

CONSTRUCTION ENGINEERING & INFRASTRUCTURE

Public Procurement Refresher

James Hutchinson –13 November 2019

Seminar objectives

1. Identify when the Procurement Regulations apply
2. Monitor the contracting authority's obligations
3. Know what to do if you want to challenge a contract award
4. Understand impact of Brexit on procurement

Applicable legislation

- + Public procurement in England, Wales and Northern Ireland is governed by:
 - The Public Contracts Regulations 2015; and
 - The Utilities Contracts Regulations 2016.
- + Above regulations do not apply in Scotland, where similar regulations have been adopted.
- + PCR came into force on 26 February 2015 and implement Directive 2014/24.

General obligations on contracting authorities

- + Procurement regulations apply general obligations on contracting authorities:
 - **Transparency** – all decisions must be transparent and accountable;
 - **Equal treatment** – all bidders must be treated equally, irrespective of country of origin or existing relationship with the authority; and
 - **Non-discrimination** – authority is not allowed to discriminate against bidders on subjective grounds.

Defining a contracting authority (1)

- + 2015 Regulations only bite where a body is a “contracting authority”. The definition of contracting authority is wide and includes:
 - Central government departments;
 - Local authorities;
 - Police and fire authorities;
 - NHS Trusts; and
 - Various non-departmental government agencies e.g. FCA.
- + A long list of named contracting authorities is set out in Schedule 1 of the 2015 Regulations

Defining a contracting authority (2)

- + The 2015 Regulations also cover “other bodies governed by public law“, defined in Regulation 2 as:

“bodies that have all of the following characteristics: (a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) they have legal personality; and (c) they have any of the following characteristics: (i) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; (ii) they are subject to management supervision by those authorities or bodies; or (iii) they have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law”.

Thresholds (applying from 1 January 2018)

	Supplies	Services	Schedule 3 services	Works
Central government authorities	£118,113	£118,113	£615,278	£4,551,413
Other public sector contracting authorities	£181,302	£181,302		

Obligations of the contracting authority

+ Advertise

- The authority must publish a notice (known as an OJEU or contract notice) in the Official Journal of the European Union.
- Notice takes a standard form.

+ Follow one of the five standard award procedures:

- Open (Regulation 27);
- Restricted (Regulation 28);
- Competitive procedure with negotiation (Regulation 29);
- Competitive dialogue (Regulation 30); or
- Innovation partnership (Regulation 31).

Selection questionnaire stage (previously PQQ)

- + SQ should set out eligibility and selection criteria methodology used to assess whether bidders qualified to bid and shortlist candidates prior to tender.
- + On receipt of completed SQ, authority should apply its SQ criteria to the responses and select bidders it will invite to submit tenders.
- + Authority must disqualify bidders convicted of various offences, including organised crime, fraud and non-payment of taxes.
- + Discretionary grounds for exclusion, including poor performance:
 - Applies to contracts performed for any other public bodies;
 - Poor performance could result in disqualification from larger contract.

Evaluating bids and award stage (1) - MEAT

- + Regulation 67 requires the sole basis for an award decision to be the most economically advantageous tender (MEAT).
- + MEAT includes:
 - Lowest price option; and
 - Best price/quality ratio option.

Evaluating bids at award stage (2) – life-cycle costing

- + “Cost” is distinguished from “price”.
- + Can include “cost effectiveness” and assessment of life-cycle costing is permitted.
- + It covers:
 - Costs borne by the authority (e.g. relating to the acquisition, maintenance); and
 - Environmental issues, provided value can be ascertained and verified.
- + If authority wishes to use a life-cycle costing, it must inform bidders of:
 - The data they must provide; and
 - The method by which the authority will determine the life-cycle costs.

Evaluating bids at award stage (3) – abnormally low tenders

- + 2015 Regulations clarify the position on abnormally low tenders.
- + Regulation 69 obliges contracting authorities to demand that bidders “*explain the price or costs proposed in the tender where tenders appear to be abnormally low*”.
- + A right to reject arises where evidence supplied does not satisfactorily explain the low price.
- + Regulation 69(5) requires authority to reject tender where price is abnormally low due to a breach of the bidder’s environmental, social or labour obligations.
- + 2015 Regulations do not provide a clear definition of an “abnormally low bid”.

Contract award notice

- + Contract award notice must set out:
 - Award criteria;
 - Reasons for decision, including characteristics and relative advantages of the successful tender;
 - Scores obtained by unsuccessful bidder and winning bidder (including a full breakdown of scores against each criterion and sub-criterion, supported with narrative);
 - Name of the winning bidder; and
 - Precise statement of when the standstill period is expected to end.

Standstill period

- + During the standstill period, the authority does not award the contract.
- + When the authority issues the award decision notice, the standstill period ends at midnight at the end of:
 - When sent by fax or email - 10th day after the day the authority sent the notice; or
 - When sent by any other means (e.g. post or courier) - 15th day after the day when the authority sent the notice.
- + For example, if the authority sends the award decision notice on 1 July 2019 by email, then the standstill period ends at midnight on 11 July 2019.

Automatic suspension

- + Automatic suspension of contract award when proceedings for breach of the procurement rules are issued and served on the authority.
- + Proceedings do not have to be actually served, the authority just needs to be aware that proceedings have been issued.
- + Suspension remains in force until the court brings it to an end by an interim order, or the proceedings are determined, discontinued or otherwise disposed.
- + Court may require bidder to give a cross undertaking in damages.

Limitation period

- + Proceedings must be started within 30 days beginning with the date when the bidder first knew or ought to have known that grounds had arisen.
- + Court may extend the time limit where it considers that there is a good reason.
- + Court must not exercise its power to extend 30 day time limit so as to permit proceedings to be started more than 3 months after the date bidder first knew or ought to have known that grounds for starting the proceedings had arisen.
- + Proceedings are to be regarded as started when the claim form is issued and, where proceedings are started, bidder must serve the claim form on the authority within seven days after the date of issue.

Remedies

- + An order to set aside a decision of the authority in the course of a tender process.
- + The award of damages to a bidder which has suffered loss or damages as a result of the breach.
- + Declaration of ineffectiveness.
- + Financial penalty on the authority.

Challenge checklist

- + Check award decision notice sets out:
 - Award criteria;
 - Characteristics and relative advantages of the successful tender;
 - Scores obtained by the unsuccessful bidder and winning bidder;
 - Name of the winning bidder; and
 - Precise statement of when the standstill period is expected to end.
- + Request copies of relevant documents, especially scoring spreadsheets.
- + Bidder will want to check weightings used by authority.
- + Consider a request under the Freedom of Information Act 2000.

Brexit

- + Brexit likely to have a limited impact on procurement law.
- + The Public Procurement (Amendment etc.) (EU Exit) Regulations 2019 repeal the Public Contracts Regulations 2015 but then immediately re-enact them on largely the same terms.
- + Difference for UK procurement likely to be marginal:
 - For example, UK contracting authorities will no longer publish in the OJEU but will instead use a UK e-notification service; and
 - financial thresholds will be expressed in pounds.
- + Difference for UK companies tendering for EU projects unclear.

Key takeaways

- + Know which regulations apply
- + Plan your tender in line with the evaluation criteria
- + Act quickly if there is a problem - 30 day limitation period
- + What remedy are you looking for?
- + Understand internal procedures for challenging
- + Brexit likely to have limited impact on UK procurement (at least in short-term)

Contact details

+ James Hutchinson

j.hutchinson@beale-law.com

+44 (0) 20 7469 0408

