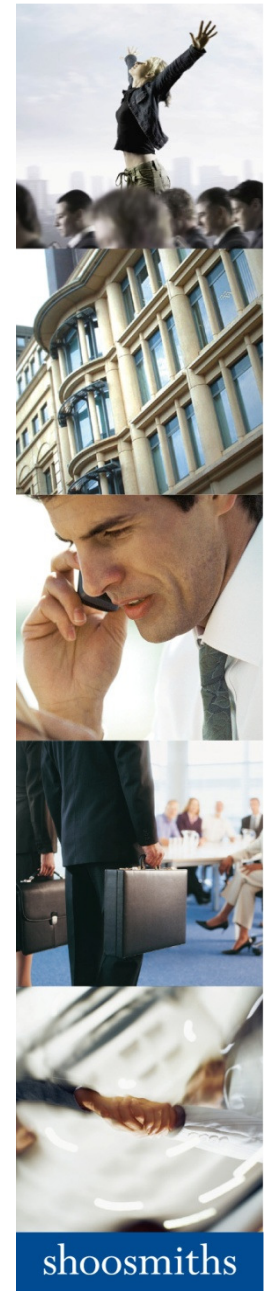
- No obligation to run-standstill, but voluntary standstill will fend-off “ineffectiveness”
- Framework pre-Dec 09 and call-off after?
- If the “framework” is ineffective, what happens to existing “call-offs”?



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Part B and below thresholds

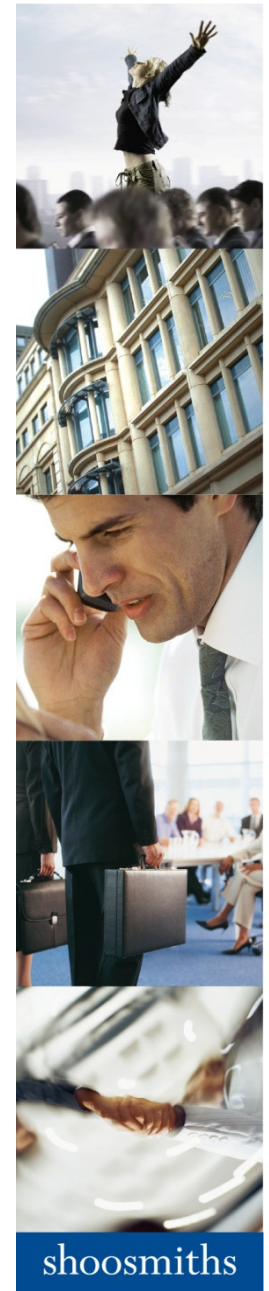
- No standstill obligation
- No ground for ineffectiveness, unless should actually have been “OJEU”d fully.
- To protect against risk, could issue “voluntary” transparency notice and wait 10 days.



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Summing up



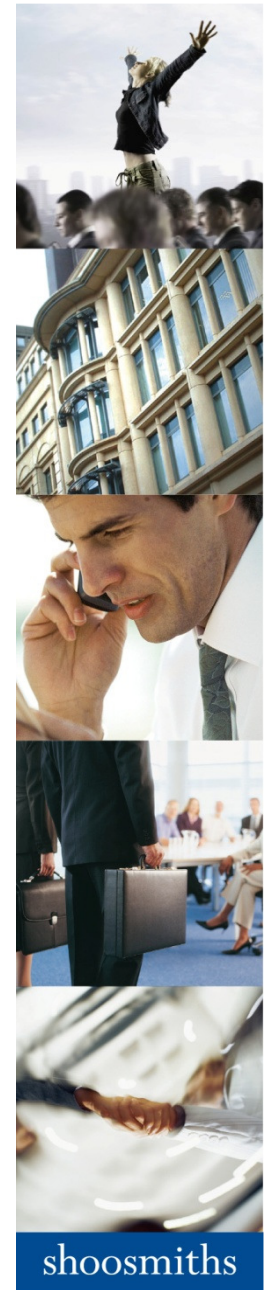
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Summing up

- Will this make a difference?
- What does it mean for you?
- Consider:
 - Pre-nuptial wording
 - Voluntary transparency notices on Part B and <£
 - Voluntary standstill on some framework call-offs

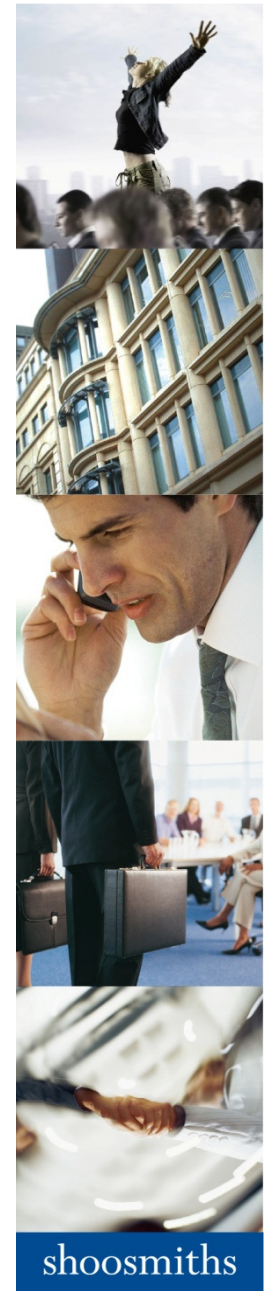


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Award criteria

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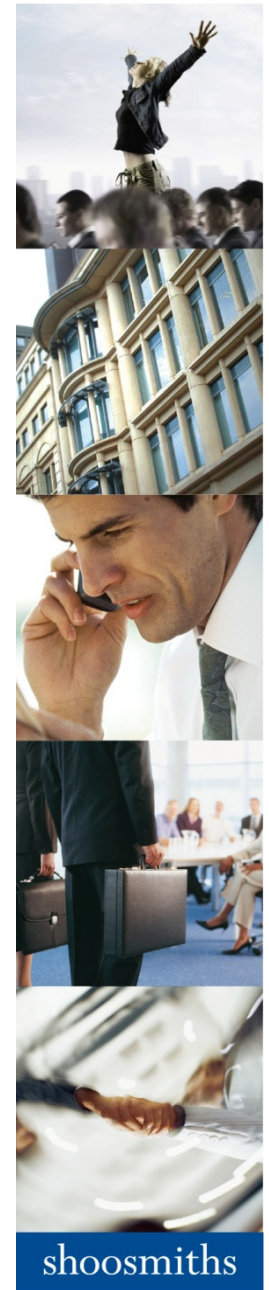
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Award criteria

- Linked to subject matter of contract
- *EVN case* – must be measurable

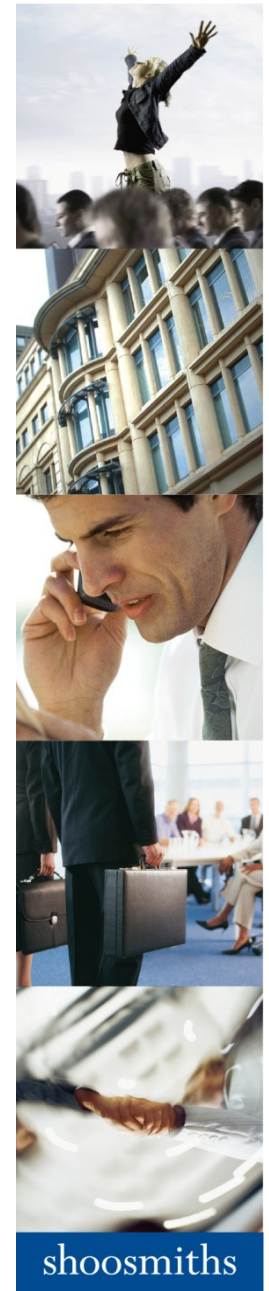
- Note, clear distinction from PQQ stage
- Experience as award criteria?



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Award criteria (2)

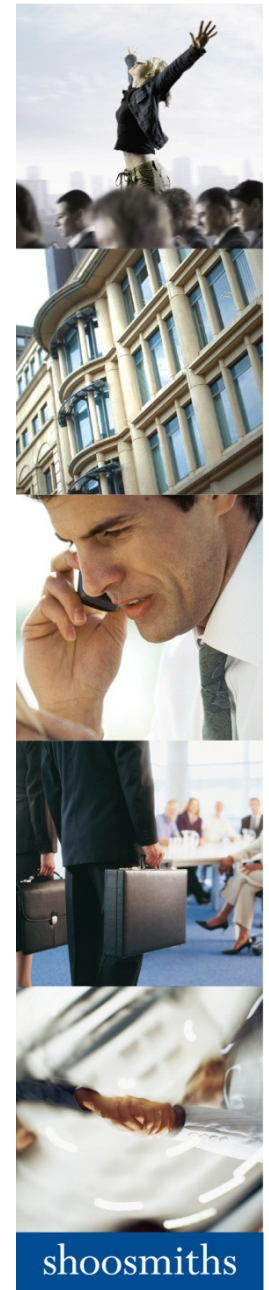
- State relative weightings in OJEU notice or contract docs
- Can provide “appropriate” range
- Unless, “in opinion of CA, weighting is not possible for demonstrable reasons” ...



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Award criteria (3)

- Lettings International V Newham
 - The facts
 - The issues
 - The judgement
- Other cases: McLaughlin V Harvey
- Henry Brothers (Magherafelt)
- Implications?
- What about selection stage?



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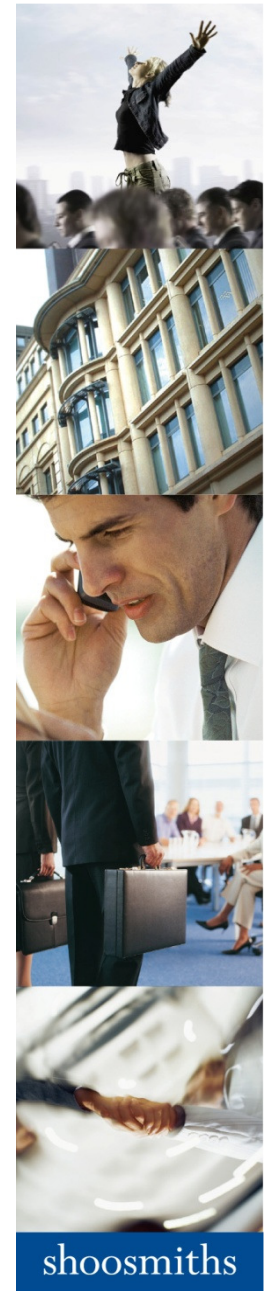
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Framework agreements

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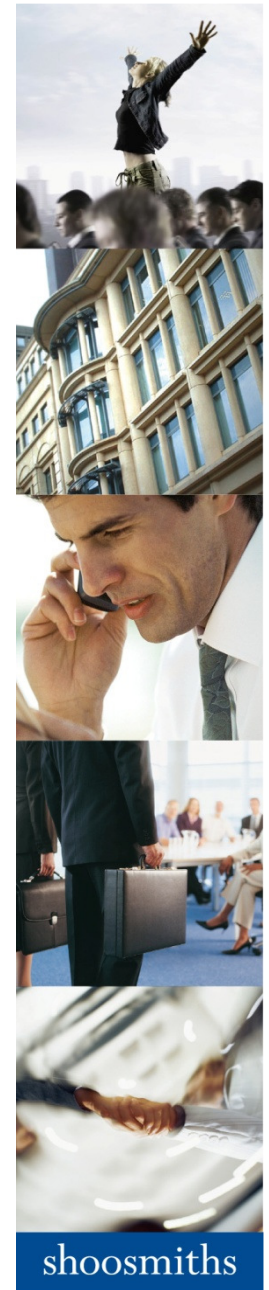
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Framework agreements (1)

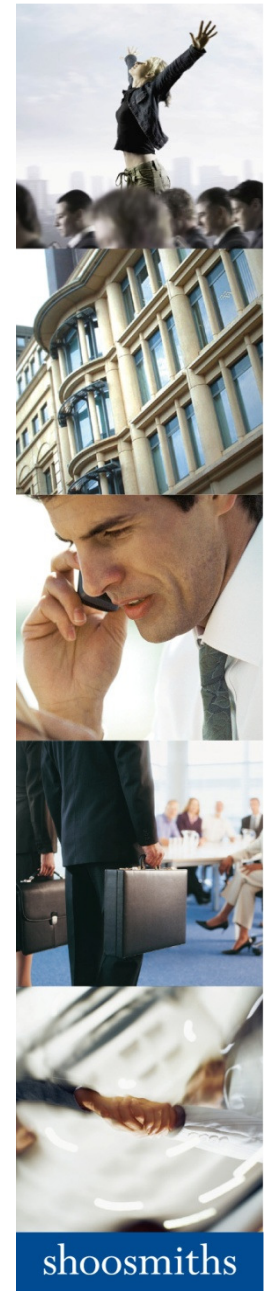
- What are they?
- Agreement re main terms of future contracts
- No commitment to buy
- Was no specific reference under public sector...but in practice, widely used
- Commission reaction.....
- Alcatel



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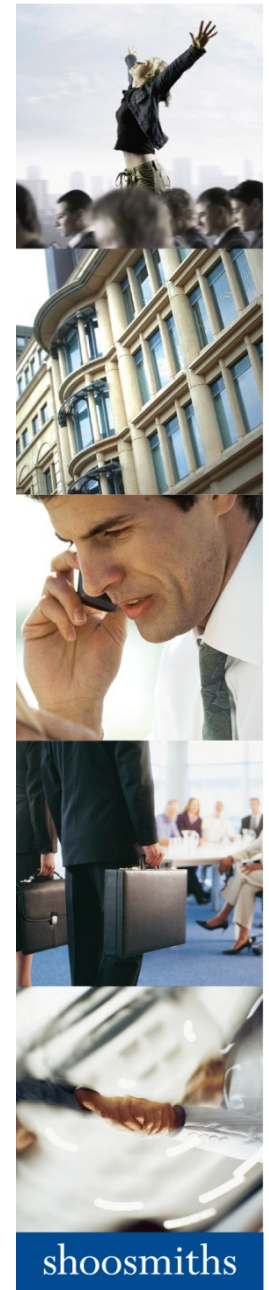
Framework agreements (2)

- “Agreement between one or more CAs and one or more [suppliers] the purpose of which is to establish the terms governing contracts to be awarded over a particular period”



Frameworks (3)

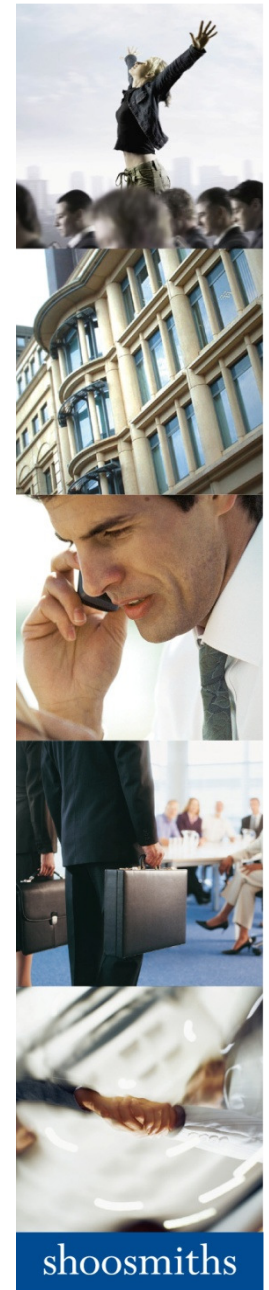
- Who can use them? (Important!)
- Who can supply under them?
- Value on basis of maximum off-take
- Award framework as usual contract
- Limited scope for amendments (meaning?)
- Duration limited...4 years?
- Single supplier, or at least 3?
- Where multi-supplier, call off or mini-competition



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Frameworks (4)

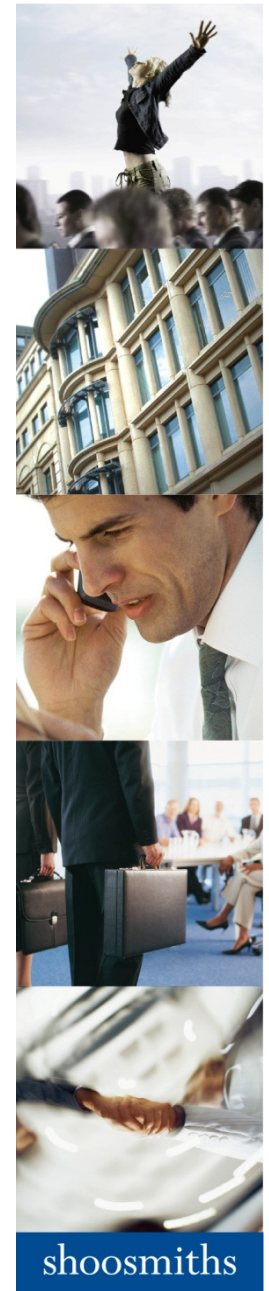
- Simple call-off:
 - Sufficiently detailed?
 - Apply award criteria
- Mini-competitions:
 - invite all capable providers
 - bids in writing
 - award on basis of award criteria
 - May alter weightings?





Development Agreements

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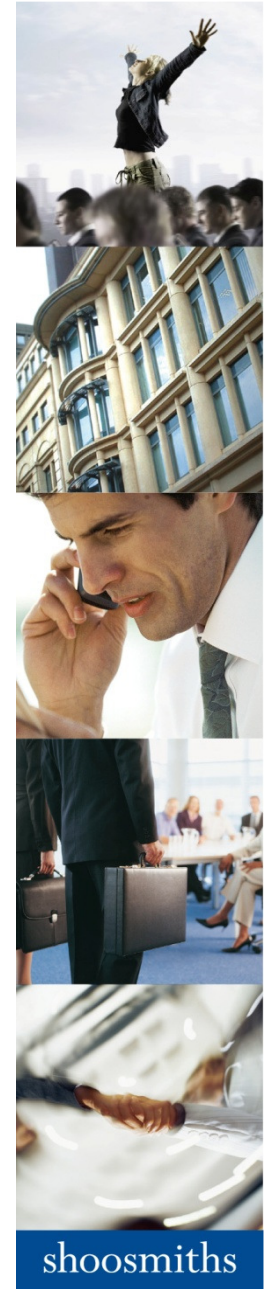


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Development Agreements

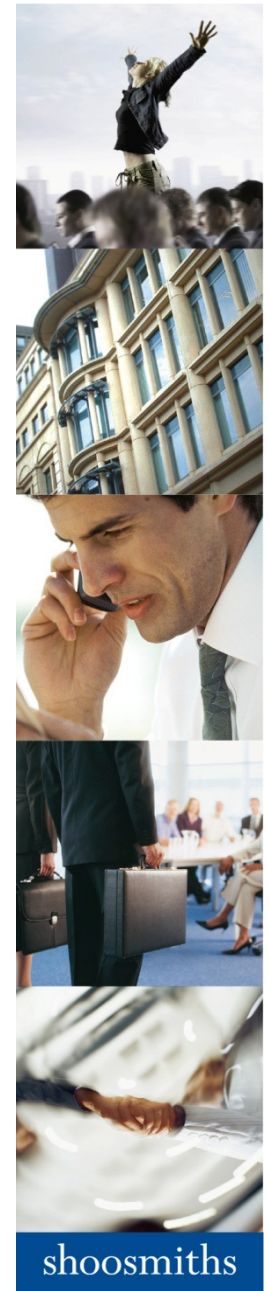
- Why be concerned?
- Issues:
 - Are works being procured?
 - Extent of public element? “La Scala” decision
 - Specification & control? “Jean Auroux” decision
 - Leases: Cologne case
- Why be concerned
- Best Practice
- HCA framework



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Questions?



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