

The public procurement rules: an introduction

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1. What is public procurement law?

- Law governing the award of public contracts by public bodies to third parties
- EU law based:
 - The Public Contracts Directive 2014/24/EU
 - The Concessions Directive
 - The Utilities Directive
 - EU Defence and Security Procurement Directive 2011
- Implemented by:
 - Public Contracts Regulations 2015
 - ~~Concession Contract Regulations 2016~~
 - Utilities Contracts Regulations 2015
 - Defence and Security Public Contract Regulations 2011
- Also note:
 - Other forms of public auctions/franchising: Radio spectrum auctioning, energy subsidy auctions (Low Carbon Contracts), rail franchise and competitions for major licence grants (eg National Lottery etc).

2. The scope of the Public Contract Regulations



- **Public contracts:** executions of works, supply of products, provision of services.
- Applies to all “**contracting authorities**” – Article 2 test is “bodies governed by public law”:
 - “Established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character
 - Legal personality
 - Financed for the most part by the State, regional or local authorities
- Inclusive definition in PCRs (includes central govt authorities listed at Schedule 1)
- Main contract thresholds:

Type of contract	Threshold from 1 Jan 2018
Supply and services contracts (central government)	£118,133
Supply and services contracts (non-central government)	£181,302
Works and subsidised works contracts	£4,551,413
Social and other services contracts falling within the "Light Touch Regime"	£615,278

- NB Application of general TFEU principles of equal treatment, non-discrimination and transparency can still apply to sub-threshold contracts.

3. The key procurement principles

- Regulation 18 PCRs:

(1) Contracting authorities shall treat economic operators **equally and without discrimination and shall act in a transparent and proportionate manner.**

(2) The design of the procurement shall not be made with the **intention of excluding it from the scope of this Part or of artificially narrowing competition.**

(3) For that purpose, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators

Transparency in bid design

- The “RWIND” test: award criteria must be “*clear, precise and unequivocal, so that a reasonably well-informed and diligent tenderer can understand their significance and interpret them in the same way, and secondly, the contracting authority can ascertain whether tenders satisfy the relevant criteria*”: **SIAC Construction Ltd v County Council of the County of Mayo** [2001] ECR1-7725, at paragraph 41
- Unlike other allegations commonly made during procurement disputes, such as whether or not a manifest error has been made in the evaluation, a breach of the transparency obligation does not allow for any “margin of appreciation”: see **Lion Apparel Systems v Firebuy Ltd** [2007] EWHC 2179 (Ch) at [36]

Case Study: *MLS (Overseas) Limited v Secretary of State for Defence* (21 December 2017)



MLS: evaluation methodology in the ITT



- **Technical evaluation:**
 - Capability
 - Customer relationship
 - Supply Chain Management
 - Value for Money
 - **Safety**
 - Quality management
- Scoring guidance set out criteria for score of “High Confidence” “Good Confidence” “Concerns” or “Unacceptable”, but only for 5 questions out of 6
- 6th Question re Safety was just stated as pass/fail
- **“The Authority will reject any Tender if any response achieves an assessment of lower than “Good Confidence” in accordance with the evaluation criteria”**
- ITT did not expressly indicate that “pass” score for each part of Question 6 (safe working culture throughout the supply chain) was a minimum standard that had to be met to make the tender technically compliant.

Transparency and equal treatment in bid evaluation: overlapping concepts



- Award criteria and weighting cannot be changed once bids received: **C-226/09 Commission v Ireland** [2010] ECRI-11807
- A failure to comply with award criteria is a breach of duty: **Easycoach Ltd v Department for Regional Development** [2012] NIQB10
- Any clarification should not appear to have unduly favoured or disadvantaged the tenderer to whom it is addressed: **William Clinton trading as Oriel Training Services v Department for Employment and Learning** [2012] NICA 48 at [23]-[27]
- Failure to retain notes/documentation is itself a breach of transparency: **Energy Solutions (EU) Ltd v Nuclear Decommissioning Authority** [2016] EWHC 1988 (TCC)

The lack of flexibility in the rules: the principle of $\frac{L}{C}$ proportionality

- **Energy Solutions EU Ltd v Nuclear Decommissioning Authority** [2016] EWHC 1988 (TCC): “principle of proportionality may in exceptional circumstances provide some scope to depart from rules of a procurement competition, no grounds to re-write SORR or scoring matrix” (at [898])
- Examples:
 - **J Leadbitter & Co Ltd v Devon County Council** [2009] EWHC 930 (Ch) (tender submitted 3 hours late)
 - **Tideland Signal Ltd v European Commission** Case T-211/02 [2002] ECR II-3781 (obvious error in how long the tender was valid for)

Manifest error in bid evaluation

- **Lion Apparel Systems v Firebuy** at [37]:

“In relation to matters of judgment, or assessment, the Authority does have a margin of appreciation so that the court should only disturb the Authority's decision where it has committed a “manifest error”....When referring to “manifest” error, the word “manifest” does not require any exaggerated description of obviousness. A case of “manifest error” is a case where an error has clearly been made”

- **Letting International Ltd v London Borough of Newham** [2008] 1158 (QB):

“it is not my task merely to embark on a remarking exercise and to substitute my own view but to ascertain if there is a manifest error, which is not established merely because on mature reflection a different mark might have been awarded. Fourth, the issue for me is to determine if the combination of manifest errors made by Newham in marking the tenders would have led to a different result”

4. Some key duties in Part 2 of the PCRS:

- **The duty to advertise:**
 - Standard requirement is a Contract Notice (in some cases a Prior Information Notice can suffice).
 - Contract notice is supplemented by procurement documents – key ones being the Invitation to Tender (**ITT**) or Request for Participation (**RFP**)
- The 4 prescribed **methods of competition:**
 - Restricted, open, competitive dialogue with negotiation, negotiated procedure without prior competition
- Specific rules on contents of Contract Notices and Contract Award Notices, and the use of selection criteria and award criteria.

Material amendments to contracts during their term – the *Pressetext* exception in Regulation 72 PCRs



- High risk area – failure to advertise can lead to declaration of ineffectiveness (NB projects where planning permission alters scale of projects: eg SITA case referred to European Commission as a result of planning changes)
- Changes anticipated in the original procurement document (test is “do not alter the overall nature of the contract”)
- Additional works or services, where change of contractor cannot be made for economic or technical reasons (max 50% of original contract)
- Unforeseen circumstances (50% threshold)
- New contractor – unequivocal review clause, corporate restructuring, insolvency

Additional institutional investor rules and their application to beneficiaries



- Beneficiaries of EU Structural and Investment Funds have to disburse funds in accordance with EU law including procurement law, even if not a contracting authority.
- Article 6 of **Regulation 1303/2013**: operations supported by ESI funds shall comply with applicable Union law and the national law relating to its application.
- See also **Regulation 13 PCR**s
- Public procurement principles imported into funding agreements: see **DCLG ESIF Procurement Guidance, Chapter 6**.

Guidance on ESIF funding rules



- **Commission’s ESIF Procurement Guidance (October 2015):** “Guidance for practitioners on the avoidance of the most common errors in public procurement of projects funded by the European Structural and Investment Funds”
- See also **DCLG Procurement Law ESIF Guidance Note** (December 2015)

The Commission's Communication on large infrastructure projects



- **EC Communication COM (2017) 573 Final** (3 October 2017) on “*helping investment through a voluntary ex-ante assessment of the procurement aspects for large infrastructure projects*”
 - “*National authorities and contracting authorities/entities have the option to use the mechanism on a voluntary basis to raise questions with the Commission and receive an assessment of a project’s compatibility with the EU regulatory framework before taking important steps eg, launching a call for tender of the main project works*”
 - “On the basis of the information provided, the competent Commission services will deliver its views on the compatibility of the project’s procurement plan with EU procurement legislation, or of the specific issues raised by the national authorities in a letter”
 - Note FN 10, page 4: “*The views expressed by the Commission services in their assessment are **not legally binding on those using the mechanism or on the Commission, and are without prejudice to the interpretation of the rules by the CJEU***”.

Brexit and the future of public procurement rules



- Reasonably certain that the UK will accede to the WTO Government Procurement Agreement in its own right
- Powers in Trade Bill to implement the GPA: Secretary of State for International Trade (Hansard, HC Deb, 9 January 2018, Col 213):

“After we leave the EU, the UK will need to join the GPA as an independent member, not only to safeguard continuity of access for UK companies overseas, but to ensure that we can tap into international expertise and obtain the best deal for the taxpayer here in the UK. The powers in clause 1 will allow us to make regulations implementing our obligations under the GPA as an independent member, reflecting our new status within the GPA.”

So what does procurement under the GPA look like?



- No requirement for damages
- Greater flexibility in terms of procedures
- Similar general procurement principles



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