

Public Procurement under the spotlight

With public spending and procurement under intense scrutiny, Sharon Akumiah, ACE senior legal assistant, tells *Impact* about the rules as they stand and highlights new developments.

Public sector spending and procurement is at the forefront of the political agenda. We have seen an emergency budget by the new coalition government, changes to the Building Schools for the Future project and we have a comprehensive spending review set for October 2010.

The rules

The purchase of contracts for works, services and goods by contracting authorities and some utilities are regulated by public procurement law. This applies where the value of those contracts are above specified financial thresholds. Public procurement rules are set out in two EU directives that have been implemented into UK law via the Public Contracts Regulations 2006. These regulations state the procedures that must be adhered to for awarding contracts that fall in within the scope of public procurement.

The four conditions for when contracting regulations apply

1. The procuring body is a contracting authority
2. The contract relates to public works, supplies and services contract
3. The value of the contract is equal to or above the relevant financial threshold
4. No exclusions apply

Central government, local authorities and emergency services authorities such as police authorities all fall within the definition of contracting authorities. Bodies such as registered social landlords are also included as they have a public interest function either to the state or other government bodies. Public works supplies or services contracts must be in writing and for consideration or remuneration. This does not necessarily just mean money.

The public procurement rules make it very clear that they do not apply to contracts where purchases are made in-house. However, the rules will apply to contracts that make purchases through inter-departmental arrangements or where

the contract is between organisations that are closely linked.

are free to use the open or the restricted procedures.

Services contracts

Services contracts are distinguished between two types of services

1. Part A services include services such as civil engineering and facilities management services
2. Part B services include services education and legal services

If a contract falls in the Part B services category there is no requirement for an OJEU (official journal of the European Union) notice to commence the tender process. This is unlike Part A services contracts which must have an OJEU notice. However if a contract which falls under the Part B category is of cross-border interest then the contract must be adequately advertised and allow for open competition from other member states. Because of this it is not uncommon to see high-value Part B services being advertised across EU member states and in the OJEU.

Open procedure

Under the open procedure all interested parties must be allowed to submit a tender. However, only tenders from contractors which meet the contracting authority's pre-qualification criteria will be assessed. The minimum timescale for expression of interest (EOI) submission is 45 days.

“Contracts with an estimated value below the threshold are still subject to general EC Treaty principles.”

Restricted procedure

Under the restricted procedure all interested parties can submit an expression of interest. However, only those who are invited by the contracting authority having gone through a pre-qualification stage may submit a tender. At least five contractors must be invited to submit a tender.

Competitive dialogue procedure

Under the competitive dialogue procedure contractors are allowed to provide input during the tender process. This procedure is used for complex contracts where the contracting authority does not believe that the open or the restricted procedures are suitable.

During this procedure, when the contracting authority has invited three

contractors following submissions of EOI, the contracting authority will engage with individual bidders to discuss the solutions that the authority is looking to achieve. Once the desired solution has been identified, the dialogue phase must end and the invitations for tenders sent out to interested parties. The minimum timescale for submission of EOIs under this procedure is 30 days.

Negotiated procedure

There are two types of negotiated procedure

1. with prior advertisement of an OJEU notice
2. without prior advertisement

Negotiations between the contracting authority and a contractor is allowed under the negotiated procedure without prior advertisement. However, the procedure with prior advertisement follows the same process as the competitive dialogue procedure up until the selection of the three contractors. Under this procedure instead of the three contractors being asked to engage in a dialogue with

the contracting authority, contractors are invited to negotiate with the contracting authority. The negotiated procedure is not as popular as the other procedures after the Office of Government Commerce (which has now been absorbed into the Cabinet Office) and the EU Commission warned against its unjustified use.

Breach of Public Procurement rules

On 20 December 2009 the Public Contracts (Amendment) Regulations 2009 came into force. The regulations provide more remedies for procurements that commenced after 20 December 2009. The aim was to provide victims of breaches of the procurement rules with effective compensation.

Under the 2009 Regulations if proceedings are issued and served, the award of the contract in question is suspended automatically and the contract cannot be entered in to unless the court removes the suspension or the proceedings are concluded. Previously under the 2006 Regulations, before a contract had been entered into claimants could seek an order for decisions taken unlawfully, request an order for the contracting authority to amend

documents, request damages or request an interim injunction.

“It is important that suppliers ensure that the procurement rules are complied with.”

Claimants found pursuing a request for a court to grant an interim injunction costly; a court would in most cases require the claimant to give the cross-undertaking in damages prior to granting interim relief. In effect, the undertaking meant that the applicant would be required to pay the damage caused to the contracting authority arising from the grant of the interim injunction if it was later decided that the injunction should not have been ordered in the first place.

Under the 2009 Regulations it is the contracting authority that now faces the cost and burden of the interim injunction in seeking to remove the suspension. However, the court may still require a cross undertaking from the claimant.

Under the 2006 regulations if a claimant issued proceedings after the contract had been entered into the only remedy was damages. The 2009 Regulations introduce the new remedy of ‘prospective ineffectiveness’. If a court decides a contract is ‘prospectively ineffective’ then all obligations that have yet to be performed under the contract are not to be performed. Effectively the contract is set aside.

It is likely that there will be an increase in public procurement litigation although challenging a contract in court is still very expensive. It is important that suppliers ensure that that the procurement rules are complied with. If the rules have been breached a contract may be declared ineffective and a court may ask for the contracting authority to start the tender process all over again or grant damages.

For more information about the public procurement rules and the new remedies under the Public Contracts (Amendment) Regulations 2009 please email Sally Partridge, ACE legal and compliance director, at spartridge@acenet.co.uk or Sharon Akumiah, ACE senior legal assistant, sakumiah@acenet.co.uk.

