PUBLIC PROCUREMENT IN THE UNITED KINGDOM

A brief guide
LEGAL FRAMEWORK FOR PROCUREMENT

Procurement by government bodies in the United Kingdom is governed by European Law which has been translated in law in England and Wales by certain regulations. The main European and domestic legislation is set out in the table below.

<table>
<thead>
<tr>
<th>European directive</th>
<th>England and Wales regulations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Sector Directive 2014/24/EU</td>
<td>Public Contracts Regulations 2015</td>
</tr>
</tbody>
</table>

This regime covers the procurement of both goods and services.

In certain cases, the full European regime does not apply, most commonly due to the value of the goods or services falling below the set threshold values. The thresholds are set in euros and the table below sets out the applicable rates with an indicative conversion to sterling.

<table>
<thead>
<tr>
<th>Goods or services</th>
<th>(€)</th>
<th>(£)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public works</td>
<td>5,548,000</td>
<td>4,551,000</td>
</tr>
<tr>
<td>Service contracts</td>
<td>221,000</td>
<td>181,000</td>
</tr>
<tr>
<td>Supplies contracts</td>
<td>221,000</td>
<td>181,000</td>
</tr>
<tr>
<td>Supplies and services in the sectors of water, energy</td>
<td>443,000</td>
<td>363,000</td>
</tr>
<tr>
<td>and transport</td>
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</table>

European law is the source of the fundamental principles which govern procurement law. These are:

- equality of treatment,
- transparency;
- mutual recognition; and
- proportionality.

The over-riding procurement policy requirement is that all public procurement must be based on value for money, defined as ‘the best mix of quality and effectiveness for the least outlay over the period of use of the goods or services bought’. This should be achieved through competition, unless there are compelling reasons to the contrary.
In addition to the statutory framework, there are guidelines published by the government in the form of Procurement Policy Notes\(^1\) and guidance\(^2\) published by the Crown Commercial Service (CCS) (the government body which leads the development and implementation of procurement policies for the government).

**SYSTEMS CONCERNING PUBLIC CONTRACTS**

The regulations set out above prescribe certain procedures to follow during the procurement process. These include:

- **the open procedure** – a one stage process during which parties submit a written tender and the cheapest is chosen;

- **the restricted procedure** – a two stage process of initial selection (using a standard document called the ‘selection questionnaire’) followed by assessment of technical capability (often called an Invitation to Tender, or ITT) which may include an interview or product demonstration, if applicable. This is the most commonly used procedure; and

- **competitive procedure with negotiation** and **competitive dialogue** involve iterative rounds of discussion and submission of information and may be used for the most complex procurements.

In each case, the procedure requires that opportunities are advertised in the Official Journal of the European Union (OJEU). Following completion of the competition, there are additional notice requirements to publicise the award of the contract.

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1 These can be viewed at https://www.gov.uk/government/collections/procurement-policy-notes
2 Guidance is available at https://www.gov.uk/guidance/transposing-eu-procurement-directives#guidance
CRITERIA FOR SELECTION

Matters such as safety, environmental concerns, benefits for regional economy and Corporate Social Responsibility (CSR) are usually considered in the selection questionnaire when bidders are invited to set out their policies on such matters.

There are a number of challenges inherent in the way procurements are undertaken. It is predominantly document-based process which can reduce opportunities for discussion between bidder and buyer as to what is needed. Submission of a bid is a time-consuming with no guarantee of any return. Time and costs involved in preparing a bid are (almost always) entirely at the bidders expense.

Once a contract is awarded it may take a number of forms including a framework (a number of parties are appointed to a panel), public private partnership (PPP) or include elements of incentivisation. Such characteristics should be made clear on the face of documentation available to all bidders to ensure all parties are aware of the arrangement they are bidding to enter.

CORRUPTION

The selection questionnaire contains certain declarations in relation to past behaviour by the bidder. The contracting authority is entitled to (or in some cases required to) exclude a bidder if they have engaged in certain practices. This includes criminal activity, corruption, fraud and non-compliance with the Bribery Act 2010, amongst other matters. The winning bidder is required to provide evidence of compliance prior to the contract being awarded.

Disappointed bidders, including those who consider there may have been foul play have recourse to the usual courts in which to make a complaint. The Procurement Regulations make certain additional provisions in this area and other laws such as the Freedom of Information Act 2000 also assist with obtaining information in cases where it is considered that a procurement has not been correctly run.

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ASSESSMENT OF BIDS
The contracting authority conducting the procurement will put together an assessment team for each procurement. Many larger organisations have staff who specialise in procurement who are routinely involved. Other relevant staff would join them to assess bids, for example when procuring new IT software, staff with IT knowledge would be likely to be part of the panel.

There is no formal training required for people assessing bids and they are not required to have any formal procurement training. It is possible to obtain a professional qualification in procurement from the Chartered Institute of Purchasing and Supply (CIPS). This is a professional membership body with a bespoke training programme which its members are required to have completed.

PROCEDURES FOR BIDDING
It is now more common for procurements to make use of an online procurement portal whereby responses to the selection questionnaire and ITT are directly uploaded with any supporting documentation. Where an online tool is not used, soft and hard copy documents are submitted to the contracting authority directly.

In many cases, contracting authorities run their own procurement exercises and it is possible to bid directly for the opportunity advertised. The CCS also operates a number of framework contracts. These are procured by the CCS itself and other contracting authorities may then purchase goods or services from suppliers on the framework without needing to conduct a full procurement exercise.
REMEDIES
The obligations on contracting authorities to comply with the requirements of the regulations take the form of a legal duty which they owe to the bidders. If bidders consider that they have been treated in a way which conflicts with the duty they are owed, for example they have not been dealt with fairly, openly and without discrimination, they have a right to request information from the contracting authority and potentially a right of action before the courts. Remedies include a court suspending the procedure, requiring a procurement competition to be rerun, cancelling any contract unlawfully entered into and even fining the authority concerned.

The law in this area is complex and, in appropriate situations, you are advised to seek professional legal advice.

BREXIT
The European public procurement market has been the subject of European directives since the 1970s. These have changed and developed over time. The current directives have been in place since 2014 and implementing regulations since 2015 or 2016. The current regime has not changed dramatically from the previous iteration but adjusts, for example, the cases in which it can be claimed that the regime does not apply. There are significant implications following the UK’s decision to leave the EU, which is bound to affect the whole procurement regime, whether under a controlled or a ‘no deal’ scenario. We will be following developments closely and advising accordingly.
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