5
Legislative and Regulatory Controls on Delegation

5.1 Introduction

In contrast with the overarching constitutional principles examined in the last chapter, the control techniques considered in this chapter are those which tend to regulate the day-to-day management details of private delegation. As will be seen, the focus here is primarily on executive delegators, because by their nature, and unlike constitutional controls which have the potential to apply to all governmental actors, legislative and regulatory controls are not generally used to constrain legislators.¹ The focus is also primarily on the executive’s use of its dominium power as an instrument of delegation. The term dominium is often used to describe governmental power to regulate through its spending capacity—in contrast to government’s imperium power of regulation through the command of law.² But the government’s dominium power also provides an important means of delegating power. In particular, as was mentioned in Chapter Two, in all three jurisdictions, contract and grant constitute two very significant instruments of private delegation for governmental actors,³ and it is these mechanisms which will be examined in detail in this chapter.

As between contract and grant, it is important to note generally that there is no necessary correlation between the chosen instrument and the degree of power delegated. Neither need involve significant power: a government department might contract out the cleaning of its offices or give a grant to a research student in a university. Alternatively, though, both may involve delegation of notable discretionary power: a governmental authority might contract out to a private housing association its provision of welfare housing to the elderly,⁴ or give a grant

¹ In the EU context, of course, this statement has to be qualified due to the unique distribution of powers between the institutions discussed in Ch Two (above 2.3.3.1), and legislative controls may bind the institutions even though they also participate in the legislative process.
³ Above 2.4.1.3, 2.4.2.3, and 2.4.3.3.
Delegation of Governmental Power to Private Parties

to a private organization to administer an educational training programme,⁵ involving determinations of eligibility for programme participation and discretionary decisions on the distribution of government funds to achieve government objectives. The point is that both instruments can be used to delegate power.

Turning then to the issue of identifying the specific control systems applying to contracts and grants, first, the range of sources from which controls are derived is vast—from US executive orders and legislation, to English statutes and policy statements, to EU directives and an EU regulation. Contracts and grants also tend to be regulated in each jurisdiction by different systems of control. Grants are usually governed by their authorizing legislation—and to the extent that any common controls exist in any jurisdiction, they tend to be quite vague. Contracts, on the other hand, usually fall within the remit of public procurement regimes, which tend to be ‘technocratic’ in nature, involving ‘detailed specifications’ and ‘elaborate procedures’.⁶ Whether this difference in treatment is fully justifiable will be considered through the course of the chapter. As a general matter too, in each jurisdiction, governmental spending power is, of course, regulated by government-wide audits and accounting mechanisms⁷; but the focus of this chapter is more specifically on those, mostly legally enforceable, constraints that pertain particularly to private delegation.

Structurally, given the complexity of the different levels of control, for the sake of manageability, each jurisdiction will be considered in turn: beginning with the EU, where regulation of the Commission’s private delegation is extremely strict, and ending with England, which, by contrast with the EU and US, has quite a lenient system of private delegation control. The discussion of each jurisdiction will consider both those situations where government is delegating a task it already performs and those where government is organizing the performance of a new function and opting for private performance. Within each control system, four issues will be considered: substantive constraints, procedural requirements, supervisory obligations, and the enforceability of all of these. Substantive constraints involve functional and choice of delegate limits on delegation capacity;

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procedural requirements refer to the processes by which governmental delegating authorities delegate; supervisory obligations encompass both supervision of governmental delegators and supervision of delegates by governmental delegators; and the enforceability discussion reviews the mechanisms, administrative and judicial, that exist to enforce the controls.

Three points should be made at the outset. First, the aim of this chapter is not to provide an in-depth account of each type of control and, in particular, of procurement regimes, as such an exercise in itself would require and indeed has required whole books. Rather, the aim is to highlight the important elements in each control system, with particular emphasis on those features of control which differ significantly between jurisdictions. Second, although there will be much discussion of procurement, the scope of this chapter extends well beyond procurement. This is because, as Davies has noted, procurement only begins ‘once the government has decided to use contract for a particular purpose’. It does not address ‘wider questions’ which are addressed in this chapter, such as, most notably, the extent to which each jurisdiction controls decisions as to whether contractual methods of service delivery should be used at all.

Finally, the discussion of the controls in the three jurisdictions will, by necessity, be heavily descriptive. However, the conclusion to the chapter will provide analysis of the detail and will aim to do two things: first, to consider generally how the types of control examined here respond to the challenges of private delegation raised in Chapter Three; and second, to compare and contrast the controls available in each jurisdiction. For now, though, a few guiding comments are worth making on the four types of legislative and regulatory constraint considered in this chapter. Functional controls on delegation powers are relevant to the question of the impact of private delegation on democratic values, with delegation of broad discretionary powers to private actors being more likely to undermine representative democracy. Different controls on the choice of delegate will affect the ability of private delegation to achieve efficiency and also to further participatory democracy, although these aims will usually conflict. If delegates are chosen using purely cost criteria, this may positively affect efficiency returns. However, if secondary aims are pursued and delegates are chosen because they represent minorities or local communities, this will increase the potential of private delegation to enhance participatory democracy, as discussed in Chapter Three. Procedural controls, particularly if involving public-private competitions, will seek to ensure efficiency. Supervisory obligations can ensure the long-term

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10 Ibid.
11 See above 3.3.1.2.
success of the private delegation; while if all these controls are enforceable, this will enhance accountability and transparency.

5.2 European Union

As will be recalled from Chapter Two, the delegation processes identified in the EU—aside from legislative measures—were the following: contracting out by the Commission to private delegates; grant-making by the Commission to private delegates; payment of funds by the Commission to a national authority, which in turn makes a contract or grant to a private delegate; and delegation by the Commission to an executive agency, which in turn makes a contract or grant to a private delegate.

5.2.1 Contracting out to a private delegate

All contracting out by the Commission is regulated by the 2002 Financial Regulation (‘the Financial Regulation’) and its accompanying implementing regulation (‘the Implementing Regulation’), and there is no separate treatment of delegation of already-performed and newly-required tasks.

5.2.1.1 Substantive constraints

In functional terms, the new EU model of control rests on what has been described by one commentator as the ‘transmission-belt model of administrative regulation’. According to the Explanatory Memorandum which accompanied proposals for the Financial Regulation, externalization of Commission tasks is to be limited. Article 54(1) of the Financial Regulation establishes the general principle that the Commission ‘may not delegate to third parties the executive powers it enjoys under the Treaties where they involve a large measure of discretion implying political choices’. In particular, in its review of the initial proposed regulation, the Council ‘requested that it be stipulated that budget implementation tasks may not be entrusted to legal persons governed by private law—a principle now enshrined in Article 57 of the Regulation. Article 57(2) indicates that the only tasks to be entrusted by contract to external private-sector bodies that do not have a ‘public-service mission’ are

12 Above 2.4.3.3.
15 Explanatory Memorandum to Proposal (n 13) [B.3].
16 Explanatory Memorandum to Amended Proposal (n 13) [2.5.1].
technical expertise tasks and administrative, preparatory or ancillary tasks involving neither
the exercise of public authority nor the use of discretionary powers of judgment.¹⁷

As yet, there is no indication of which tasks will fall within the scope of Article
57, and, as will be considered in greater depth below,¹⁸ the meaning of such terms
as ‘technical’ and ‘ancillary’ and so on is obviously not uncontested. It suffices to
note for now that the EU contracting-out scheme has adopted a strong notion of
the policy-making/policy-implementation dichotomy,¹⁹ with a broad understand-
ing of the former and a very narrow understanding of the latter: the role of private
actors in EU governance, at the EU level at least,²⁰ is intended to be limited.

As for choice of delegate controls, the Financial Regulation limits the Com-
misson’s choice of delegate strictly, ‘[i]n order to prevent irregularities and to
combat fraud and corruption and promote sound and efficient management’.²¹
Candidates are excluded if they have engaged in any of a long list of activities
ranging from bankruptcy, professional misconduct, fraud, to any other illegal
activity detrimental to the Communities’ financial interests.²² Also excluded
are those who have been declared to be in serious breach of contractual obliga-
tions following a previous procurement or grant procedure²³ and those guilty of
a conflict of interest or misrepresentation during the procedure.²⁴ Requiring the
exclusion of candidates, who have performed poorly under previous contracts
or grants, clearly constrains the delegator’s choice of delegate, yet also provides a
particularly useful mechanism for ensuring accountability of private delegates.

When selecting among candidates not excluded on any of the listed grounds,
the procurement model adopted might be described as primarily ‘economic’,²⁵
and the Commission’s choice is constrained by an obligation to select candi-
dates on the basis of the automatic award procedure or the best-value-for-money
procedure.²⁶ The former involves awarding the contract to the responsive bidder

¹⁷ See also Art 57(1) (private actors can only administer budgetary funds where the benefi-
ciaries and conditions and amounts of payment are determined by the Commission); Preamble
[17]; Proposal (n 13) Preamble [15].
¹⁸ Below 5.5.2.
¹⁹ Above 3.4.
²⁰ The Regulation does not speak to private delegation by Member States, in their role as EU
administrators. See above 2.3.3.2.
²¹ Financial Regulation Preamble [25].
²² Ibid Art 93(1); Implementing Regulation Art 133.
²³ Financial Regulation Art 93(1)(f) and Art 96(1)(b). It is unclear whether Art 93(1)(f) can be
used by the Commission to declare a private contractor in breach of contract without having to
use any of the dispute resolution procedures set out in the contract: see, eg, Case T-289/06 CESD-
Communautaire v Commission (action brought on 11 October 2006) OJ 2006 C310/20; Case
T-286/05 Centre Européen pour la Statistique et le Developpement Asbl (CESD) v Commission
²⁴ Financial Regulation Art 94. For challenges relating to the operation of Art 94, see Case
T-195/05 NV Deloitte Business Advisory v Commission, 18 April 2007 nyr (CFI) [67] (risk of conflict
of interest must be real and not a ‘mere possibility’).
²⁵ P Trepte, Regulating Procurement: Understanding the Ends and Means of Public Procurement
2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works
which quotes the lowest price, while the latter requires determining the ‘best price-quality ratio’, taking into account a variety of factors, including price, technical merit, ‘aesthetic and functional characteristics’, and ‘environmental characteristics’. A weighting system should be specified in advance for the different factors, although weighting must not result in the neutralization of price in the choice of contractor. Where a tender price appears to be ‘abnormally low’, the EU delegator may reject the tender, but only after requesting written details and hearing the bidder’s explanation.

5.2.1.2 Procedural requirements

The Financial Regulation also brought changes to the method by which private contractors are chosen. Most significantly, where the Commission delegates a task to a private body pursuant to Article 57 of the Financial Regulation it must enter into a contract with that private actor in accordance with the procurement rules set out in the Financial Regulation, and these rules approximate to those applied to Member State procurement by the 2004 Procurement Directive. The general principles of EU procurement law are that all public contracts should comply with the principles of transparency, proportionality, equal treatment, and non-discrimination. Because all procurement contracts should be put out to tender on the broadest possible base, there are various rules relating to publication, the most important of which is that all contracts falling within the threshold value should be published in the Official Journal of the European Communities. Even contracts below the threshold value of the 2004 Procurement Directive must be advertised by appropriate means to ensure competitive tendering and the impartiality of the procurement procedure. The procurement procedure can take one of five forms: the open procedure, the restricted procedure, contests, the negotiated procedure and competitive dialogue, and the award must be made on the basis of the selection criteria contained in the documents relating to the call for tenders.

The procedures are not set out in detail in the Regulation, but are described in the Implementing Regulation and are also found in the 2004 Procurement Directive. In brief, the open procedure requires the consideration of bids from any contracts, public supply contracts and public service contracts [2004] OJ L134/114 (‘the 2004 Procurement Directive’) Art 53(1)(a)-(b).

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27 Implementing Regulation Art 138 (1)(a).
28 Ibid Art 138(2).
29 Ibid Art 138(3).
30 Ibid Art 139(1).
31 Ibid Art 40; Financial Regulation Preamble [45].
32 Above n 26. See also below 5.4.1.1(b), and 5.4.1.2.
33 Financial Regulation Art 89(1).
34 Ibid Art 89(2).
36 Ibid.
37 Financial Regulation Art 90(2); Implementing Regulation Arts 119, 120 and 121 (electronic advertising).
38 Financial Regulation Art 91(1) (a)–(c); Implementing Regulation Arts 122–9, 140–45.
39 Financial Regulation Art 97(1); Implementing Regulation Arts 135–7.
40 Implementing Regulation Arts 122–9, 140–45.
interested party who responds to the advertisement. This procedure facilitates ‘the maximum possible competition’ and is extremely transparent and less likely to result in collusive behaviour since there is no discretion in selecting providers to tender. However, Arrowsmith notes that the open procedure can result in wasted time and costs when unqualified firms submit bids, and may result in potentially strong competitors being unwilling to submit a bid due to the reduced chances of success in open procedures. By contrast, with the restricted procedure, all interested parties are invited to contact the authority in response to the contract advertisement: however, only candidates satisfying particular selection criteria are invited to submit a tender. With contests, the delegator invites a number of candidates—‘which must be sufficient to ensure genuine competition’—to participate, and appoints a selection board, which will deal anonymously with the bids until it has made its decision. Meanwhile, the negotiated procedure—whether with or without a notice—enables contracting authorities to select one or more persons with whom to negotiate the terms of the contract, which will be awarded to one or more of them; and competitive dialogue is only used for particularly complex contracts.

5.2.1.3 Supervisory obligations

EU delegators are subject to a number of supervisory obligations. They are required to inform disappointed candidates of the grounds on which the procurement decision has been made, to maintain a database of contractors that should be excluded from procurement, and to penalize contractors who are guilty of misrepresentation or in serious breach of contractual obligations. Written records of evaluation decisions must be kept. A power is provided by Article 101 of the Financial Regulation for the delegator to either abandon the procurement or cancel the award procedure before the contract is signed, without the candidates or tenderers being entitled to claim any compensation. This is a useful mechanism which may, for instance, enable the Commission to avoid continuing with a contract in the absence of sufficient competition. However, any decision to use Article 101 must be substantiated and be brought to the attention of the candidates or tenderers. Generally, conflicts of interest are to be avoided, and financial actors are precluded from participating in bid evaluation

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42 Implementing Regulation Art 122(2).
43 Arrowsmith (n 8) 422 [7.3].
44 Ibid.
45 Implementing Regulation Arts 122(2), 135.
46 Ibid Art 125.
47 Ibid Art 122(3) (on negotiated procedure). On competitive dialogue, see ibid Art 125b and below 5.4.1.2.
48 Financial Regulation Art 100(2); Implementing Regulation Art 149.
49 Financial Regulation Art 95.
50 Financial Regulation Art 96; Implementing Regulation Arts 133a and 134b.
51 Implementing Regulation Art 147.
52 Whether this is an adequate reason to avail of Art 101 is to be determined: see, eg, Case T-264/06 DC-Hadler Networks v Commission (action brought on 22 September 2006) OJ 2006 c294/53.
where their impartiality is compromised for reasons of family, emotional life, political or national affinity, economic interest or any other shared interest with the beneficiary of the act.⁵⁴ Supervisory controls also relate generally to supervision of expenditure of Community funds, such as appointment of accounting officers to monitor officers who authorize expenditure.⁵⁵ While general controls on spending of funds are clearly of great relevance to private delegation, there are additional controls that could have been appropriately included here, such as a duty on officers making the contracting-out decision to demonstrate to superiors the efficiency and effectiveness of contracting out compared to potential in-house performance.

As for the delegating authority’s supervision of delegates, most importantly, perhaps, Article 54(1) of the Financial Regulation states the general requirement that any implementing tasks delegated must first ‘be clearly defined’, which is reminiscent of the third of the Meroni requirements discussed in Chapter Four⁵⁶ and, second, ‘fully supervised as to the use made of them’, which clearly places an onus on EU delegators to monitor private delegate performance. If a task is delegated to an executive agency⁵⁷ or a delegate with a public-service mission,⁵⁸ as opposed to a private delegate, the Commission delegator is required to ensure that the delegate has effective internal controls, a system for presentation of accounts which will enable the correct use of Community funds to be ascertained, an external audit, and that there is public access to information regarding the expenditure of funds.⁵⁹ No such parallel controls appear to exist in respect of private delegates, although to an extent these concerns are pre-empted in the private delegate context by the provisions mentioned above regulating the trustworthiness of potential delegates.⁶⁰ It can also be required that the private delegate lodge a financial guarantee with the Commission.⁶¹

Article 103 of the Financial Regulation is extremely important here and provides that, where the award procedure or performance of a contract is vitiated by substantial errors or irregularities or by fraud, the institutions are required to suspend performance of the contract. Additionally, where such errors, irregularities or fraud are attributable to the contractor, the EU delegating authorities may refuse to make payments or may recover amounts already paid, in proportion to the seriousness of the errors, irregularities or fraud.⁶² The suspension of the contract is required in order to ascertain whether the errors or fraud actually occurred; and the Implementing Regulation makes it clear that the purpose of

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⁵⁴ Ibid Art 52; Implementing Regulation Art 146(2).
⁵⁵ Financial Regulation Art 61.
⁵⁶ Above 4.3.1.2.
⁵⁷ Financial Regulation Art 55.
⁵⁸ Ibid Art 54(2).
⁵⁹ Ibid Preamble [18], Art 56.
⁶⁰ Above 5.2.1.1.
⁶¹ Financial Regulation Art 102; Implementing Regulation Arts 150–52.
⁶² See also Implementing Regulation Art 153.
Article 103 is to preserve Community funds, with a 'substantial error or irregularity' defined as 'any infringement of a provision of a contract or regulation resulting from an act or an omission which causes or might cause a loss to the Community budget'.

5.2.2 Grants to national authorities

As discussed in Chapter Two, it can be a feature of both centralized and shared EU management that the Commission makes funds available to national authorities for distribution through either grant or contract. It is difficult to make any general observations here, since the Commission's ability to make such funds available will be governed in a very specific way by the particular legal basis for the programme, and by any generally-applicable budgetary rules set out in the Financial Regulation. In turn, the ability of the national authorities to distribute funds to private beneficiaries will be constrained by the primary legal basis, by applicable national regulations, by any conditions the EU may happen to attach to the grant of funds, and, of course, by EU procurement rules. Under the Phare programme, for instance, the local authorities are not subject to the full rigours of EU procurement regulation, as these authorities are usually outside the Union. There is, however, a Practical Guide governing procurement procedures, which closely mirrors those rules applicable to internal EU and Member State procurement. Provision is also made here for both ex ante and ex post control by the Commission.

5.2.3 Grants to private delegates

Grants falling within this category are governed by general rules provided in the Financial Regulation.

5.2.3.1 Substantive constraints

The Financial Regulation stipulates that grants must be used to finance an action intended to help achieve an objective forming part of an EU policy, or the functioning of a body which pursues an aim of general European interest or has an...
objective forming part of an EU policy. With regard to the ‘action’, the only additional limitation appears to be that the ‘action’ must be ‘clearly identified’. A body pursuing an aim of general European interest is a European body involved in education, training, information or research and study in European policies, any activities contributing to the promotion of citizenship or human rights; or a European standards body; or a European network representing non-profit bodies active in the Member States or in the candidate countries and promoting principles and policies consistent with the objectives of the Treaties. Meanwhile, insofar as choice of delegate controls are concerned, grant applications submitted by legal persons are eligible and in some cases, depending on circumstances, grants may also be made to natural persons. Applicants are excluded from eligibility for grants for the same reasons as they are excluded from eligibility for procurement contracts, and penalties may be imposed on applicants who are excluded.

5.2.3.2 Procedural requirements

There are a number of procedural obligations imposed on grant-making. The award process is subject to principles of transparency and equal treatment, and so there should be an annual programme of grants, published at the start of each year, with exceptions for crisis management and humanitarian aid operations. Calls for proposals should always be published, save in cases of exceptional urgency, or where the characteristics of the beneficiary leave no option. Selection criteria should focus on the applicant’s ability to complete the proposed action; the award criteria listed in the call for proposals shall be such as to make it possible to assess the quality of the proposals submitted in the light of the objectives and priorities set; and proposals should be evaluated on the basis of the pre-announced selection and award criteria.

5.2.3.3 Supervisory obligations

Delegators must publish awards annually, while respecting confidentiality and security concerns, and an authorizing officer is required to list the beneficiaries and amounts awarded, to inform successful applicants, and to provide disappointed applicants with an explanation. There are also strict

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70 Ibid Art 108(1)(b).
71 Implementing Regulation Art 161.
72 Ibid Art 162.
73 Financial Regulation Art 114(2); Implementing Regulation Arts 173–5.
74 Above 5.2.1.1; Financial Regulation Art 114(3).
75 Ibid Art 114(4).
76 Ibid Art 109(1).
77 Financial Regulation Art 114(4).
78 Financial Regulation Art 110(1); Implementing Regulation Art 166.
79 Financial Regulation Art 110(1); Implementing Regulation Arts 167–8.
80 Financial Regulation Art 115(1); Implementing Regulation Art 176.
81 Financial Regulation Art 115(2); Implementing Regulation Art 177.
82 Financial Regulation Art 116(1); Implementing Regulation Art 178.
83 Financial Regulation Art 116(2).
84 Financial Regulation Art 116(3).
85 Ibid.
guidelines for supervision by delegators of the impact of the grant on the delegate. Thus, awards may not be cumulative or awarded retrospectively; they must involve co-financing; and they must not produce a profit for the beneficiary. There are also limits on the number of grants that may be made to a particular beneficiary—only one per action and only one per beneficiary per financial year. Grants must not finance the entire costs of either the action or the operating expenditure of the beneficiary body and, importantly, the rate of grant payments must be in accordance with the financial risks involved, and the duration and progress of the action and costs incurred by the beneficiary. As with contract applicants, beneficiaries may be required to lodge financial guarantees with the Commission. The amount of the grant does not become final until after the institution has accepted the final reports and accounts, and should the beneficiary fail to comply with their obligations then the grant can be suspended, reduced or terminated after the beneficiary has been given an opportunity to comment. Most significantly though, where the implementation of the beneficiary’s action requires awarding a contract, either the 2004 Procurement Directive or a best value for money approach must be adopted; and where the beneficiary gives financial support to third parties, the amounts must be small and the conditions set by the Commission, such that the beneficiary has ‘no margin for discretion’.

5.2.4 Delegation to private delegates via executive agencies

Functionally, the Commission is not allowed to delegate to executive agencies tasks involving ‘a large measure of discretion implying political choice’ and, as with delegation to any third party, the tasks delegated to executive agencies must be ‘clearly defined and fully supervised’. Each delegation to an executive agency also requires a Commission Decision. If executive agencies are delegating, it seems that they are in turn required to comply with the procurement and grant award procedures already described and, of course, any other more specific conditions mentioned in the authorizing legislation.

86 Ibid Art 109(1).
87 Ibid.
88 Financial Regulation Art 109(2); Implementing Regulation Art 165.
89 Financial Regulation Art 111.
90 Financial Regulation Art 113(1) (with limited exception).
91 Ibid Art 117; Implementing Regulation Arts 180–81.
92 Financial Regulation Art 118; Implementing Regulation Art 182.
93 Financial Regulation Art 119(1).
94 Ibid Art 119(2); Implementing Regulation Art 183.
95 Ibid Art 120; Implementing Regulation Arts 184 and 184a.
96 Ibid Art 54.
98 Ibid Art 56.
5.2.5 Enforceability of the controls

Generally, in the EU procurement regime, there is a preference for legally enforceable remedies for violations of procurement procedure, as found in the Remedies Directive. The reason for this is that, as with most international procurement systems, a prescriptive approach coupled with judicial control removes the task of monitoring compliance with the procurement regime from governments who may be motivated to protect national bidders, and transfers it to bidders who have a significant stake in the outcome. The Financial Regulation does not seem to apply the substance of the Remedies Directive to the Commission, however. The reason for this is unclear, and there is no mention of remedies in any of the preparatory documents either. Thus, if the Commission does not comply with the provisions of the Financial Regulation, it is not clear, from the Regulation at least, whether or which remedies might be awarded. Importantly, provision is made for a 14 day standstill period before signing the contract, and the Commission is granted the power to discipline individual officers who act in violation of the Regulation, although this latter remedy will be of little benefit to disappointed bidders seeking more useful remedies, such as set-aside or injunction.

This apparent omission probably has no real repercussions, since if a disappointed bidder wishes to challenge the award of a contract or grant as a violation of the Financial Regulation or any aspect of the procurement procedure it is clear that it will be able to do so pursuant to Article 230 EC. To fall within the scope of Article 230, the act to be reviewed must be:

[a] measure the legal effects of which are binding on, and capable of affecting the legal interests of, the applicant by bringing about a distinct change in his legal position.

Moreover, it is a cardinal rule that ‘the nature of the act must be considered rather than its form’. Thus even preliminary actions relating to procurement may be challenged and, in the case of UK v Commission, the Commission’s act of drawing

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100. Trepte (n 25) 55.

101. Financial Regulation Arts 88–107; see also Preamble [24], which refers to the application of Directives coordinating the procedures for the award of public works, services, and supply contracts, but which does not mention the Remedies Directive.

102. Above n 13.

103. Financial Regulation Art 105(2) (standstill), Arts 64–8 (disciplinary actions). See also Implementing Regulation Art 158a.


up restricted lists of potential contract candidates was capable of having legal effects ‘insofar as it may result in the omission of certain undertakings from those lists and thus deprive them of the possibility of participating in the contracts in question’. Furthermore, although the locus standi requirements for individual applicants are notoriously strict in the EU, any natural or legal person is entitled to challenge a decision addressed to them. The term ‘decision’ has not been restricted to a formal decision, but refers to acts which are decisions in substance, such as a letter addressed to companies withdrawing their immunity from fines and an oral statement made by a Commission spokesperson at a press conference. By extension, it would seem that, in most circumstances at least, a disappointed bidder will have standing to challenge a decision denying it a contract.

In terms of remedies, interim relief can be sought pursuant to Articles 242 and 243 EC, which provide respectively that, where the circumstances so require, the application of a contested act can be suspended and any necessary interim measures may be awarded. Thus a stay suspending a contract can be awarded. However, such relief will only be granted to a competing bidder in exceptional circumstances, where in the absence of such measures the bidder would be in a situation likely to jeopardize its very existence or irremediably alter its position in the market. As for final remedies, if the award of the contract is annulled by the Court, it is for the contracting authority to take the measures necessary for compliance with the judgment: the court annulling an act has no jurisdiction to direct the institution whose act it has annulled as to the manner in which the judgment is to be complied with. Payment of financial compensation can be considered adequate reparation, and if the Commission fails to make such reparation, the applicant may take a damages action against the Commission given that loss of a contract is a loss in respect of which financial reparation may be afforded by way of an action under Article 288 EC.

5.3 United States

By contrast with the consolidated and highly legalized framework which applies to private delegation by the Commission in the EU, the US federal framework for

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107 Ibid [13].
108 Ibid.
112 See, eg, European Dynamics (n 104) [28]; Case T-148/04 TQ3 Travel Solutions Belgium SA v Commission [2004] ECR II-3027 [25].
113 Capgemini (n 104) [15].
114 Ibid [101]; Travel Solutions (n 112) [46]–[47].
115 Capgemini (n 104) [95] and EC Treaty Art 233.
116 Ibid [99].
private delegation by the federal government has a number of sources. As was discussed in Chapter Two, contract and grant provide two very useful mechanisms of private delegation for the US federal government and three possibilities for private delegation arise here.¹¹⁷ First, the federal government may procure the required services directly from a private actor, using a contract. Within this option, there are two possible control systems. If the function is either new or a segreable expansion to a function already being performed by federal actors, it can be outsourced without a public-private competition. However, where the function is one that is already being performed by federal actors, it is subjected to a public-private competitive sourcing process.¹¹⁸ Second, the government may award assistance—through either a grant or what is known as a cooperative agreement—to a state or local government, for the performance of a task, incorporating a power for the state or local government to contract out. Third, the government may award assistance—again via either a grant or a cooperative agreement—to a private actor to pursue a programme with a public purpose. A distinction is drawn between a contract and an assistance agreement by the Federal Grant and Cooperative Agreement Act 1977 (the ‘1977 Grant Act’): a grant or cooperative agreement should be used if ‘the principal purpose of the relationship’ is to enable the recipient, whether public or private, to ‘carry out a public purpose of support or stimulation authorized by a law of the United States’,¹¹⁹ whereas a contract is to be used where the ‘principal purpose’ is to acquire property or services ‘for the direct benefit or use of the United States government’¹²⁰ or if the agency considers it appropriate in the given circumstances.¹²¹ Furthermore, between a cooperative agreement and a grant, the legislation indicates that the former is to be used when ‘substantial involvement’ is expected between the agency and the recipient,¹²² whereas a grant is to be used where such ‘substantial involvement’ is not anticipated.¹²³

Insofar as contract is concerned, the government enjoys inherent authority to enter into contractual arrangements pursuant to its mission, incidental to the general sovereignty granted to it by the Constitution¹²⁴—although the exercise of contractual authority must, of course, comply with any relevant statutory limitations set by Congress.¹²⁵ By contrast, the government enjoys no inherent authority to enter into assistance agreements. Grants or cooperative assistance agreements may only be awarded where the purpose is ‘authorized’ by federal statute,¹²⁶ which is determined by examining relevant legislation, legislative history, and appropriation acts.

¹¹⁷ Above 2.4.1.3.
¹¹⁹ 31 USC §§ 6301–8; §§ 6304(1) (grant), 6305(1) (cooperative agreement).
¹²⁰ Ibid § 6303(1).
¹²¹ Ibid § 6303(2).
¹²² Ibid § 6305(2).
¹²³ Ibid § 6304(2).
¹²⁶ 31 USC §§ 6304–5.
5.3.1 Contracting

5.3.1.1 Contracting out functions already performed by federal actors

Contracting-out of functions currently performed by federal actors is regulated by an executive Circular, the Office of Management and Budget (‘OMB’) Circular A-76 (‘Circular A-76’), of which the most recent version was issued on 29 May 2003.¹²⁷ The legal authority for Circular A-76 is derived from a number of statutes intended to ‘improve economy and efficiency’ in government¹²⁸ and to prescribe ‘Government-wide procurement policies’,¹²⁹ and it incorporates directly the Federal Activities Inventory Reform Act 1998 (‘the FAIR Act’), which seeks, inter alia, to have experts review ‘policies and procedures governing the transfer of commercial activities’ to the private realm.¹³⁰ Circular A-76’s scope of application is broad—however, it will not always apply to military contracting, with the result that many military outsourcing decisions tend to be single-sourced rather than made pursuant to the competitive bidding process set down in the Circular.¹³¹

(a) Substantive constraints

With respect to functional constraints, the most important feature of the Circular A-76 system has always been the distinction it draws between ‘commercial activities’ and ‘inherently governmental activities’: while the latter should be performed by government, the former should be subjected to public-private competition.¹³² The FAIR Act gave the inherently governmental-commercial distinction, which had been used in previous versions of Circular A-76, statutory standing, by introducing a requirement that agencies prepare annually and make publicly available a list of ‘commercial activities’ suitable for contracting out.¹³³ Agencies are required to designate every activity as either inherently governmental or commercial and then, if commercial, to give the activity a ‘reason code’.¹³⁴ The code indicates, inter alia, whether the task is appropriate for private sector performance pursuant to a written determination,¹³⁵ whether it is suitable for¹³⁶ or currently being subjected to a streamlined or standard competition,¹³⁷ whether it is being

¹²⁷ Above n 118.
¹³² Circular A-76 [4].
¹³⁷ Ibid Reason Code, ‘C’.
Delegation of Governmental Power to Private Parties

performed by government personnel as the result of a streamlined or standard competition within the past five years,¹³⁸ or whether it is being performed by government personnel due to a statutory prohibition on private sector performance.¹³⁹ One example of a relevant statutory provision is found in 10 USC § 2465, already noted in Chapter Two, which, subject to certain exceptions, limits the ability of the Department of Defense to enter into contracts for the performance of fire-fighting or security-guard functions at any military installation or facility.¹⁴⁰ Furthermore, activities are listed with specificity, not just according to generic type such as prison management, but according to the particular context, such as prison management of the institution in Danbury, Connecticut.¹⁴¹ So, for example, in the 2002 list, the Federal Bureau of Prisons coded all government jobs in low and minimum security prisons as ‘A’ or ‘commercial in-house’, meaning that, although the tasks were classified as ‘commercial’, they were not subject to the A-76 process ‘since competing them would not be in the best interests of the federal government’.¹⁴² This Reason Code was justified on the basis of the need to ensure safety and security and the fact that studies had indicated that federally operated prisons may be more cost-effective than their private counterparts.¹⁴³

In scope, the term ‘inherently governmental’ refers to a function that is ‘so intimately related to the public interest as to mandate performance by government personnel’.¹⁴⁴ While previous versions of Circular A-76 have included within the remit of ‘inherently government’ those activities involving the exercise of discretion,¹⁴⁵ the current version requires ‘the exercise of substantial discretion in applying government authority/or in making decisions for the government’.¹⁴⁶ It is stressed that ‘not every exercise of discretion is evidence that an activity is inherently governmental’¹⁴⁷; rather, to be ‘inherently governmental’, the exercise of discretion must have the effect of committing the federal government to a course of action when two or more alternative courses of action exist; there must be no guidance of ranges of acceptable conduct; and the discretionary authority must not be subject to agency oversight.¹⁴⁸ Examples include oversight of monetary transactions and entitlements, ‘the exercise of sovereign government authority’,¹⁴⁹ and:

1. Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

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¹⁴⁰ See also 2.4.1.1. ¹⁴¹ Department of Justice, DOJ 2006 Inventory of Commercial and Inherently Governmental Activities <http://www.usdoj.gov/jmd/pe/prison.pdf> accessed 30 May 2007.
¹⁴³ Ibid. ¹⁴⁴ Circular A-76 Attachment A [B.1.a].
2. Determining, protecting, and advancing its economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

3. Significantly affecting the life, liberty, or property of private persons;

4. Exerting ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other federal funds.¹⁵⁰

Clearly, a showing of ‘inherently governmental’ is not an easy one to make. The requirement of ‘substantial discretion’ introduces a qualitative and subjective element which renders the notion of ‘inherently governmental’ more malleable and contestable and, correspondingly, it will be more difficult to challenge an agency categorization of a function as not ‘inherently governmental’. Indeed, the requirement that there be no guidance of ranges of acceptable conduct¹⁵¹ and no agency oversight seems unduly onerous, since very few functions are delegated without any guidance whatsoever: ‘substantial discretion’ exists where guidelines are skeletal, not just absent. Commentators have also suggested that the OMB has reason to interpret the ‘discretion’ standard narrowly,¹⁵² since, in its original proposed rules, the OMB had actually sought to establish a presumption that ‘all activities are commercial in nature unless justified as inherently governmental’.¹⁵³ Furthermore, if the criterion of the ‘exercise of sovereign authority’ is considered important, the ‘inherently governmental’ category may be narrowed even further, given that, judicially, the only activity accepted unequivocally as ‘traditionally associated with sovereignty’ has been that of eminent domain.¹⁵⁴

Overall, although Circular A-76 is to be commended for articulating an awareness of the risk of delegating excessive power to private delegates, in some ways the meaning accorded to ‘inherently governmental function’ is quite insubstantial. As already noted, the operation of low- and minimum-security prisons has been easily classified as a purely ‘commercial’ activity, albeit that other considerations have led to the function not being deemed suitable for contracting out. Moreover, even the management and oversight of contracts is not considered to be ‘inherently governmental’, and the government has made master contract awards to prime contractors and required these prime contractors to ‘serve as the Government’s surrogate in the award and oversight of many further contracts and contractors’.¹⁵⁵

¹⁵⁰ Ibid.
¹⁵¹ Ibid Attachment A [B.1.b].
¹⁵³ Ibid.
Turning then to substantive choice of delegate controls, Circular A-76 also incorporates and applies the primary federal procurement regulations,¹⁵⁶ the Federal Acquisitions Regulations (‘FAR’), which require that contractors be found to be ‘responsible’ before they can be awarded a contract, through establishing that the contractor, inter alia, has adequate financial resources,¹⁵⁷ will be able to comply with the performance schedule,¹⁵⁸ and has a satisfactory record of performance,¹⁵⁹ integrity, and business ethics.¹⁶⁰ Contractors may be suspended or debarred, usually for specific periods of time up to three years, where it appears, based on serious previous acts, that they lack the ethics, performance record or internal controls required of a government contractor; recently, in particular, suspensions have been commonplace for lack of business integrity.¹⁶¹ Lists of excluded contractors are also maintained.¹⁶² This does not, however, mean that mistakes are not made and even contractors charged with fraud have on occasion remained eligible for future government contracts.¹⁶³

In selection of the delegate, evaluative criteria other than cost are to be used very rarely. Thus, one of the procedures, the ‘tradeoff’ negotiated procedure, involves consideration of factors other than lowest price,¹⁶⁴ but its use in the category of functions already conducted by federal employees is restricted to information technology requirements.¹⁶⁵ That said, however, FAR and other US statutes do provide scope for accommodating other than purely economic criteria in choice of delegate, and so-called ‘political’ procurement objectives are also facilitated.¹⁶⁶ Preferences can be applied to bids submitted from certain categories of firms owned by women or racial minorities and, indeed, even internationally within the framework of the Agreement on Government Procurement, the US has maintained exceptions for such categories of bidder.¹⁶⁷ FAR itself has a number of sub-chapters addressing socio-economic programmes,¹⁶⁸ and states that it is the policy of the US government that small business concerns—small business

¹⁵⁶ A-76 [4.d].
¹⁵⁸ Ibid § 9.104-1 (b).
¹⁵⁹ Ibid § 9.104-1 (c).
¹⁶⁰ Ibid § 9.104-1 (d).
¹⁶¹ Ibid § 9.400 et seq. See also CR Yukins, ‘Suspension and Debarment: Re-examining the Process’ (2004) 13 Public Procurement L Rev 255, 255–6 (suggesting that the discretion granted by FAR to governmental actors to disbar and suspend contractors is too wide).
¹⁶⁴ Attachment B [D.5.b(3)].
¹⁶⁵ Ibid.
¹⁶⁶ Trepte (n 25) 8.
¹⁶⁷ Ibid 48. The Agreement on Government Procurement (1994) was signed in Marrakesh on 15 April 1994, at the same time as the Agreement Establishing the WTO, and entered into force on 1 January 1996. It is one of the ‘plurilateral’ agreements included in Annex 4 to the Agreement Establishing the WTO, signifying that not all WTO Members are bound by it. The UK, EC, and US are bound.
concerns owned by socially and economically disadvantaged individuals such as veterans or service-disabled veterans, and small business concerns owned and controlled by women—shall have the maximum practicable opportunity to participate in federal contracting.¹⁶⁹ The Small Business Act,¹⁷⁰ by Section 8(a), seeks to increase the participation of minority- and female-controlled enterprises in prime contracting.¹⁷¹ It enables the Small Business Administration (‘the SBA’) to enter into construction, supply, and service contracts with various federal departments and agencies,¹⁷² and, in turn, the SBA will enter into contracts with socially and economically disadvantaged businesses for the performance of the relevant contracts.¹⁷³ Other programmes also exist and, for example, the Department of Defense adheres to a five per cent per year minority participation goal when it awards its contracts.¹⁷⁴

Formerly, where such programmes permitted preferences based on race, they were deemed constitutional where they were ‘substantially related’ to important governmental objectives.¹⁷⁵ However, such programmes will now only be considered to be constitutional where they satisfy a ‘strict scrutiny’ test: at the very least, it will be necessary for the governmental delegator to demonstrate a compelling need to redress past discrimination and that its set-aside plan is narrowly tailored to address its remedial objectives.¹⁷⁶ Even with this strict constitutional scrutiny, there is still greater scope than in the EU¹⁷⁷ and, as will be seen, in England¹⁷⁸ to take account of non-economic criteria in the choice of private delegate.

(b) Procedural requirements
Once it has been decided that a particular activity is not ‘inherently governmental’, and is therefore suitable for outsourcing, Circular A-76 sets out detailed rules governing the public-private competition. Whilst previous versions of Circular A-76 indicated a clear preference for outsourcing to private actors over performance by public actors, this version expresses no preference and introduces a complicated regime for the competition.¹⁷⁹ The crucial elements of the

¹⁶⁹ 48 CFR § 52.219-8(a).
¹⁷⁰ 15 USC § 637.
¹⁷³ Ibid § 637(a)(1)(B).
¹⁷⁴ 48 CFR § 219.000 et seq.
¹⁷⁷ Above 5.2.1.1.
¹⁷⁸ Below 5.4.1.1(b).
process involve: a performance work statement (‘PWS’), produced by the agency and identifying the technical, functional, and performance characteristics of the agency’s requirements\textsuperscript{180}; the most efficient organization (‘MEO’) which represents the agency’s most efficient means of completing the task as determined by business analysis, market research, and re-engineering\textsuperscript{181}; and the competition. The competition involves a two-tier scheme—streamlined and standard\textsuperscript{182—and structured calculation systems, with which cost estimates are assessed.\textsuperscript{183}}

Use of the streamlined and standard procedures depends primarily on the size of the activity: the standard procedure is to be used if the commercial activity requires an aggregate of more than 65 full-time employees (‘FTEs’) to perform,\textsuperscript{184} while either procedure may be used where the numbers are 65 or fewer FTEs, or where military personnel are involved.\textsuperscript{185} In the streamlined competition, the agency must indicate its performance cost, preferably on the basis of its MEO, then conduct market research in lieu of actually seeking a private offer to estimate private performance price, and then use this to decide on the performance method.\textsuperscript{186} In the standard procedure, the key to the competition is determining the cost of the agency’s MEO and comparing it with the cost proposed by private actors. Two source selection alternatives exist for the standard competition: the sealed bid acquisition and the negotiated acquisition.\textsuperscript{187} With the former, all bids are opened concurrently and a decision made; under the negotiated procedure, all bids are opened simultaneously, but exchanges are allowed between the contracting officer and the competitors.\textsuperscript{189}

Evaluation of cost estimates is strictly guided. In the standard competition, with the sealed bid process, private sector bids must be evaluated for responsiveness, which requires that the bid ‘comply in all material respects with the invitation for bids’.\textsuperscript{190} The negotiated procedure requires a price analysis\textsuperscript{191} and cost realism evaluation to ensure that the proposed cost estimate is ‘realistic for the work to be performed’.\textsuperscript{192} Notably, to increase the accuracy of the comparison between the agency and the private sector, in calculating cost the standard competition also requires that a conversion differential be added to the cost of performance by the non-incumbent source—the lesser of 10 per cent of the MEO’s personnel-related costs or $10 million over all the performance periods.

in the solicitation.¹⁹⁴ The conversion differential is, however, not used at all in streamlined competitions, and given that there are few units within government that require more than 65 full-time employees,

[i]t is highly likely that the streamlined competition process will be the primary procedure used by the agencies going forward because it is a faster and less resource-intensive process than is the standard competition process.¹⁹⁵

This means that, in these competitions, the system is not designed to incorporate the costs of transfer, thereby weighting the procedure in favour of private sector performance in most cases. Furthermore, while the previous Circular A-76 contained a prohibition on dividing functions so as to come under the (then 66) FTEs limit, the revised Circular A-76 lacks such a prohibition.¹⁹⁶

(c) Supervisory obligations

Delegators are subject to a number of obligations and, in particular, to ensure that the provisions of Circular A-76 are followed, each agency is required to designate an official, known as the competitive sourcing official (‘CSO’), to take responsibility for the Circular’s implementation.¹⁹⁷ Performance standards of implementing officials must be established in annual performance evaluations, in order to ‘require full accountability’,¹⁹⁸ and oversight responsibility must be centralized ‘to facilitate fairness in streamlined and standard competitions and promote trust in the process’.¹⁹⁹ The CSO is also required to identify savings resulting from competitions.²⁰⁰ For competition procedures, there are duties to ensure fairness and independence: there should be competition officials (who will be held ‘accountable for the timely and proper conduct’ of competitions),²⁰¹ agency tender officials (to develop the agency tender and designate the agency’s MEO),²⁰² a contracting officer,²⁰³ a PWS leader,²⁰⁴ a human resource advisor,²⁰⁵ and a source selection authority.²⁰⁶ There are strict obligations ‘to avoid even the appearance of conflicts of interests’²⁰⁷ between all of these different actors, and detailed rules govern the separation of the different teams—such as the MEO team, the PWS team, and the source selection panel—working on the different parts of the A-76 process.²⁰⁸

As for supervision of private delegates, Circular A-76 also specifically requires post-award monitoring of the execution of competitions,²⁰⁹ and monitoring of

¹⁹⁴ Ibid. ¹⁹⁵ Sorett (n 152) 15.
¹⁹⁷ Circular A-76 [4.f]. ¹⁹⁸ Ibid [4.g].
²⁰⁷ Sorett (n 152) 13. ²⁰⁸ Circular A-76 Attachment B [D.2].
²⁰⁹ Ibid Attachment B [E.2].
Delegation of Governmental Power to Private Parties

the contract performance. subdivision The latter entails monitoring performance, implementing a quality assurance surveillance plan, and, most interestingly, recording the actual cost of performance, and recording and evaluating performance for the purposes of past performance evaluation in future competition. subdivision There are also mechanisms for the agency to notify a service provider of poor performance through cure notices and show cause notices, and to terminate the arrangement by issuing a notice of termination. subdivision In addition, obligations may be placed on federal contractors to subcontract in a particular way. Here again, non-economic objectives may be pursued. Thus, Section 8(d) of the Small Business Act aims to increase minority and female participation in the area of subcontracting and requires prime contractors on certain federal contracts to formulate a ‘subcontracting plan’ which contains a proposed socially and economically disadvantaged and female subcontractor participation goal.

5.3.1.2 Contracting without replacing federal employees

Where a function is required that is not already being performed by federal employees, the government need not comply with Circular A-76 to choose private performance. Rather, the contracting will be governed directly by the ‘basic competition statute currently governing federal procurement’ subdivision—the Competition in Contracting Act 1984 (‘CICA’) subdivision—and FAR. CICA establishes the general principle that agencies should obtain ‘full and open competition through the use of competitive procedures’, such as those provided in CICA itself and in FAR. Exemptions from competitive procedures are permitted where there is only one responsible contractor that may perform the contract or where the procurement is of such ‘unusual and compelling urgency that the Government would be seriously injured’ if unable to limit access to the procurement. Although the original Circular A-76 preceded FAR, the current version obviously post-dates FAR; and in relevant part, FAR does not differ significantly from A-76. For substantive constraints, again, it is stressed that agencies should not procure ‘inherently governmental’ services from private actors, and FAR rules on choice of delegates are actually used by Circular A-76 and have been described above. In procedural terms, obviously there is no public-private competition, and instead there is a competition between private contractors, governed

primarily by a sealed bid process.\textsuperscript{224} This means that invitations for bids must be prepared ‘clearly, accurately, and completely’, that unduly restrictive requirements are prohibited,\textsuperscript{225} and that bids are evaluated without discussions.\textsuperscript{226} FAR also imposes detailed pre- and post-award supervisory obligations relating to avoidance of conflicts of interest,\textsuperscript{227} administrative duties such as records retention,\textsuperscript{228} required contractor qualifications,\textsuperscript{229} different types of contract,\textsuperscript{230} contract management,\textsuperscript{231} and socio-economic programmes.\textsuperscript{232}

5.3.2 Assistance to states

Where private delegation arises because of state outsourcing in the context of implementing a federal grant programme, there will be two levels of legislative and regulatory control, federal and state. At the federal level, for the most part, whether or not there are any controls on the federal delegators’ power to award grants will depend on the particular authorizing legislation, although skeletal common guidance is found in OMB Circular A-102 (‘Circular A-102’).\textsuperscript{233} At the state level, controls on state private delegation pursuant to the federal grant are determined by state procurement regimes (assuming the particular federal programme does not override such controls) and any conditions imposed by the federal scheme itself.\textsuperscript{234}

5.3.2.1 Circular A-102

Substantively, unlike Circular A-76, Circular A-102 does not provide any limitations to the functions for which grants may be made to states. This is easily explicable: the functions to be supported by the grant will be determined by the legislative basis for the awarding of the grant. Debarment and suspension criteria apply to regulate the choice of grantee.\textsuperscript{235} Mainly, though, controls provided in Circular A-102 are procedural and supervisory. The agency should provide the public with advance notice in the Federal Register of intended funding priorities for discretionary assistance programmes\textsuperscript{236} and, time permitting, the public will be given an opportunity to comment on intended funding priorities.\textsuperscript{237} All discretionary grant awards in excess of $25,000 are to be reviewed for consistency with agency priorities by a policy level official.\textsuperscript{238}

\begin{itemize}
\item \textsuperscript{224} 48 CFR § 37.105.
\item \textsuperscript{225} Ibid § 14.101(a).
\item \textsuperscript{226} Ibid § 14.101(d).
\item \textsuperscript{227} Ibid § 3 et seq.
\item \textsuperscript{228} Ibid § 4 et seq.
\item \textsuperscript{229} Ibid § 9 et seq.
\item \textsuperscript{230} Ibid § 16 et seq.
\item \textsuperscript{231} Ibid §§ 42–51 et seq.
\item \textsuperscript{232} Ibid §§ 19–26 et seq.
\item \textsuperscript{233} <http://www.whitehouse.gov/omb/circulars/a102/a102.html> accessed 30 May 2007.
\item \textsuperscript{234} See the discussion on federalism in Ch Two at 2.3.1.2.
\item \textsuperscript{235} Circular A-102 (1997) [1.d].
\item \textsuperscript{236} Ibid [1.b(1)].
\item \textsuperscript{237} Ibid [1.b(2)].
\item \textsuperscript{238} Ibid [1.b.(3)].
\end{itemize}
Although there are no specific guidelines on how an application for assistance is to be assessed, as a general matter it is important to ‘[d]etermine how well the project can compete with similar projects from others’.²³⁹ To encourage better evaluation of applications, a ‘narrative statement’ should be requested, outlining the objectives and need for assistance, the results or benefits expected, the plan of action, and the geographic location.²⁴⁰ Post-award, agency delegators are expected to monitor the grantee’s expenditure of funds, assessing the adequacy of its financial management system through audit reports or on-site reviews²⁴¹ and requiring grantees to fill out financial status forms.²⁴² Long-term grants must be reviewed at least annually,²⁴³ and at the end of the grant period the federal agency must ensure that it has received all required reports.²⁴⁴

5.3.2.2 State procurement regimes

Once the grant is made to a state, as noted, the state’s delegation power may be regulated by both state procurement regulations and any federal conditions attached to the grant. Most states have detailed and sophisticated procurement regimes, seeking to achieve transparency and cost-effectiveness,²⁴⁵ and the familiar elements of publication, competition, fair evaluation, and proper record-keeping are usually present.²⁴⁶ Some states place greater emphasis on the need to justify use of a private actor and in Wisconsin, for instance, while there is no public-private competition, for each specific contract it is necessary for a ‘justification of need’ to be given and approval to be sought from the Department of Administration.²⁴⁷ However, given that Wisconsin has contracted out its obligations under the Personal Responsibility and Work Opportunity Reconciliation Act 1996 more extensively than most states,²⁴⁸ it is not clear how rigorously the justification is scrutinized. It is also open to the federal government to attach certain conditions to the contracts between private contractors and states. For example, federal regulations often include conditions that apply to contracts between the state agency and the private institutions that deliver health care.²⁴⁹ At the state level, non-economic goals are also often pursued in choice of private delegate and, as DiLiberto has observed, municipalities regularly employ race-based programmes modelled on the federal schemes.²⁵⁰ These programmes

²⁴⁷ Wis Stat Ann § 16.705(2).
²⁴⁸ D Stevenson, ‘Privatization of Welfare Services: Delegation by Commercial Contract’ (2003) 45 Arizona L Rev 83, 104 fn 86. As will be recalled from Ch Two (above 2.3.1.2 and 2.4.1.3), this Act establishes a federal programme, which is administered by states.
²⁴⁹ See, eg, 42 CFR § 434.
²⁵⁰ See DiLiberto (n 171) 2040 fn 3 (listing examples of state legislation implementing preference schemes).
typically provide for a numerical participation goal, which is expressed as a percentage of the total dollar amount of contracts awarded by the municipality. Once the goal is established, the municipality then attempts to allocate the stated percentage of contract dollars only to the groups eligible under the programme.²⁵¹ Finally, states occasionally provide for greater participation in the contract approval process than is provided at the federal level. Tennessee’s prison privatization statute provides for a contract approval procedure, which requires, first, approval by the state building commission, the attorney general, and the commissioner of correction and, second, review by two state legislative committees; all approved and proposed contracts are then sent to the state and local government committees of both the state senate and the state house.²⁵² In Kentucky, private prison providers are even required to disseminate information about the facility to the public, government agencies, and the media, to enable them to make informed decisions about the quality and value of privatized services.²⁵³

5.3.3 Assistance to private actors

Grants to private actors are regulated by Circular A-110.²⁵⁴ Although the Circular’s title indicates that it is to provide ‘uniform administrative requirements for grants and agreements with institutions of higher education, hospitals and other non-profit organizations’, it is clear from Circular A-110 that the private recipient need not necessarily be a non-profit entity and could be within certain categories of ‘commercial organizations’.²⁵⁵ Again, as with assistance to states, there are no functional limitations because everything will depend on the authorizing legislation, although, again, the delegator’s choice of delegate is limited as debarment and suspension rules apply²⁵⁶ and federal agencies are also permitted to impose additional award conditions if a particular delegate has a history of poor performance, if it is financially unstable, if it has a management system which does not comply with Circular A-110, if it has not conformed with the terms and conditions of a previous award, or if it is otherwise not responsible.²⁵⁷ Delegators are expected to supervise their delegates: requiring that recipients relate financial data to performance data,²⁵⁸ retain effective control over and accountability for all funds, property and other assets,²⁵⁹ and maintain records that identify the source and application of funds for federally sponsored activities.²⁶⁰ There

²⁵¹ Ibid 2054.
²⁵⁵ Circular A-110 [A 2(cc)].
²⁵⁶ Ibid [B 13].
²⁵⁷ Ibid [B 14].
²⁵⁸ Ibid [C 21(a)].
²⁵⁹ Ibid [C 21(b)(3)].
²⁶⁰ Ibid [C 21(b)(2)].
Delegation of Governmental Power to Private Parties

are detailed regulations requiring agencies to make quick and effective payment to recipients.²⁶¹ Most provisions, though, concern the conditions to be imposed on the recipients of grants, including, for instance, compliance with certain procurement standards—although not the full rigours of something like the requirements of Circular A-76²⁶²—and various reporting and monitoring obligations.²⁶³ The procurement standards also require accommodations for small businesses, minority-owned firms, and women’s business enterprises.²⁶⁴ Delegators have powers of termination and remedies for non-compliance if a delegate fails to comply with the terms and conditions of the award.²⁶⁵

5.3.4 Enforceability of the controls

5.3.4.1 Assistance or contract?

Clearly, procurement contracts are much more heavily regulated than assistance agreements, and by ‘using domestic assistance vehicles to acquire what should be acquired through procurement, agencies can avoid the cumbersome requirements of the procurement process’.²⁶⁶ Potential contractors have the option of challenging an agency’s award of grant or cooperative agreement before the Comptroller General, (who is head of the Government Accountability Office (‘the GAO’)) before the Court of Federal Claims, and also in federal district court.²⁶⁷ To bring a claim in federal court it is necessary to establish standing and the Courts require the individual to demonstrate constitutional Article III injury in fact that can be addressed by a favourable decision, and to satisfy a prudential requirement that the interest on which the claim is based falls within the zone of interest of a statute or constitutional guarantee.²⁶⁸ Insofar as the contract-assistance choice is concerned, ‘deprivation of the right to fairly compete for procurement contracts’²⁶⁹ is an injury, while the ‘zone of interest’ test is satisfied under CICA²⁷⁰ because ‘the government is allegedly attempting to funnel procurement contracts away from the competitive bidding process’.²⁷¹

²⁶¹ Ibid [C 21(b)(5)], [C 22]. ²⁶² Ibid [C 40]–[C 48].
²⁶³ Ibid [C 50]–[C 53]. ²⁶⁴ Ibid [C 44(b)].
²⁶⁵ Ibid [C 61]–[C 62].
²⁶⁷ Ibid 70–71.
²⁷⁰ Above n 217.
²⁷¹ TMC Technologies Inc (n 269) *10 fn 4; see also Chem Service Inc v Environmental Monitoring Systems Laboratory-Cincinnati 12 F3d 1256, 1266–7 (3d Cir 1993) (discussed in Rylander (n 266) 77–8).
The primary purpose of the transaction is the key factor in deciding between a contract and an assistance agreement: the question is whether the principal purpose is to serve the immediate needs of the federal government or to provide assistance to a non-federal actor serving a public purpose. Rylander has suggested that the term ‘public support or stimulation’ must mean ‘a purpose other than that served by the agency under its charter’. In other words, if the subject matter of the assistance agreement falls within the existing legal duties of the agency, the principal purpose ‘is for the direct benefit of the Government because it fulfils the agency’s mission and thus a procurement contract [is] required’. The Comptroller General has, on occasion, ruled that an agency should have used a contract instead of a grant. For example, a centre was found to be directly aiding the Office of Personnel Management (‘OPM’) in carrying out its primary responsibilities by conducting customer satisfaction surveys of the Federal Employee Health Benefits Plan, on which OPM relied to administer the plan. Indeed, it has been held that even though the principal purpose of a relationship may directly benefit the public, if it also ‘furthers the mission of the particular government entity’ it requires a procurement contract. The absence of specific authorizing legislation will also lead to a conclusion that a procurement contract, rather than an assistance agreement, should be used. In one case, the Department of Housing and Urban Development (‘HUD’) had authority to award grants and cooperative agreements, but the Comptroller General ruled that it did not have authority to award a grant to a third party to act as an intermediary between it and the targeted recipient, since the third party was not one that HUD was statutorily authorized to assist. A procurement contract was required.

5.3.4.2 Enforcing A-76 and FAR

There are two possible levels of Circular A-76 enforcement: administratively, through the agency, as governed by FAR, and also through the GAO; and judicially, through the federal district courts and the US Court of Federal Claims. The extent to which the implementation of Circular A-76 can be challenged is dependent both on who is bringing the challenge and on which element of the Circular A-76 process is being challenged but, as a general observation, federal

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272 Report to the Chairman, Legislation and National Security Subcommittee, Committee on Government Operations, House of Representatives, Comp Gen Dec B-22708.5, 67 Comp Gen 13, affirmed on reconsideration, Comp Gen Dec B-227084.6 (19 December 1988).


274 Rylander (n 266) 82.

275 Ibid.


277 Rylander (n 266) 83 citing Matter of West Coast Copy Inc Comp Gen B-254044 (16 November 1993) 93-2 CPD ¶283, 5.

278 Matter of Civic Action Institute (n 273) 641.

279 Circular A-76 Attachment B [F.1]; 48 CFR § 33.103.
employees are more constrained in their ability to bring challenges than private bidders.²⁸⁰

Circular A-76 provides for challenges within the agency to an inventory designation as ‘inherently governmental’ or ‘commercial’,²⁸¹ and for challenges to the standard competition procedure.²⁸² Importantly, though, no challenge is allowed to any aspect of a streamlined competition.²⁸³ After agencies submit their lists of activities that are not inherently governmental, OMB reviews the lists to assess their accuracy. However, as Verkuil has observed, OMB does not generally mount effective challenges to the agency designations as it has neither the personnel nor, given that it is pursuing the government’s privatization agenda, the incentive to do so.²⁸⁴ Once OMB’s Federal Register notice of the availability of those lists is published, ‘interested parties’ have thirty days to challenge the inclusion or exclusion of any governmental function on the list and to challenge the application of reason codes.²⁸⁵ ‘Interested parties’ include an agency tender official who submitted the agency tender, a single individual appointed by a majority of directly affected employees as their agent, and a private sector offeror with a direct economic interest or their business or professional association representative.²⁸⁶ For challenges to inventory designation, the challenge authorities are agency officials at the same level as or higher than the individual who prepared the inventory²⁸⁷; while inventory appeal authorities are ‘independent and at a higher level in the agency than inventory challenge authorities’.²⁸⁸ In general, challenges to agency designation have been unsuccessful.²⁸⁹ One notable success is worth mentioning, however: when the National Oceanic and Atmospheric Administration (‘the NOAA’) made a decision to list the functions of a seafood inspector as ‘commercial’, a challenge was brought by inspectors who argued that government employment was required to ensure that inspectors enjoyed credibility and authority in the view of foreign governments, an argument that was accepted by the fishing industry. The inspectors also gained assistance from Members of Congress and had the designation reversed on appeal by the Department of Commerce, the agency to which the NOAA reports.²⁹⁰ Meanwhile, intra-agency protests to the standard competition are accommodated through a process of ‘contests’.²⁹¹ Procedures for pursuit of a contest are governed by FAR § 33.103,²⁹² which encourages disputes to be resolved through ‘open and frank discussions’²⁹³

²⁸¹ Circular A-76 Attachment A [D].
²⁸² Ibid Attachment B [F.1].
²⁸³ Ibid Attachment B [F.2].
²⁸⁴ Verkuil (n 131) 458.
²⁸⁵ Ibid Attachment A [D.1.a].
²⁸⁶ Ibid Attachment A [D.2].
²⁸⁸ Ibid Attachment A [D.1.b].
²⁸⁹ Verkuil (n 131) 459.
²⁹⁰ Ibid 459–61 for discussion.
²⁹¹ Ibid Attachment B [F.1].
²⁹² Ibid.
²⁹³ 48 CFR § 33.103(b).
and urges agencies to devise procedures that are inexpensive, informal, procedurally simple, and expeditious.²⁹⁴

The GAO also has bid protest authority under CICA.²⁹⁵ In this context, an ‘interested party’ is defined as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract,²⁹⁶ and the official responsible for submitting the agency tender in a public-private competition conducted pursuant to Circular A-76.²⁹⁷ It does not, however, include union representatives of federal employees²⁹⁸ or other federal employee representatives.²⁹⁹ The GAO’s role is to determine whether an agency followed the procedural requirements of Circular A-76 and it will not review the commercial-inherently governmental designation decision which it views as a matter of executive branch policy.³⁰⁰ This position has led to suggestions that the GAO, as an independent body charged with the task of providing ‘Congress with professional, objective, fact-based, non-partisan and non-ideological information’³⁰¹ should be given a greater role in monitoring the contracting-out process, including review of the agency decision.³⁰²

Insofar as judicial enforcement has been concerned, Circular A-76 unequivocally seeks to exclude judicial review,³⁰³ and disappointed bidders have in the past sought judicial review, ‘with mixed results’.³⁰⁴ Harney explains that the most common source of challenge is under the Administrative Procedure Act 1946 (‘the APA’). However, there are two obstacles. First, judicial review is excluded where agency action is ‘committed to agency discretion by law’³⁰⁵; and second, as noted above, the zone of interest test means that it is necessary to show an interest ‘within the meaning of a relevant statute’.³⁰⁶ On the discretionary point, some cases have held that outsourcing decisions are ‘necessarily a matter of judgment and managerial discretion’ and therefore not subject to judicial review.³⁰⁷ However, in the Sixth Circuit case of Diebold v United States, the opposite

²⁹⁴ Ibid § 33.103(c). ²⁹⁵ Above n 217.
²⁹⁶ 31 USC § 3551(2)(A).
²⁹⁷ Ibid § 3551(2)(B).
²⁹⁸ Verkuil (n 131) 461–2.
³⁰² Verkuil (n 131) 462–3.
³⁰³ Circular A-76 [5.g].
³⁰⁵ 5 USC § 701(a)(2).
³⁰⁶ Above 5.3.4.1; 5 USC § 702.
³⁰⁷ Local 2855, AFGE (AFL-CIO) v US 602 F2d 574, 583 (3d Cir 1979).
conclusion was reached.³⁰⁸ It was reasoned that Circular A-76 was part of a ‘complex scheme of statutes and regulations [that] governs federal procurement decisions’,³⁰⁹ setting out ‘an elaborate, mandatory process’.³¹⁰ More difficult still, though, is the second hurdle of standing. The Court in the Diebold case specifically did not address the question of standing,³¹¹ but generally it has been held that the Circular is not a ‘relevant statute’ within the meaning of the APA to establish prudential standing.³¹² The Circular is considered to be ‘a managerial tool and internal operating procedure, rather than as a statute conferring a legal right’.³¹³ Indeed, the Circular’s only effect has on occasion been as an indication of congressional intent, for the purpose of determining if the applicant is within the ‘zone of interest’ of another statute that has been violated in the contracting-out decision.³¹⁴ In this way, somewhat unusually, in National Air Traffic Controllers v Pena, Circular A-76 was used to support a finding that federal employees, seeking to challenge a decision of the Federal Aviation Authority to contract out air traffic control responsibilities, are within the zone of interest of the Office of Federal Procurement Policy Act Amendments of 1979—³¹⁵—insofar as the Circular expressed the policy of not contracting out inherently governmental functions.³¹⁶ In itself, however, the Circular does not constitute a statute to fulfill the standing requirement.³¹⁷

Standing may be derived from the FAIR Act, which, as was noted above, placed Circular A-76’s commercial-inherently governmental distinction on a statutory footing.³¹⁸ The FAIR Act, like Circular A-76,³¹⁹ provides that challenges may be brought to agency lists of ‘commercial’ activities by an ‘interested party’,³²⁰ which includes four categories of actor: first, a private sector body that is an actual or

³⁰⁹ Ibid.
³¹⁰ Ibid. See also NTEU and Department of the Treasury, IRS 42 FLRA No 31 (27 September 1991), where the Federal Labor Relations Authority held that Circular A-76 constituted ‘applicable law’ for the purposes of 5 USC § 7106(a)(2); see Federal Service Labor and Employment Law Committee, ‘Federal Service Labor and Employment Law’ (1992) 8 Labor Lawyer 495, 503–4.
³¹¹ Above (n 308) 811. See also CP Gillette and PB Stephan III, ‘Constitutional Limitations on Privatization’ (1992) 46 American J of Comparative L 481, 490.
³¹² Courtney v Smith 297 F3d 455, 462–3 (6th Cir 2002) (noting that the Circular is not a law and stating that ‘[t]his limitation suggests that the internal administrative appeals process... is intended to be the sole basis for challenging agency action that allegedly violates the Circular’); National Federation of Federal Employees v Cheney 883 F2d 1038, 1043 (DC Cir 1989); National Air Traffic Controllers Association v Slater 2006 WL 456481, *3 (ND Ohio 2006).
³¹³ Harney (n 304) 100. ³¹⁴ Courtney (n 312) 462.
³¹⁵ 41 USC § 403 et seq.
³¹⁷ Cheney (n 312) 1043; Courtney (n 312) 462.
³¹⁸ Verkuil (n 131) 452 (suggesting that Circular A-76 could provide for judicial review); but see Shriver (n 280) 621. The Senate’s Committee on Governmental Affairs’ report accompanying the FAIR Act indicates, however, that ‘any challenges to the inventory list [are] to be resolved solely at the agency level by the agency’: Senate Report, Federal Activities Inventory Reform Act of 1998 S Rep No 105-269, 9 (1998).
³¹⁹ See text to nn 280–293. ³²⁰ 31 USC § 501 note 3(a).
prospective offerer and has a direct economic interest in performing the activity that would be adversely affected by a determination not to procure performance from a private sector source\(^{321}\); second, the representative of any business or professional association including such a private sector source in its membership\(^{322}\); third, an officer or employee of an organization within an executive agency that is an actual or prospective offerer to perform the activity\(^{323}\); and fourth, the head of a labour organization including in its membership such officers or employees.\(^{324}\) However, the ability of federal employees or their representatives to bring an APA challenge, by demonstrating that they fall within the ‘zone of interests’ of the FAIR Act, appears to be limited to challenging the decision as to whether or not to designate a task as inherently governmental or commercial. Federal employees have not been considered to have standing to challenge cost comparisons\(^{325}\)—on the basis that the only purpose of federal employees is ‘to protect one interest—retention of their government jobs’,\(^{326}\) which does not bring them within the ‘zone of interest’ of the FAIR Act.\(^{327}\)

Meanwhile, the Court of Federal Claims has jurisdiction, pursuant to the Tucker Act as amended by the Administrative Dispute Resolution Act 1996, over an action by an interested party objecting to a solicitation by a federal agency for bids or proposals for a proposed contract; or to a proposed award or the award of a contract; or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.\(^{328}\) Again, this has been interpreted to mean that actual or prospective bidders have standing,\(^{329}\) but not federal union employees.\(^{330}\)

Of course, even if the standing hurdle were surmounted, courts would only overturn an agency’s procurement decision if the agency’s award lacked a rational basis\(^{331}\); the agency’s procurement ‘involved a clear and prejudicial violation of applicable statutes or regulations’\(^{332}\); or if there was subjective bad faith on the part of procuring officials that deprived the bidder of a fair and honest assessment of its proposal.\(^{333}\) Procurement decisions are considered deserving of ‘highly deferential’ consideration since they involve the ‘technical expertise’ of the agency,\(^{334}\)

\(^{321}\) Ibid (b)(1).
\(^{322}\) Ibid (b)(2).
\(^{323}\) Ibid (b)(3).
\(^{324}\) Ibid (b)(4).
\(^{325}\) Verkuil (n 131) 452; and see American Federation of Government Employees v Babbitt 46 Fed Appx 254, 256–7 (6th Cir 2002) (holding that civil employees who lost their jobs at air force bases lacked prudential standing under the APA); AFGE (n 307) 595.
\(^{326}\) Babbitt (n 325) 257; Courtney (n 312) 461.\(^{327}\) But see Shriver (n 280) 622.
\(^{328}\) 28 USC § 1491(b)(1). This provision allowed concurrent district court jurisdiction over bid protests, but this jurisdiction lapsed on 1 January 2001. See Shriver (n 280) 628 fn 103.
\(^{330}\) AFGE, Local 1482 v US 258 F3d 1294, 1302 (Fed Cir 2001); for discussion see Poling (n 280).
\(^{331}\) LeBouef, Lamb, Greene & MacRae LLP v Abraham 347 F3d 315, 320 (DC Cir 2003).
\(^{332}\) Ibid, citing Kentron Hawaii Ltd v Warner 480 F2d 1166, 1169 (DC Cir 1973).
\(^{333}\) Keco Industries Inc v US 492 F2d 1200, 1203 (Cr Cir 1974).
\(^{334}\) Multimax Inc v Federal Aviation Administration 231 F3d 882, 887 (DC Cir 2000); Systems Plus Inc v US 69 Fed Cl 757, 769 (Fed Cl 2006).
and since judges consider themselves ‘ill-equipped to settle the delicate questions involved in procurement decisions’.³³⁵ As Verkuil has noted, ‘[i]nstead of serious substantive review, the courts would likely settle for review of the procedures employed at the administrative level’.³³⁶

5.3.4.3 Enforcing grant controls

Insofar as a disappointed grant applicant relies entirely on the Circulars, the same obstacles to standing, as arise in the A-76 context, will apply. However, if the grant applicant is able to rely on the authorizing statute, the standing difficulty will be obviated.

5.4 England

As will be recalled from Chapter Two, the primary processes of private delegation that are subject to legislative and regulatory controls in the English context are contract, in its many different manifestations, and grant by both central government and local government.

5.4.1 Contracting: central government

For Labour, ‘Better Government’ was the starting point of its government management strategy and initially there were two primary policy statements outlining what ‘Better Government’ means: Better Quality Services: Guidance for Senior Managers (the ‘Guidance’), and Better Quality Services: A Handbook on Creating Public/Private Partnerships through Market-Testing and Contracting-Out (the ‘Handbook’).³³⁷ These policy statements have been replaced by a myriad of policy statements regarding public services delivery³³⁸ which range across a variety of departmental actors, from the Cabinet Office,³³⁹ and in particular the Office of the Third Sector within the Cabinet Office,³⁴⁰ to the Treasury,³⁴¹ and most importantly to the Office of Government Commerce, an independent

³³⁵ Kinnett Dairies Inc v Farrow 580 F2d 1260, 1271 (5th Cir 1978).
³³⁶ Verkuil (n 131) 453.
³³⁸ In fact, by contrast with the EU which has codified the process in legislation and the US, where there are a limited number of significant overarching legislative measures and policy circulars, the policies of the UK government in this area are highly fragmented.
office of the Treasury which coordinates government procurement. However, although there are many policy statements, by far the most important sources of control for present purposes are found in the Deregulation and Contracting Out Act 1994 (‘the 1994 Act’) and the 2004 Procurement Directive, with the accompanying 2006 Public Contracts Regulations (‘the 2006 Regulations’).

As a general principle, the government’s overarching objective here is to achieve value for money having regard to propriety and regularity, while public services are to be improved by ‘drawing on the best of public, private and third sector provision’.

5.4.1.1 Substantive constraints

(a) Functional controls

With regard to functional controls imposed on central governmental delegating authorities, a distinction is drawn between statutorily conferred powers and common law or prerogative powers. With respect to prerogative or common law powers, very briefly, as was considered in Chapters Two and Four, if a function is performed by government as part of its prerogative or common law powers and has not been specifically authorized by statute, the 1994 Act does not even apply, and potentially any non-statutory function can be contracted out.

In addition to specific statutory authorizations for the delegation of certain functions, general overarching authority for governmental delegators to contract out statutory functions is provided by the 1994 Act, which, in many ways, really facilitates rather than limits the externalization capacity of the governmental delegator. The 1994 Act provides for a Minister to provide by order for any statutory function currently performed by the Minister or an officer-holder, to be performed by any person or the employee of any person authorized by the Minister. The scope of this order power is wide, and the list of functions excluded from it narrow: apart from a few specific exceptions, the excluded

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343 Above n 26.
344 Public Contracts Regulations 2006 SI 2006/5.
348 Above 2.3.2.1 and 4.4.2.
350 See, eg, Immigration and Asylum Act 1999 Pt VIII; Criminal Justice Act 1991 ss 80, 84; Police Reform Act 2002 Pt IV and Sch 4. See also Ch Two above (2.4.2.2).
352 1994 Act s 69(1)–(2).
353 Ibid s 79(1) excluding functions of the Comptroller and Auditor General, Parliamentary Ombudsman, Health Service Ombudsman.
category only extends to judicial power, functions affecting the liberty of the individual, powers of entry, search or seizure, and, in deference to parliamentary intention, functions that must be exercised personally by a Minister or office-holder. This list of externalization exceptions fails to recognize the importance of many other powers at the government’s disposal, such as discretionary administrative powers deciding on the individual’s eligibility for welfare benefits. There are even exceptions to the coercive powers excluded from the Act: enforcement for non-payment of rates and taxes is a function that may be delegated, in spite of its clear potential to entail coercion. Indeed, the only significant limitation is temporal, rather than substantive, and delegations must not exceed ten years in duration.

A quick survey of the functions that have been delegated under the 1994 Act indicates that while, most of the time, efforts are made to delegate only technical tasks, on occasion more important tasks, about which we should probably be concerned, have also been delegated. A typical delegation is found under the Contracting Out (Jury Summoning Functions) Order 1999, which provides that the function of posting out jury attendance summonses can be performed by private actors, while the function of deciding whether or not an individual should be considered qualified for jury service remains with the Lord Chancellor’s office. On the other hand, orders have been made to outsource the requiring and receiving of information or evidence needed for the administration of the welfare food scheme, to determine how to dispose of property which has been accepted in satisfaction of tax, and even to outsource the application of certain regulations to teachers. Article 2 of the Contracting Out (Administration of the Teachers’ Pension Scheme) Order 2003 (the 2003 Order) includes in the functions to be delegated, functions conferred on the Secretary of State by regulations made in accordance with, inter alia, section 9 of the Superannuation Act 1972. Section 9(1) enables the Secretary of State to make provision with respect to the payment of pensions, allowances or gratuities to teachers. Unsurprisingly, quite a few regulations have been made pursuant to Section 9, but one notable function conferred on the Secretary of State by Regulation H9 of the Teachers’ Pensions Regulations 1997 is the power to determine ‘all questions arising under these Regulations’. This is a very open-ended power, but can be contracted

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354 Ibid s 71(1)(a).  
355 Ibid s 71(1)(b).  
356 Ibid s 71(1)(c).  
357 Ibid s 71(1)(d).  
358 Ibid s 69(1).  
359 Ibid s 71(3); Freedland (n 351) 23.  
360 1994 Act s 69(5)(a).  
361 SI 1999/2128.  
362 Article 2(a) specifically states that functions are only to be contracted out, ‘in so far as those functions involve the production and posting of jury summonses.’  
364 National Heritage Act 1980 s 9; Contracting Out (Functions in Relation to Cultural Objects) Order 2005 SI 2005/1103 Art 2(b).  
365 SI 2003/1668.  
366 SI 1997/3001.
out in accordance with the 2003 Order. Although section 71 of the 1994 Act is not violated because none of its exceptions are implicated—there is no exercise of judicial power (at least in a narrow sense of the term), no impact on the liberty of an individual, no power or right of entry, and no power to make subordinate legislation—at the same time, surely, we should be concerned that such an open-ended discretionary power, in the important area of determination of teachers’ pensions entitlements, could be conferred on private actors.

Finally, substantive functional considerations will also be relevant in England in determining the particular type of contract used for the outsourcing of both statutory and non-statutory functions. For example, PFI arrangements are only to be used in respect of provision of services which are dependent on the construction and maintenance of infrastructure, such that there will be a development or construction phase followed by an operational phase.³⁶⁸ PFI arrangements are also deemed to be unsuitable for low capital value projects, because of the relatively high level of procurement costs, and for projects where there is rapid technological or other change which makes it difficult to fix pricing schemes.³⁶⁸

(b) Choice of delegate controls

With regard to substantive controls on the choice of private delegate, the 2004 Procurement Directive and 2006 Regulations will apply where the value of the contract is above a certain threshold.³⁶⁹ Generally, the choice of delegate process occurs in two stages. At the ‘selection’ stage, candidates can be rejected or selected, based on evidence that they are unsuitable, on their economic and financial standing, and on their technical or professional capacity.³⁷⁰ Regulation 23 of the 2006 Regulations, in accordance with Article 45 of the 2004 Procurement Directive, obliges authorities to disqualify an economic operator if it or its directors or other person having powers of representation, decision or control have been convicted of conspiracy,³⁷¹ corruption,³⁷² bribery,³⁷³ fraud,³⁷⁴ money laundering³⁷⁵ or any other offence within the meaning of Article 45(1) of the 2004 Procurement Directive,³⁷⁶ as defined by the national law of any relevant Member State.³⁷⁷ In these circumstances, the authority may only disregard the prohibition where there are overriding requirements in the general interest.³⁷⁸ By contrast, contractors may be deemed ineligible for selection by reason of, inter alia, bankruptcy,³⁷⁹ conviction of a criminal offence or the committing of

³⁶⁸ Ibid 7 [1.8].
³⁶⁹ 2006 Regulations (n 344) Reg 8.
³⁷⁰ Ibid Regs 15(1), 16(7), 17(9) or 18(10).
³⁷¹ Ibid Reg 23(1)(a).
³⁷² Ibid Reg 23(1)(b).
³⁷³ Ibid Reg 23(1)(c).
³⁷⁴ Ibid Reg 23(1)(d).
³⁷⁵ Ibid Reg 23(1)(e).
³⁷⁶ The 2004 Procurement Directive (n 26) is referred to as the ‘Public Sector Directive’ in the Regulations: see Reg 2.
³⁷⁷ 2006 Regulations (n 344) Reg 23(1)(f); see also Reg 23 for a list of the specific statutory offences.
³⁷⁸ Ibid Reg 23(2).
³⁷⁹ Ibid Reg 23(4)(a).
Delegation of Governmental Power to Private Parties

grave misconduct relating to the conduct of business or profession, failure to fulfil social security or tax obligations, or serious misrepresentation in providing information required pursuant to Regulation 23 itself. In order to pass this stage of the process, interested contractors are required to complete a core pre-qualification questionnaire and three supplementary modules, addressing finance, health and safety, and equal opportunities. The process is thorough, reviewing insurance coverage, environmental management, health and safety policies, equal opportunities policies, and financial standing.

With regard to the actual award of the contract, overall, the model of procurement adopted by the EU and imposed on England is ‘international’ and ‘economic’ and, by contrast with the US, scope for pursuit of secondary or ‘political’ purposes is limited. National authorities may pursue secondary policies to an extent by drafting specific contractual clauses relating to those policies, an issue which will be returned to in Chapter Eight, in the context of designing contracts to incorporate human rights obligations. However, the award of the contract will be determined using the ‘lowest bid’ or ‘economically most advantageous’ criterion and it is UK central government policy to use the ‘economically most advantageous’ criterion. This criterion, as with the equivalent provision in the Financial Regulation and Implementing Regulation applying to the Commission, permits the delegate to be chosen on the basis of more than just economic considerations, but requires the authority to establish a weighting system for the different criteria of ‘technical merit’, ‘aesthetic and functional characteristics’, ‘environmental characteristics’, and ‘cost effectiveness’. This provision reflects pre-existing ECJ jurisprudence. In the well-known Concordia Bus case the ECJ held that an entity could take into account as award criteria the pollution and noise levels of the buses to be used in providing a transport service; in the EVN case it held that it was lawful to give a 45 per cent weighting to an environmental criterion concerning use of renewable energy; while in the Nord Pas de Calais case it was even held

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380 Ibid Reg 23(4)(d)–(e).  
381 Ibid Reg 23(4)(f)–(g).  
382 Ibid Reg 23(4)(h).  
384 Ibid.  
385 Trepte (n 25) 8. It is fair to say that, even without EU intervention, England did not have as strong a tradition of the use of procurement to achieve non-economic goals as the US: PE Morris, ‘Legal Regulation of Contract Compliance: An Anglo-American Comparison’ (1990) 19 Anglo-American L Rev 87, 92.  
386 Below 8.3.1.3.  
389 Above 5.2.1.1.  
390 2006 Regulations (n 344) Reg 30(2)–(5); 2004 Procurement Directive Art 55.  
391 Case C-513/99 Concordia Bus Finland v Helsingin Kaupunki [2002] ECR I-7213; for discussion see Arrowsmith (n 8) [7.102] et seq.  
392 Case C-448/01 EVN and Wienstrom v Austria [2003] ECR I-14527 [72].
that the ability of firms to combat local unemployment could in principle constitute an ‘award criterion’, provided that it was not discriminatory.³⁹³ However, to the extent that award criteria are not economic, they ‘must be linked to the subject matter of the public contract in question’³⁹⁴ and it is unclear just how broadly or narrowly this phrase is to be interpreted.³⁹⁵

Article 19(2) of the 2004 Procurement Directive is also worth noting here. This Article permits the reservation of contracts for what it terms ‘sheltered workshops’ and ‘sheltered employment programmes’, involving disabled employees. This has been implemented by Regulation 7(2) of the 2006 Regulations, which enables authorities to reserve contracts for a supported business, supported employment programme, and supported factory. A ‘supported business’ refers to a service where more than 50 per cent of the workers are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market; a ‘supported employment programme’ refers to a scheme under which work is provided for disabled persons and where more than 50 per cent of workers so supported are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market; while, finally, a ‘supported factory’ refers to an establishment where more than 50 per cent of workers are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market.

In England, the Conservative government had a strong preference for purely commercial procurement,³⁹⁶ but the Labour government has engaged in use of procurement to accommodate, for example, environmental concerns.³⁹⁷ What EU law does not permit, insofar as the choice of delegate is concerned, is the pursuit of secondary policies through aggressive techniques such as set-asides or reservation of contracts, as were seen in the US context, outside the limited example of the sheltered workshops.³⁹⁸ Such preference schemes in choice of private delegate

³⁹³ Case C-225/98 Commission v France (‘Nord Pas de Calais’) [2000] ECR I-7445 [52]. The Commission has sought to narrow the scope of Nord Pas de Calais by suggesting that workforce-based award criteria should only be considered if the economic aspects of the tenders are equal: Commission (EU), Commission Interpretative Communication on the Community Law applicable to public procurement and the possibilities for integrating social considerations into public procurement COM(2001) 566 final (15 October 2001) [1.4].
³⁹⁴ EVN (n 392) [66].
³⁹⁶ See, generally, Arrowsmith (n 8) 1226 [19.2].
³⁹⁷ Ibid 1227 [19.2].
have been rejected in the EU context as ‘being administratively costly, protecting economic inefficiency and distorting competition’. Indeed, any attempt to use such schemes may even constitute state aid. For example, Article 163(2) EC provides that in pursuing the aim of scientific and technological development and encouraging competitiveness, the Community shall encourage undertakings, including small and medium-sized undertakings (‘SMEs’), research centres, and universities and shall support them in their efforts, inter alia, to exploit the opening up of national public contracts. Yet at the European level, efforts to support SMEs have been limited to ‘soft’ measures, such as improving access to electronic contract information published by the Commission or commissioning reports on barriers to access for SMEs. The UK government has been similarly constrained to such techniques. Encouragement of participation of SMEs in public contracts has been limited to such initiatives as the report of the Better Regulation Task Force and Small Business Service, Government: Support and Customer?, which involved developing a single government portal on contract opportunities and a single national pre-qualification document to reduce the burdens of qualification for SMEs. Similarly, the Treasury’s Government Accounting guidance only goes so far as to state that government purchasers should seek to remove barriers to participation by small firms and the self-employed without discriminating against larger firms; while guidance for voluntary actors, to educate them on opportunities for participation, has also been published.

Finally, where the value of the relevant contract falls below the EU threshold, the pre-qualification questionnaire described above is still used to select potential contractors. In addition, governmental authorities are required to comply with the non-discrimination principle in Articles 12, 28, 43, and 49 against
Authorities should also be motivated to ensure value for money and preferably adopt the ‘economically most advantageous’ criterion of contract award even outside the scope of the 2004 Procurement Directive. These guidelines also apply where the type of contract brings it outside the 2004 Procurement Directive. For example, a concession contract—which delegates to a private operator the right to run a public service and to exploit at his or her own risk and cost a task normally reserved for public authorities or subject to permits—does not fall within the 2004 Procurement Directive, but is still subject to general EC Treaty requirements.

5.4.1.2 Procedural requirements

For functions regulated by the 1994 Act, the office-holder must be consulted before the function is eligible for contracting out, while orders are also subject to approval by both Houses of Parliament. These controls are probably fairly ineffective and primarily formalities: neither requires the government to justify its decision to contract out. Once the decision to contract out has been made, if the contract in question falls within the scope of the 2004 Procurement Directive, the process will be regulated in the same way as EU procurement is regulated. In particular the new competitive dialogue provided in the 2004 Procurement Directive is intended to be used for ‘particularly complex contracts’ and enables the awarding authority to issue a notice of requirements and to initiate a ‘dialogue’ with interested contractors. It is only permitted for use when the authority is not able to define the technical means capable of satisfying its needs or objectives or is not objectively able to specify the legal or financial make-up of the project and the procedure will be used primarily where PFI contracts are at issue. The procedure was deemed necessary because the open and restricted procedures could not accommodate the award of complex contracts; negotiated procedures, without prior advertisement, are exceptional; and the grounds for using negotiated procedures with prior advertisement are interpreted restrictively.

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407 See Arrowsmith (n 8) ch 4 for discussion.
410 1994 Act s 69(3).
411 Ibid s 77(2).
412 Freedland (n 351) 23.
413 Above 5.2.1.2.
416 Value for Money Assessment (n 367) [1.19].
In addition, for PFI contracts, it will be necessary for authorities to comply with the Value for Money Assessment Process, which involves review stages preceding the actual procurement process. The first review, the Programme Level Assessment, is intended to ensure that PFI is only used for those programmes where it is appropriate and likely to represent good Value for Money; the second review, the Project Level Assessment, requires an upfront procurement appraisal and Outline Business Case; and the Procurement Level Assessment is an ongoing assessment through the procurement phase of the project to ensure that the project can be delivered, taking account of the competitive interest and market capacity.

Moreover, even where the 2004 Procurement Directive does not apply, departments are required to comply with EU Treaty obligations of non-discrimination, equal treatment, transparency, mutual recognition, and proportionality and, in particular, some degree of advertising will be necessary to comply with the transparency principle. Competition is the preferred method of choosing a private delegate and should only be abandoned where there are compelling reasons to do so.

5.4.1.3 Supervisory obligations

The legal post-award supervisory duties imposed on Ministers for functions regulated by the 1994 Act are striking: Ministers remain accountable for outsourced services. Section 72(2) of the Act indicates that the Carltona principle of ministerial responsibility is to apply to the private actor, such that ‘anything done or omitted to be done by or in relation to the authorized person (or an employee of his) in, or in connection with, the exercise or purported exercise of the function’ shall be treated as the action of the Minister or office-holder. The Carltona principle holds that ‘[l]egally and constitutionally the act of the official is the act of the minister, without any need for specific authorization in advance or ratification afterwards and it applies only to central government and not to local authorities. A civil servant is considered to be the alter ego of the Minister, and this is ‘based on the view that ministers, being responsible to Parliament,
will see that important duties are committed to experienced officials’. In the contracting out situation, however, this rationale collapses.

For a start, the alter egos of the Ministers will not be ‘experienced officials’ but private contractors. In the Carltona case itself, the decision was in fact taken by a civil servant ‘at an irreproachably high level in the departmental hierarchy’ and bears no resemblance to the private contractor situation. Even more problematically, the Act does not address the issue of the contractor’s identity. Carltona assumes that a Minister will take responsibility for the capabilities of his or her officials: and accordingly, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament.

This important aspect of Carltona has not been introduced to the Act, and there is no indication that a Minister will be expected to answer for a poor choice of private contractor. In any event, the extent to which the Minister will be held responsible for a private contractor’s failure is highly questionable. It is widely accepted that the concept of ministerial responsibility has been weakened greatly in recent times, and its use as a mechanism of accountability has been doubted. Finally, on the Carltona point, it is even possible that the Carltona principle is excluded in the contractual situation. There are two exceptions to the principle: it is not applied for criminal liability purposes, nor ‘for the purpose of so much of any contract made between the authorized person and the Minister, office holder or local authority as relates to the exercise of the function’. This is awkwardly written and not quite clear. As Freedland has noted, it may just mean that the Minister may enforce the terms of the contract against the private contractor, while still bearing responsibility for the statutory function in question. Alternatively, it may actually enable the Minister to displace the Carltona principle, and plead the terms of the contract to show that the act or omission of the contractor should not be considered to be the act or omission of the Minister.

As was noted in Chapter One, there has been some debate in English law as to whether a delegation means that the delegating authority can continue to exercise the delegated power concurrently with the delegate. The 1994 Act appears to adopt this interpretation and, for instance, section 69(5)(c) provides that an authorization given pursuant to an order under section 69 shall not prevent the relevant Minister or office-holder or any other person ‘from exercising the function to which the authorization relates’.

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426 Carltona (n 425) 563.
428 Carltona (n 425) 63.
430 1994 Act s 72(3)(b).
431 Ibid s 72(3)(a).
432 Freedland (n 351) 25.
433 Above 1.1.1.
In public management terms, the primary review applied to central government procurement projects was introduced by the Office of Government Commerce (‘OGC’) in 2001 and is known as the OGC Gateway Process.⁴³⁴ Once a project has been established, governmental delegators are required to undertake mandatory review at critical stages in its lifecycle to provide assurance that it can progress successfully to the next stage.⁴³⁵ The first review, the strategic assessment, reviews the justification of a particular programme, considering inter alia the policy or organizational objectives sought and how well it fits within the department’s overall policy or management strategy and priorities.⁴³⁶ Next, a business justification assessment is undertaken which considers business needs and an assessment of the project’s likely costs and potential for success,⁴³⁷ while the third review scrutinizes the proposed procurement strategy.⁴³⁸ A fourth review considers the investment decision and ensures that the procurement process has been managed properly and that the necessary processes are in place to achieve a successful outcome after the contract award.⁴³⁹ At the fifth stage, readiness for service is reviewed, which entails assessing whether the business case is still valid, the contractual arrangements and documentation up to date, and the implementation plans still achievable.⁴⁴⁰ The final ‘benefits evaluation’ review can be carried out on a number of occasions if, for example, the procurement involves a long-term service contract. It aims to assess whether the business case made for the project was realistic.⁴⁴¹

As for post-award supervision of the delegate by the delegator, government policy is that contracts for delivery of services ‘need to be actively (and ideally proactively) monitored and managed’.⁴⁴² Thus governmental actors are encouraged to ensure that the contract makes monitoring and reporting mechanisms clear, that it envisages clearly defined linkages between each element of service delivery and payment, and that it devises a schedule of regular progress meetings.⁴⁴³ Delegators are also required to devise a performance management plan which

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⁴³⁵ Ibid.
⁴³⁶ Ibid.
⁴⁴³ Ibid.
defines the principles and targets for a programme against which it delivers its outputs, outcomes, and benefits.⁴⁴⁴

The post-award supervision entailed in PFI contracts is also worth noting, as these contracts usually include a contractual provision which requires regular value-testing. This will mean that governmental actors involved in long-term PFI projects are required to ensure that the private partner to the PFI contract engages in benchmarking and market testing on a regular basis throughout the duration of the contract, to ascertain whether ‘soft services’ are being performed in the most cost-effective manner.⁴⁴⁵ ‘Soft services’ are services such as catering, cleaning, and security, which do not involve significant capital expenditure or affect the value of the capital asset.⁴⁴⁶ Detailed guidance has been provided by the government on how to conduct the value-testing process. Additionally, governmental delegators should draft PFI contracts to require the private parties to PFI to share with the government any profits derived from re-financing of debt.⁴⁴⁷

Finally, both governmental delegators and private delegates are subject to stringent and important constraints derived from employment law. The 1981 Transfer of Undertakings (Protection of Employment) (‘TUPE’) Regulations⁴⁴⁸ have been overtaken by the new TUPE Regulations (‘the new Regulations’),⁴⁴⁹ which came into force in April 2006.⁴⁵⁰ The new Regulations are primarily intended to give effect to the 2001 Acquired Rights Directive⁴⁵¹ and apply to all transfers of an undertaking or business or part of an undertaking or business from the public to the private sector and, in addition, to a service provision change.⁴⁵² The decisive factor in triggering the application of the Directive is whether there is a transfer

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⁴⁴⁷ Acquired Rights Directive (n 451) Art 1(1); new Regulations (n 449) Reg 3(1).
Delegation of Governmental Power to Private Parties

of an ‘economic entity’, engaged in an activity for remuneration, which retains its identity after the transfer. For a number of years, there was some confusing jurisprudence on the part of both the ECJ and the national courts regarding the understanding of a ‘relevant transfer’, with certain cases focusing on the need for a transfer of an ‘asset’ and others focusing on the transfer of an ‘activity’. However, Regulation 3(1)(b) of the new Regulations includes in the definition of ‘relevant transfer’ a ‘service provision change’. This means that outsourcing now clearly falls within the ambit of TUPE, which regulates the initial contracting out of a service, any re-tendering to a new service provider, and any in-sourcing back to the original employer. TUPE will apply in the PFI context, for example, where a contractor contracts to design, build, finance, and operate a new, replacement prison for an authority and to carry out the services necessary to run the prison.

The contract to carry out the services at the new prison will be transferred from the governmental authority to the contractor, to be carried out by either it or its subcontractors; and the staff previously employed by the governmental authority to carry out those services at the old prison will transfer to the contractor or subcontractor. In any event, regardless of whether or not TUPE technically applies to a particular outsourcing, it is government policy that TUPE should be applied unless there are ‘genuinely exceptional reasons’ not to do so.

The intention of the Acquired Rights Directive and the new (and old) Regulations is to protect the rights of employees in the event that the undertaking

454 New Regulations (n 449) Reg 3(1)(a).
456 Süzen (n 455).
458 New Regulations (n 449) Reg 3. See also Lamont, ‘The New TUPE Regulations’ (n 450).
459 Lamont, ‘The Acquired Rights Directive’ (n 450) 264. See also Value for Money Assessment Guidance (n 367) [1.14] (stating that value for money should not be achieved at the expense of employee terms and conditions).
in which they are employed is transferred. This is done primarily by way of an automatic transfer of the contracts of employment of the employees employed immediately prior to the transfer to the transferee employer, together with all the rights and liabilities of those employees (with the exception of some rights and liabilities which specifically do not transfer), and the new employer is bound by any pre-existing collective agreement. Any dismissal for a reason ‘connected with the transfer’ either before or after the transfer has taken place is automatically unfair unless there is an ‘economic, technical or organizational reason’ for the dismissal, entailing a change in the workforce. The term ‘economic, technical or organizational reason’ is not defined in the new Regulations although guidance from the Department of Trade and Industry indicates that it is likely to include a reason relating to: the profitability or market performance of the transferee’s business; the nature of the equipment or production processes which the transferee operates; or the management or organizational structure of the transferee’s business. Regulation 13 of the new Regulations also requires that employees are informed and consulted in respect of the transfer. By way of added incentive for governmental actors to comply, Regulation 15 of the new Regulations makes the transferor and transferee jointly and severally liable for any compensation payable as a result of any failure to inform or consult with a trade union or employee representative about a TUPE transfer.

The primary way in which the new (and old) Regulations affect governmental outsourcing is to create cost implications and risks for the private contractors, which should be incorporated into any value for money analysis. If it is necessary to reduce employee numbers, then the cost of any redundancies, including unfair dismissal liability, will need to be priced by the contractor and incorporated into the bid price.

5.4.2 Grants: central government

Certain grants are authorized by statute, which may or may not include limits on the government’s granting discretion—although usually any limits only require that the money be spent to further the specified statutory purposes. Specific statutory authorization does not, however, seem to be absolutely necessary for grants and many grants seem to be awarded on the basis of the government’s general spending authority. Under the annual Appropriation Act, each government department is given a certain amount of money from the government’s consolidated fund, alongside a general statement of the purpose of the department and a long list of the

462 New Regulations (n 449) Reg 7.
activities undertaken by the department.⁴⁶⁵ In the list of activities, some are specific, such as in the list of the Department for Communities and Local Government, payments to the Academy for Sustainable Communities, while others are vague, such as ‘minor grants and payments in support of housing, planning, regeneration, liveability’.⁴⁶⁶ It seems that the department is then free to opt for grants as a means to achieve its ultimate ends. The guide, *All About Government Grants*, issued by the former Enterprise Advisory Service states that ‘[e]ach awarding body (whether it be a ministry, agency or quango) has its own specific remit and objectives and may spend part of its budget on schemes to help achieve these’.⁴⁶⁷ The principles and process of the OGC Gateway™ Process, discussed above in respect of contract, can also be applied to the management of other expenditure, such as benefits and grants.⁴⁶⁸

A distinction is made between grants and what are known as ‘grants-in-aid’.⁴⁶⁹ With the former, a more detailed level of control is exercised by the granting body than in respect of grants-in-aid.⁴⁷⁰ Thus, grants are only paid on the production of evidence of individual expenditures, whereas payment of a grant-in-aid confers discretion on the grantee to spend the money within the context of an overarching framework.⁴⁷¹ The normal rules of supply finance apply to the award of grants, which should not be issued to the recipient body in advance of need. Need is assessed when the recipient has accrued the expenditure and has claimed reimbursement,⁴⁷² and the Accounting Officer is responsible for ensuring that the grant is applied by the recipient to the specific services for which it is authorized.⁴⁷³ Grants-in-aid are normally given to non-departmental public bodies and indicate a preference for the recipient body to operate at arm’s length.⁴⁷⁴ Nonetheless, the terms and conditions on which the grant-in-aid is issued must be clearly set out and the Public Accounts Committee will monitor these terms and conditions.⁴⁷⁵

### 5.4.3 Contract and grant: local government

Whether local authorities have power to contract out or make grants is dependent on legislation, as local authorities only enjoy expressly conferred powers.⁴⁷⁶ An

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⁴⁶⁵ See, eg, Appropriation Act 2007 Sch 2(2) para 1, stating the general purposes of the Department for Communities and Local Government to be ‘[i]mproving the quality of life by creating thriving, inclusive and sustainable communities in all regions’ and ‘[p]roviding for effective devolved decision making within a national framework’ and adding a detailed list of specific activities.

⁴⁶⁶ Ibid.


⁴⁶⁹ *Government Accounting* (n 345) [9.1] and ch 9 generally.

⁴⁷⁰ Ibid [9.2.1].

⁴⁷¹ Ibid.

⁴⁷² Ibid [9.3.1].

⁴⁷³ Ibid [9.3.2].

⁴⁷⁴ Ibid [9.4.1].

⁴⁷⁵ Ibid [9.4.7].

⁴⁷⁶ P Badcoe, ‘Best Value—an Overview of the United Kingdom’s Government’s Policy for the Provision and Procurement of Local Authority Services’ (2001) 10 Public Procurement L Rev 63, 64. See also Ch Two above (2.3.2.2).
order for contracting out of a local authority activity may also be made under the 1994 Act.\footnote{1994 Act s 70.} More generally, though, the Local Government Act 1999 provides a central legislative framework, while particularly important policy documents include the 2001 White Paper, \emph{Strong Local Leadership—Quality Public Services},\footnote{Secretary of State for Transport, Local Government and the Regions (now Communities and Local Government) <http://www.communities.gov.uk/pub/215/StronglocalleadershipQualitypublicservicesDTLR2001PartOne_id1165215.pdf> accessed 30 May 2007.} and the \emph{National Procurement Strategy for Local Government}.\footnote{Office of the Deputy Prime Minister <http://www.communities.gov.uk/pub/723/NationalProcurementStrategyforLocalGovernmentinEngland_id1136723.pdf> accessed 30 May 2007.} Private delegation at local government level occurs within a broad context of ensuring ‘best value’.\footnote{See, eg, Local Government Act 1999 s 1.} Local authorities are expected to constantly improve the performance of functions, having regard to economy, efficiency, and effectiveness.\footnote{Ibid s 3(1).} More particularly, each authority is required to review performance of its functions by reference to a number of criteria, such as whether it should be exercising the function and its objectives in relation to the exercise of the function.\footnote{Local Government (Best Value) Performance Plans and Reviews Order 1999/3251 Art 6(1)(a), 1(c).} Each authority is also required to assess the competitiveness of its performance in exercising the function by reference to the exercise of the same function, or similar functions, by other best value authorities and by commercial and other businesses, including organizations in the voluntary sector.\footnote{Ibid Art 6(1)(e).} Reviews are very broad in scope and entail consultation of recognized trade unions, organizations representing staff engaged in the exercise of the function, staff engaged in the exercise of the function, other best value authorities, and commercial and other businesses, including organizations in the voluntary sector, about the exercise of the function.\footnote{Ibid Art 6(1)(f); see also ODPM Circular 03/2003 (n 460) [49], [51]; see also Local Government Act 1999 s 3.} Consultation of service users is also recommended.\footnote{Circular 03/2003 (n 460) [54].} In deciding whether to delegate performance of an activity to a private actor, public-private competitions are not compulsory; however, mere market testing is deemed inadequate and ‘exacting comparisons with the best that other authorities and service providers can offer’ should be undertaken.\footnote{Ibid [57]–[58].} It is also made clear that the choice facing authorities is not just between in-house delivery and outsourcing, and other options to be considered include various forms of partnership.\footnote{Ibid [60].} Insofar as choice of private delegate is concerned, where the relevant EU rules apply, the authority’s choice of private contractor will be limited in the way outlined above in respect of central government.\footnote{Above 5.4.1.1(b).} Even where the rules do not apply, however, the process for choosing a private delegate is similar to that under
the EU system. There should be a pre-qualification stage, which will consider experience and track record in providing similar services, quality, and details of convictions for criminal offences or any acts of grave misconduct relating to the bidder’s business or profession.⁴⁸⁹ In terms of award, the focus is on achieving ‘best value’,⁴⁹⁰ which is defined as ‘the optimum combination of whole life costs and benefits to meet the customer’s requirement’, and enables sustainability and quality to be taken into account when service delivery options are being considered, as well as factors such as fuel efficiency or benefits to local people.⁴⁹¹ Local authorities may also take account of the practices of potential service providers in respect of equal opportunities where it is relevant to the delivery of the service under the contract.⁴⁹² In addition, there is a legal duty on local authorities, as a result of the Race Relations Act 1976,⁴⁹³ to have regard to the need to eliminate unlawful discrimination and to promote equality of opportunity and good relations between people of different racial groups.⁴⁹⁴ This duty applies in the procurement context and, pursuant to section 18 of the Local Government Act 1988, local authorities are entitled to ask approved written questions and include terms in a draft contract, if it is reasonably necessary to secure compliance with the Race Relations Act duty.

However, beyond these specific examples, the authority’s ability to take account of non-commercial criteria in awarding the contract is constrained and section 17 of the Local Government Act 1988 prevents authorities from introducing political or other irrelevant considerations into the procurement process by defining certain matters as ‘non-commercial’ and prohibiting authorities from considering these in the contractual process. By section 19 of the Local Government Act 1999, the Secretary of State may by Order provide for a specified matter to cease to be ‘non-commercial’ for the purposes of section 17 of the Local Government Act 1988. The list of ‘non-commercial’ factors includes any involvement of the business activities or interests of contractors with irrelevant fields of government policy, and any political, industrial or sectarian affiliations or interests of contractors or of their directors, partners or employees. However, the terms and conditions of employment by contractors of their workers or the composition of the arrangements for the promotion, transfer or training of, or other opportunities afforded to, their workforces and the conduct of contractors or workers in industrial disputes between them have been designated by Order as acceptable factors to consider.⁴⁹⁵ As with central government, scope for set-asides and reserved contracts is highly limited, but the National Procurement

⁴⁸⁹ Circular 03/2003 (n 460).
⁴⁹⁰ Local Government Act 1999 s 3.
⁴⁹¹ Circular 03/2003 (n 460) [62]; see also Annex C [12].
⁴⁹² Ibid Annex C [38].
⁴⁹³ As amended by the Race Relations (Amendment) Act 2000.
⁴⁹⁴ Section 71.
Strategy for Local Government requires all corporate procurement strategies to address how the council will encourage a diverse and competitive supply market, including small firms and the voluntary and community sectors, and encourage measures such as providing better information on opportunities and procedures.\textsuperscript{496}

In terms of contracting process, local authorities are regulated by the 2004 Procurement Directive where applicable, and if the EU rules do not apply, the authority will still be required to adhere to the general obligations contained in the EC Treaty discussed above.\textsuperscript{497} By section 135 of the Local Government Act 1972, local authorities are obliged to make their own standing orders with respect to the making of contracts for the supply of goods or materials or the execution of works\textsuperscript{498} and are empowered to do so for all contracts.\textsuperscript{499} Any such standing orders must include provision for securing competition and for ‘regulating the manner in which tenders are invited’.\textsuperscript{500} Generally, all contracting processes should give the authority sufficient information to form a view of providers’ competence without placing undue burden on them; requirements and criteria should be fairly and consistently applied; potential service providers should understand clearly what information and standards may be expected; and all potential service providers, including those part of the authority, must be subject to the same requirements to ensure fair competition and equal treatment throughout the procurement process.\textsuperscript{501}

With regard to supervision processes, Part II of the Local Government Act 1988 applies to all best value contracts, and imposes a number of obligations, including reason-giving.\textsuperscript{502} Moreover, local authority delegators are subject to audit controls as set out in the Local Government Act 1999.\textsuperscript{503}

5.4.4 Enforceability of the controls

Central government expenditure in England is primarily subject to oversight by the Treasury and Parliament, and not by the courts at the behest of individuals,\textsuperscript{504} although both central and local authority expenditure can be challenged for being ultra vires.\textsuperscript{505} As for enforcement of the specific contracting-out rules,

\textsuperscript{496} National Procurement Strategy for Local Government (n 479).
\textsuperscript{497} Above 5.2.1.2 and 5.4.1.2; see also Circular 03/2003 (n 460) Annex C [11].
\textsuperscript{498} Local Government Act 1972 s 135(2).
\textsuperscript{499} Ibid s 135(1).
\textsuperscript{500} Ibid s 135(3).
\textsuperscript{501} Circular 03/2003 (n 460) Annex C [14].
\textsuperscript{502} Local Government Act 1988 s 20.
\textsuperscript{503} Local Government Act 1999 ss 4, 6, 7; Circular 03/2003 (n 460) Annex B [22]–[26].
\textsuperscript{505} Ibid 384–7; R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd [1995] 1 WLR 386 (DC) 398.
there is a two-tier system of enforcement, and the relationship between the two tiers is not entirely clear. If the 2004 Procurement Directive applies, judicial review can be sought as of right under the Remedies Directive and the 2006 Regulations. If the 2004 Procurement Directive does not apply, establishing legal remedies can be more complex.

It is not necessary to discuss the Remedies Directive in huge detail, particularly as it is soon due to be replaced. Article 1(1) requires that a procurement decision be reviewed effectively and ‘as rapidly as possible’, and Article 2 demands certain specific forms of relief—interim measures, setting aside of unlawful decisions, and damages. Under the UK’s current regulations, a challenge is available for a contractor, supplier, or service provider who suffers or risks suffering loss or damages as a result of a violation of contract procedure.

There is also a fail-safe option, referred to as a ‘corrective mechanism’, under Article 3 of the Remedies Directive for the European Commission to intervene in award procedures, where it concludes that there has been a ‘clear and manifest’ breach of law. Generally, the Remedies Directive has proved unsatisfactory, particularly in failing to specifically require effective pre-contractual review, and the proposal for the new remedies directive seeks to rectify this by introducing a standstill period of ten calendar days with effect from the day after the date on which the contract award decision is communicated to the tenderers concerned. However, the ECJ had already also found a standstill provision to be necessary in order to comply with obligations in Article 2 of the Remedies Directive, and in England the proposed remedies directive has been pre-empted by the 2006 Regulations, Regulation 32 of which provides for a ten-day standstill period.

With regard to standing for judicial review, unlike the US situation, the English position is very flexible and, no doubt, bidders would be recognized as

507 Above n 99. A less helpful option from the disappointed bidder’s point of view is that of an Art 226 EC Commission infringement action against England.
508 Above n 344 Reg 47.
511 2006 Regulations (n 344) Reg 47(5)–(6).
512 Remedies Directive (n 99) Art 3(1).
513 Bovis (n 417) 628.
514 Remedies Proposal (n 510) 2–4, and proposed Art 2a at 15.
515 Case C-81/98 Alcatel Austria AG v Bundesministerium fur Wissenschaft und Verkehr [1999] ECR I-7671 [43].
having standing,⁵¹⁶ as would representative trade associations,⁵¹⁷ and perhaps even ratepayers⁵¹⁸—although, obviously, relief can be refused where it would create administrative inconvenience or hardship to innocent parties, as might happen through disruption to services where a contract is invalidated.⁵¹⁹ Further, in judicial review actions in general, it is not necessary to show that the outcome of the decision affected by the violation, in this case the award decision, would have been different but for the violation in order to have standing.⁵²⁰ In practice, rather than standing, as in the US,⁵²¹ the main impediment to subjecting contracting-out or procurement decisions to judicial review in England is the rule of procedural exclusivity, which will be discussed in greater detail in Chapter Seven below, and which holds that judicial review is strictly preserved for those cases which have a public law element.⁵²² For the most part, contract has been ‘presumptively placed in the private sphere’ by English courts,⁵²³ and ‘the perception of contract as a “private” matter appears to have influenced the courts’ approach to the judicial review of the government’s contractual activities’.⁵²⁴ However, the courts have not always been consistent and, on occasion, they have intervened, not only to enforce procurement rules, but also to impose procedural fairness obligations on the governmental actor in the procurement context.⁵²⁵ The problem is that it is not always entirely clear when the courts will intervene.

Generally, the fact that a public body is exercising a statutory power to enter a contract does not of itself make the matter amenable to judicial review and an additional element is usually required.⁵²⁶ Failure to comply with statutory procedure

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⁵¹⁷ R v Inspectorate of Pollution, ex p Greenpeace (No 2) [1994] 4 All ER 329, 350 (QB), Arrowsmith (n 8) 1369 [21.7].

⁵¹⁸ R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees Mogg [1994] QB 552 (DC) 562; R v HM Treasury, ex p Smedley [1985] QB 657 (CA); Arrowsmith (n 8) 1369 [21.7]. Although see also R v Inland Revenue Commissioners, ex p National Federation of Self Employed and Small Businesses Ltd [1982] AC 617 (HL).


⁵²⁰ Arrowsmith (n 8) 1368 [21.7]; Jobsin Co UK plc (t/a Internet Recruitment Solutions) v Department of Health Judgment of Blofeld J of 18 May 2001 (noted by S Arrowsmith, ‘Categorization of Services and Some Issues Relating to Remedies: A Note on Jobsin Internet Services v Department of Health’ (2001) 10 Public Procurement L Rev NA 116). There is, however, some limited support for the proposition that standing may be precluded when the applicant has submitted a bid in an award procedure that the purchaser is not permitted to accept: Arrowsmith (n 8) 1368 [21.6] citing Ralph Gibson LJ in Terry Adams (n 516).

⁵²¹ Above 5.3.4.2. ⁵²² Below 7.4.2.1, 7.4.3.1, and 7.4.4.1.

⁵²³ Freedland (n 349) 101. There have been some exceptions: see, eg, R (Molinaro) v Kensington and Chelsea Royal LBC [2001] EWHC 896 (Admin), [2002] LGR 336 [69], [73].

⁵²⁴ Arrowsmith (n 519) 290.

⁵²⁵ For detailed discussion, see Arrowsmith (n 8) 79–85 [2.63]–[2.67].

⁵²⁶ Bailey (n 506) 295, although see: R (Haggerty) v St Helen’s Council [2003] EWHC 803 (Admin) [26] (assuming although not deciding that a local authority’s decision not to enter into a
may suffice to justify intervention.\textsuperscript{527} Similarly, judicial review has been used to invalidate a procurement decision where a local authority’s decision had been motivated by an improper purpose,\textsuperscript{528} while another local authority’s decision to suspend a contractor from a list was considered reviewable for breach of natural justice.\textsuperscript{529} The courts may also intervene where they consider the contract to have a uniquely public character and in \textit{R v Legal Aid Board ex p Donn} Ognall J found the process of selection by the Legal Aid Board of solicitors for a multi-party action to be of public interest and therefore judicially reviewable.\textsuperscript{530} Mostly, though, the courts hold that the ‘pure’ exercise of the executive’s contractual powers should not be subjected to judicial review as the requirement of an element of public law is not satisfied. This is borne out strikingly in the \textit{Hibbit and Saunders} case.\textsuperscript{531} Here, the Court of Appeal found a violation of natural justice because the procedure actually used by the Lord Chancellor’s office for deciding on the winning tender for court reporting services was not in compliance with the advertised procedure. Relief could not be granted, however, because it was not considered appropriate to equate tendering conditions attendant on a common law right to contract with a statement of policy or practice, and accordingly the decision challenged lacked a sufficient public law element to found relief.\textsuperscript{532} By referring to the ‘common law right to contract’ of the Lord Chancellor, the Court was effectively indicating that it did not envisage limitations to this right. Thus, as Daintith has noted:

in the pre-contractual phase, in selecting contractual partners and deciding the terms it will offer them, the Government enjoys almost unfettered freedom and total immunity from judicial review by reason of the absence of general rules of domestic law to control this process.\textsuperscript{533}

This will particularly be the case where the government is exercising its common law or prerogative contractual powers.

Oliver has suggested that local authorities, who, as was noted above, are required by section 135 of the Local Government Act 1972 to adopt standing orders respecting their contracting, and other public authorities, who may contract was amenable to judicial review); and \textit{National Lottery Commission} (n 516) [57] (Richards J noting that ‘it is well-established that the exercise of statutory powers is subject to a requirement of procedural fairness’).\textsuperscript{527} Bailey (n 506) 295–6 (citing \textit{R v East Berkshire Health Authority, ex p Walsh} [1985] QB 152 (CA) and \textit{Terry Adams} (n 516).

\textsuperscript{528} \textit{R v Lewisham LBC, ex p Shell UK} [1988] 1 All ER 938 (DC) 951 (the local authority refused to deal with firms with trade links to South Africa during apartheid).


\textsuperscript{530} \textit{Hibbit and Saunders} (n 531) 328–9.

\textsuperscript{531} \textit{Mass Energy} (n 516) 306.

\textsuperscript{532} \textit{T Daintith, ‘Regulation by Contract: The New Prerogative’} (1979) 32 CLP 41, 59; see also Freedland (n 349) 98–9.
publish advice setting out their tendering practice, may be bound by any legitimate expectations to which their policies give rise. While logically convincing, as Oliver accepts, it does not seem that this argument has been adopted by the courts in practice. She notes that in Connor v Strathclyde Regional Council a breach of natural justice was found, due to bias of a member of an interviewing panel for the post of assistant head teacher at a local authority school. The unsuccessful applicant was held to have had a legitimate expectation that she would be interviewed in accordance with the procedures of natural justice, but it was held that there was not a sufficient element of public law to subject the decision to judicial review. Moreover, even if these policies do give rise to legitimate expectations, it is hard to conceive of such policies as controlling the power of the government to delegate—given that government has the power to decide on the content of those policies. At best, it is a form of self-regulation.

Oliver has also pointed to the fact that there is some private law supervisory jurisdiction over the ability to contract. This, however, as will be seen below in Chapter Eight, tends to be concerned more with implying terms or imposing obligations of fairness in private contracts, and not with the pre-contractual phase of governing with whom and on what terms the contract will be made in the first instance. One narrow exception is found in the rarely-used ‘Blackpool’ contract. This technique was first used to hold that refusal to consider a bid, mistakenly treated as late but actually submitted on time, constituted breach of an implied contract under which any party submitting a bid before the deadline had a right to have the bid considered. Beyond this, though, it is not entirely clear how extensive the ‘Blackpool’ contract is: one obvious risk of an extremely expansive scope is the creation of uncertainty, and the judiciary has also been quite cautious about interfering excessively with the commercial freedom of the government. While in Fairclough Building Ltd v Port Talbot BC the Court of Appeal held that an implied contract arose under which the Council must act ‘reasonably’ in removing a bidder from a list, in Pratt Contractors Ltd the Privy Council adopted a narrower approach and indicated that obligations of fairness and good faith in tendering required merely that the authority not act with ‘bad faith’. In Harmon the implied contract was stated even more narrowly as

534 D Oliver, ‘Is the Ultra Vires Rule the Basis of Judicial Review?’ in C Forsyth (ed), Judicial Review and the Constitution (Hart, Oxford 2000) 3, 20. See also Arrowsmith (n 8) 83 [2.65] (noting that judicial review may be available to challenge a general policy or practice on procurement rather than an individual decision).
536 Oliver (n 534) 17.
537 Below 8.2, and see also below 7.4.2.1.
538 Blackpool and Fylde Aero Club v Blackpool BC [1990] 1 WLR 1195 (CA) 1202.
540 (1991) 62 BLR 82 (CA); see also Scott LJ in Mass Energy (n 516); see, generally, discussion in Arrowsmith (n 8) 108–10 [2.89]–[2.90].
541 Pratt Contractors Ltd v Transit New Zealand [2003] UKPC 83, [2004] BLR 143 [47]. See also comment in SES Contracting Ltd v UK Coal Plc [2007] EWHC 161 (QB) [75].
being authority only that the procuring entity ‘undertakes to consider all tenders received’.⁵⁴² One conceptual difficulty with the ‘implied contract’ technique is, of course, that it is unsatisfactory, since there is no element of bargaining in the tendering situation, no exchange based on consideration, and, consequently, no basis for a finding of an implied contract.⁵⁴³ For this reason, Arrowsmith argues that it would be preferable to conceptualize the situation as one of estoppel or legitimate expectations.⁵⁴⁴

Finally, if the governmental actor violates an ECHR right of a private contractor during the procurement process, judicial review will be available pursuant to section 6(1) of the Human Rights Act 1998, which holds ‘core’ public authorities to be bound by ECHR rights in respect of all of their actions, including procurement. As Bailey has noted, however, ‘relatively few’ rights are liable to be implicated.⁵⁴⁵ Article 6 was at issue in the Tinnelly case, in which it was held that ‘clearly defined statutory rights’ not to be discriminated against on grounds of religious belief or political opinion in the employment field, including when bidding for a public works contract, could be deemed to be a ‘civil right’ within the meaning of Article 6.⁵⁴⁶ Thus, treating a certificate, issued by the Secretary of State, as conclusive evidence that a decision not to grant a contract was ‘done for the purpose of safeguarding national security or of protecting public safety or public order’ was held to constitute a violation of the applicants’ right of access to the court guaranteed by Article 6(1).⁵⁴⁷

5.5 Conclusion

As was noted at the start of this chapter, this conclusion will seek first to consider how the types of control reviewed in this chapter respond to the challenge of private delegation and, second, to assess how effectively each jurisdiction responds.

5.5.1 The impact of legislative and regulatory controls on private delegation

Starting with the first inquiry, very broadly and relating back to Chapter Three, limitations on the types of function governmental actors can delegate tend to bolster representative democracy by ensuring that certain powers may only be exercised by democratically elected officials or, at least, their publicly controlled

⁵⁴² Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons (2000) 2 LGLR 372 (QB) [210].
⁵⁴³ Arrowsmith (n 8) 113 [2.93].
⁵⁴⁴ Ibid.⁵⁴⁵ Bailey (n 506) 299.
⁵⁴⁶ Tinnelly & Sons Ltd & Others and McElduff & Others v United Kingdom (1999) 27 EHRR 249 [61].
⁵⁴⁷ Ibid [62]–[63]. See also Luck v Tower Hamlets LBC [2003] EWCA Civ 52 (CA).
subordinates. Accountability of governmental delegators is sought through procedures monitoring both their choice of delegate and the process of delegation, while efficiency goals also feature highly, particularly with the emphasis on cost-savings in choice of delegate criteria. More specifically though, and unsurprisingly perhaps, procurement regimes can have a complex and multi-factored impact on private delegation, which varies according to the emphasis of the particular regime.

Procurement scholars have identified a number of purposes which may be pursued by procurement regulation and two theories will be considered here. Schooner, for instance, identifies nine goals which might be pursued to varying degrees and in varying combinations: competition, integrity, transparency, efficiency, customer satisfaction, best value, wealth distribution, risk avoidance, and uniformity. He places particular emphasis on competition, integrity, and transparency.\(^5\) Meanwhile, Trepte opts for three overarching goals which will be exhibited to different degrees in different systems: pursuit of economic efficiency, the fulfilment of a government’s social and political responsibilities, and the facilitation of international trade.\(^6\)

The combination of competition, integrity, and transparency which Schooner highlights has a number of positive effects. Transparency assists in alleviating principal-agent difficulties—discussed in Chapter Three—at the first stage of the private delegation process. The governmental agent, with restricted market information, can persuade private actors to share their expertise in the given field in return for the government’s commitment to abide by a pre-stated process and pre-advertised evaluative criteria.\(^7\) Meanwhile, competition in the bidding process is one of the most frequently cited factors related to successful privatization.\(^8\) By requiring competition, in addition to resulting in the selection of a stronger private delegate, procurement regulations also aim to solve another principal-agent problem, that created by the corrupt civil servant acting on behalf of the government.\(^9\) Competition ensures that the procuring authority, as agent, acts in the interest of the government, as principal,\(^10\) and that contracts will not just be awarded to interest groups which may have captured the agency.\(^11\) Furthermore,


\(^6\) Trepte (n 25) 59; see also C Bovis, ‘Public Procurement and the Internal Market of the Twenty-First Century: Economic Exercise versus Policy Choice’ in T Tridimas and P Nebbia (eds), EU Law for the Twenty-First Century: Rethinking the New Legal Order: Volume 2 (Hart, Oxford 2004) 291; Bovis (n 417).

\(^7\) Trepte (n 25) 4–5, 94–5.


\(^9\) Above 3.3.4 and 3.4.


a public-private competition, as is conducted pursuant to Circular A-76 in the US, is an important exercise, as it will often displace the presumption that the private sector can perform tasks more efficiently than governmental actors. In particular, in the context of the Department of Defense in the US, roughly half of the competitions conducted pursuant to the Circular A-76 process have been won by in-house providers.⁵⁵⁵

Turning then to Trepte’s framework, the extent to which a procurement regime prioritizes ‘economic’, ‘political’ or ‘international’ ends will clearly also have consequences for the impact of the regime on private delegation. For example, the potential of private delegation to enhance participatory democracy—as considered in Chapter Three—can be increased, to an extent at least, by ‘political’ techniques such as set-asides and reserved contracts in procurement regimes. These techniques ensure that the private delegate chosen will not always be the unrepresentative multi-national corporation who has the strongest chance of winning a purely costs-based competition—a concern raised in Chapter Three⁵⁵⁶—but may be the locally based small business in the US or the sheltered workshop in England, with a genuine stake in the community. Naturally, though, this increase in participation will most likely be achieved at the expense of cost savings, which could have been obtained by a greater ‘economic’ emphasis and choice of the delegate who could perform the bid for the lowest price.⁵⁵⁷ In turn, of course, very rigid ‘economic’ regimes, which emphasize ‘purity’ and exclude consideration of non-economic criteria,⁵⁵⁸ and prioritize ‘lowest price’, can stifle the innovation necessary to ensure effective outsourcing.⁵⁵⁹ As Kelman has put it, ‘Government officials deprived of discretion which could produce misbehaviour are at the same time deprived of discretion that could call forth outstanding achievement’.⁵⁶⁰ For example, the ‘lowest bid’ option promotes fairness and economy, by ensuring a transparent arrangement that assures bidders they have been treated impartially and by reducing the opportunity for corruption.⁵⁶¹ The major disadvantage with this technique, though, is that the bid can go to contractors who ‘intentionally or through ignorance, underestimate the cost or difficulty of the government’s requirements, which increases the risk of contract non-performance’. ⁵⁶² As was discussed in Chapter Three, contractors may even adopt a conscious strategy to ‘“buy in and get well”, bidding unrealistically low initial prices and hoping to

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⁵⁵⁶ Above 3.3.1.1.
⁵⁵⁷ Trepte (n 25) 47; Arrowsmith (n 8) 1244 [19.15],
⁵⁶⁰ Kelman (n 559) 28.
⁵⁶¹ Kelman (n 216) 297–8.
⁵⁶² Ibid 298.
make money through contract modifications after award’.\textsuperscript{563} Hence, the need for the slightly more flexible ‘best value’, or ‘economically most advantageous’, source selection option.

Equally, the predominant emphasis of supranational or international regimes on non-discrimination and access to the market\textsuperscript{564} can lead to inflexibility and excessive constraints on the discretion of national actors.\textsuperscript{565} For example, the emphasis in the EU has been on competitiveness in geographical markets and import penetration.\textsuperscript{566} Rigid procedures can be counter-productive and indeed, as was noted above, the previous EU regime had to be modified to accommodate more ‘complex’ contracts, such as the English PFI arrangements, through the new competitive dialogue procedure.\textsuperscript{567} Similarly, it has been observed of local authorities in England that they are subject to excessive legal constraints in this context, even after the demise of the Conservative government’s Compulsory Competitive Tendering regime,\textsuperscript{568} in a way which undermines their role of ‘community leadership’.\textsuperscript{569} In addition, it is clear that EU law grants only very limited discretion to governmental delegators to consider non-economic criteria at the stage of choice of delegate.

As will be considered in Chapter Eight, EU law is more tolerant of contractual conditions which seek to impose special non-economic obligations on the contractor.\textsuperscript{570} Yet, as Arrowsmith has observed, pursuit of secondary or non-economic policies through contract conditions, rather than through selection of delegate or award criteria, is less efficient.\textsuperscript{571} This is because the remedies for breach of special contractual conditions will be limited: termination may be inconvenient and it may be difficult to demonstrate loss.\textsuperscript{572} By contrast, if secondary policies could be accommodated through award criteria, whether through granting price preferences to contractors able to achieve a secondary policy or through enabling contractors to submit proposals on how they might achieve the secondary policies, this would enable the government to identify and achieve the optimum balance between primary economic and secondary non-economic policies.\textsuperscript{573} As such, the emphasis in the EU rules on eradicating national discretion is, from the perspective of responding effectively to private delegation, not without disadvantages.

5.5.2 The jurisdictions compared

Clearly, all three jurisdictions seek to find trustworthy and cost-effective delegates and to achieve transparency and efficiency. For contracting out, though, the US

\textsuperscript{563} Ibid.
\textsuperscript{564} Bovis (n 417) 630; also 608.
\textsuperscript{565} Trepte (n 25) 107.
\textsuperscript{566} Bovis (n 417) 608.
\textsuperscript{567} Above 5.4.1.2 and Trepte (n 25) 98.
\textsuperscript{568} Above 2.4.2.1.
\textsuperscript{570} Below 8.3.1.3.
\textsuperscript{571} Arrowsmith (n 8) 1272 [19.41].
\textsuperscript{572} Ibid 1249–50 [19.21].
\textsuperscript{573} Arrowsmith (n 8) 1252 [19.24]; see also ibid 1289–90 [19.59].
Circular A-76 system is by far the most detailed and, in particular, a feature like the conversion differential, which, as will be recalled,\(^5\) entails adding a charge to the private bid to account for transfer costs, is a useful mechanism for enhancing the accuracy of the public-private competition. On this point also, the other two systems are unsatisfactory in allowing for the possibility of the contracting-out of existing functions, without the requirement of a proper cost-benefit analysis or public-private competition. The effectiveness of the Circular A-76 procedure may be significantly undermined, however, by the streamlined competition option, which, as already stated, will probably be the most widely used contracting-out process, and does not involve a full private-public competition or availability of challenge. In this respect therefore, the issue of adequate public-private competition, to test, rather than assume, the greater efficiency of private over public performance, needs attention in all three systems.

England’s procurement has obviously been enormously affected by the EU regime, and although historically England has not used procurement to pursue political or secondary policies as extensively as the US,\(^5\) its ability to do so is clearly constrained. That said, there is evidence of increasing flexibility emerging in the EU context,\(^6\) with the competitive dialogue procedure and even the limited set-aside provision.\(^7\) Moreover, the new EU regime reflects ECJ jurisprudence which had introduced some flexibility and permitted Member States to take into account secondary policies, albeit only to a limited extent. It may even be that, as the EU market becomes increasingly integrated, there may be an evolution to a more political regime which, as Bovis has suggested, ‘takes into account a flexible and wider view of national and community priorities, and a type of “European public policy”’.\(^8\)

More generally, it is necessary to address the distinction drawn, again in all three jurisdictions, between contract and grant, with the awarding of contracts being much more heavily regulated than the award of grants. From a private delegation perspective, this is an unjustifiable distinction, since both instruments have the potential to involve a transfer of governmental power to private actors. They just sometimes involve different payment forms. Often, though, where a grant is paid over a period of time, in response to proof of performance, and the grant agreement involves detailed conditions, it is difficult to see how the grant even differs in form from a contract. It has been said that the contract-grant distinction can be explained in part by the fact that, while procurement regulation is aimed to ensure, inter alia, non-discrimination in government contracting,\(^9\) grants are often useful to governments precisely because it is necessary to discriminate to achieve the particular public purpose: the aim is to help the ‘least

\(^{5}\) Above 5.3.1.1(b).
\(^{5}\) Arrowsmith (n 8) 1226 [19.2].  \(^{5}\) Bovis (n 417) 629.
efficient to encourage the weak or to stimulate greater future efficiency’.\textsuperscript{580} It is not disputed that government should be able to assist the weak. However, this only explains different procedural controls of the two types of award—not prioritizing competition for grants—but it does not justify different functional or supervisory controls. Why should ‘inherently governmental’ tasks be delegated through grant, if this is forbidden through contract?

In the US, of course, there will be legislative controls in the statutory authorization—but this may not involve functional limitations and, as was shown by the discussion in Chapter Four, the federal non-delegation doctrine is a weak constraint on federal legislative delegation power. Another point may be that grant schemes usually seek to avoid the making of profit on the part of the beneficiary: this again, though, does not explain why private actors should exercise governmental power. Also, although in the US there is a strictly enforced distinction between contract and grant, the distinction drawn does not even address the delegation issue. What is required in grant regulation, therefore, is a greater awareness of its potential to result in far-reaching delegations of governmental power.

Turning to the specific types of control, in the contract context, it is clear that in all three jurisdictions there is a concern that certain tasks should always remain the preserve of government performance. The EU takes this concern farthest, followed by the US and then England. In England, the concern is expressed most narrowly, through a specific list of statutorily conferred functions, rather than through the type of generic descriptions found in the US and EU, and no restraints for functions that have not been conferred by statute. Of course, the workability of functional controls on delegators is questionable. In the US, it has been argued that the ‘inherently governmental’ exception is only used to enable government to appear as if it remains in control of government work. The reality inevitably ends up being quite different. As noted by one commentator:

The more government relied on contractors, the more vigorously it proclaimed that contractors could not, as a matter of policy—although not necessarily law—perform the ‘inherent’ work of government. Given the concerted absence of visible evidence to the contrary, this policy supported a presumption of regularity—i.e., that officials in fact remained responsible for the basic work of government.\textsuperscript{581}

Definitional problems dominate in this area, and the concept of ‘inherently governmental’ in the US setting, for instance, is vague and malleable.\textsuperscript{582} The

\textsuperscript{580} Rylander (n 266) (citing MS Mason, ‘Highlights’ in MS Mason (ed), Federal Grant Law (1982) 1, 3).


distinction between ‘commercial’ and ‘inherently governmental’ has resulted in much controversy between agencies and contractors⁵⁸³—possibly exacerbated by the fact that there are no judicially enforceable definitions. In this respect, it will be interesting to follow the development of Article 57 in the EU context: its legal enforceability may help to give some meaning to the Regulation’s vague terms—‘administrative’, ‘ancillary’, ‘technical’, and ‘discretionary’.

However, the difficulty of the policy-making/policy-implementation distinction is not just at the enforceability level: it runs deeper. Even assuming that there is a consensus on the meaning of ‘discretion,’ for example, and borrowing Bell’s definition of ‘discretion’ as ‘having genuine freedom of action within a significant range of options… even if there is not unlimited choice’,⁵⁸⁴ it is nonetheless difficult to delegate in a manner which limits discretion: ‘[v]irtually every act of implementation necessarily involves policy choices, often important ones’.⁵⁸⁵ In Bell’s framework, to reduce the power it is necessary to narrow the range of options. This, of course, requires that delegations be structured in detail, an exercise which generates its own difficulties and may be counter-productive. Detailed rules may be over-inclusive or under-inclusive. Even the EU model will not always reduce the degree of power exercised by private actors: often, seemingly ancillary tasks, such as compiling data, involve significant exercises of discretion, allowing the author to emphasize a certain perspective or use certain language, which in turn can control outcomes.⁵⁸⁶ That said, however, as difficult as the distinction may be, it is one that is nonetheless worth trying to enforce, and the EU Regulation is to be commended for seeking to limit the risks that can be posed by private delegation by narrowing its scope.

Finally, this overview of the procedures mandated for private delegation gives some indication of how complex and demanding they are and, consequently, of just how significant the transactional costs of private delegation can be. For instance, of the US system, Schooner has complained that ‘the Government lacks sufficient qualified acquisition, contract management, and quality control personnel to handle the outsourcing burden’.⁵⁸⁷ All three systems are to be criticized for not including, in their regulatory systems, controls to ensure that there is a remaining body of governmental actors with the expertise and experience required to oversee the many contracts and grants being awarded.⁵⁸⁸

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⁵⁸⁷ Schooner (n 179) 265.
⁵⁸⁸ Guttman (n 155) 340.