

Update on procurement law for local authorities

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May 2015

So what has changed in procurement?



- The Public Contracts Regulations 2015
 - Took or takes effect from variety of dates but mainly 26 February 2015
 - Repeals the Public Contract Regulations 2006
 - Implements Public Sector Procurement Directive 2014/24/EU and re-enacts the Remedies Directive
 - Overall effect is limited changes to procurement law but no revolution
 - This talk is an edited “highlights” on some of the changes

Change 1: Reg 53: Internet access

- Reg 53(1) provides:

“Contracting authorities shall, by means of the internet, offer unrestricted and full direct access free of charge to the procurement documents from the date of the publication in the Official Journal of a notice sent in accordance with regulation 51 or the date on which an invitation to confirm interest is sent”

- Limited exceptions in reg 22
- If not available, then note provisions for alternative routes of communication.

Change 2: Advertising smaller contracts

- Lord Young reforms
- Applies to contracts over £25k
- Regs apply where a contracting authority advertises a contract award opportunity”
- If so LA must advertise on Contract Finder
- “Contracts Finder” is defined as ““Contracts Finder” means a web-based portal provided for the purposes of Part 4 by or on behalf of the Cabinet Office”
- Lets contractors search for information about contracts worth over £10,000 with the government and its agencies
- <https://www.gov.uk/contracts-finder>

Change 3: Publishing awards on Contracts Finder

- Reg 112(1) provides that local authorities must now publish all public contract awards on Contract Finder
 - All awards above *de minimis* of £25k
- Applies even if no contract procedure followed
- But no clear remedy if breached

Change 4: Exit Part B and welcome “Light Touch”

- Part B services – including health and social care largely excluded from all but Part 1 of 2006 Regs
- Now “Schedule 3” services
 - Includes legal services
- Contracts for these services now within the 205 Regulations but:
 - Higher threshold – €750,000
 - Contracts must be advertised
 - Greater scope for LA to design its own contract award procedures
- Does not apply to NHS contracts until 18 April 2016

Change 5: “In house” contracts

- *Teckal* exemption now set out in Regulations
- Regulation 12(1) now defines the conditions
 - “control which is similar to that which it exercises over its own departments”
 - 80% rule
 - no direct private capital participation or none which exerts a “decisive influence on the controlled legal person”
- Can have joint control between local authorities
- Remains to be seen how this will work out in practice and if anyone will challenge arrangements

Change 6: Limiting competitions to non-profits



- New rules to limit contracts to non-profit providers
 - Came from the *Gloucestershire* case
- Only for defined types of contracts – mainly health and social care
- Tight rules about provider limitations
 - Not all non-profits
 - Not all charities
 - Employee mutuels seem most likely to benefit
- One off contracts for 3 years
- Limitations cannot be repeated for subsequent contracts

Change 7: Pre-procurement engagement

- Reg 40 says “contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements”
- May seek or accept advice from independent experts or authorities or from market participants
- But:
 - “Such advice may be used in the planning and conduct of the procurement procedure, provided that it does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency”

Change 7: Pre-procurement engagement (2)



- How is level playing field maintained?

“contracting authority shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer”

- Communication of involvement and time limits
- Involved provider only excluded if there are “no other means to ensure compliance with the duty to treat economic operators equally”

Change 8: New rules on confidentiality

- Reg 21 (1) provides “A contracting authority shall not disclose information which has been forwarded to it by an economic operator and designated by that economic operator as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders”
- Note width of the contractors right to designate as “confidential”
- But:
 - Does not apply if duty to publish under regs
 - Does not apply if FOIA requires publication – but note s43
 - Does not apply if legal duty to publish (e.g. under court proceedings)

Change 9: New rules for calculating value



- Rules set out in Reg 6
- Total amount payable, net of VAT, as estimated by the contracting authority, including any form of option
- Still 4 years value for extended contracts
- Note anti-avoidance provisions:
 - A procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Part, unless justified by objective reasons
 - The choice of the method used to calculate the estimated value of a procurement shall not be made with the intention of excluding it from the scope of this Part

Change 10: New exclusion provisions

- Changes to mandatory exclusion rules under 2006 Act
- Now in Reg 57
- Duty to exclude if:
 - convicted of specified offences in past 5 years
 - the contracting authority is aware that the economic operator has been held to be in breach of its obligations relating to the payment of taxes or social security contributions
- May disregard any of the prohibitions if disproportionate or for overriding reasons relating to the public interest such as public health or protection of the environment.

Change 10: New exclusion provisions (2)

- Discretionary exclusion of “bad” contractors
- List of grounds in reg 56(8)
- Includes “significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract” or market abuse activity
- “Self cleaning” under 56(8)
- Contractor provides “evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion”
- Contracting authority provides reasoned response.