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Briefing: The Public Contracts Regulations 2006

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The procurement of work, goods and services by public authorities is subject to a new EU Directive and new implementing Regulations in the UK. The aim of the new laws is to bring the legislative framework into line with practical developments in procurement and new European case law. The changes are also intended to simplify the law for lawyers and construction professionals alike. Have the new Regulations achieved these aims? This briefing suggests that the answer is a qualified yes, and explains some of the most important changes brought about by the new laws.

1. INTRODUCTION

Many in the construction industry will at some stage have encountered the public procurement regulations, which govern the award of public contracts for construction work, for goods and for certain services. It is a fair assumption that a similar number will have found the regime complex and cumbersome. If that is the case, spare a thought for public authorities, which have an obligation to observe both the letter and the spirit of the regulations whenever embarking on a substantial procurement exercise.

On that basis, the news that the EU has passed new legislation to modernise and simplify the public procurement regime should be welcomed by public authorities and industry parties alike. The new EU Directive (2004/18)[1] was passed in March 2004, and has been implemented in the UK by the Public Contracts Regulations 2006,[2] which apply to procurement competitions commencing after 31 January 2006. The new legislation, like its predecessor, has the primary aim of ensuring that public procurement is conducted without any discrimination between tenderers, protecting especially (but not exclusively) tenderers from other member states of the EU. The Regulations pursue this aim by imposing a series of obligations on public authorities when procuring works, goods and services above a certain threshold value. Questions now arise: what are the most important changes given effect by the new regulations, and has the new legislation achieved its aims of simplification and modernisation? This article ventures to suggest answers to these difficult but important questions.

2. CONSOLIDATION

In one respect, there has been obvious simplification of the legislation—works, supply and services are all now governed by one Directive, which has been implemented in the UK by one set of regulations. The 2006 Regulations thus replace three separate pieces of legislation in the UK. A separate new Directive (2004/17)[3] applies to public procurement by utilities, and this was implemented by the Utilities Contracts Regulations 2006,[4] which also came into force in January 2006.

The consolidation of the three regimes is welcome, at least for lawyers working with the legislation on a day-to-day basis. For the construction industry, the provisions dealing with works contracts, and the provisions regarding construction services, will be most important.

A second consolidating function of the new Directive is to bring the legislation into line with developments in the European case law. Thus regulation 30 clarifies that authorities can have regard to '*environmental characteristics*' in evaluating competing bids, as long as the environmental characteristics are '*linked to the subject matter of the contract*'. This confirms the decision of the European Court of Justice (ECJ) in the *Concordia Buses* case,[5] and clarifies an issue which is of increasing importance in today's green-conscious world.

A second important development with its roots in the case law is the introduction of a 'standstill period' between the selection of a successful bidder and the actual conclusion of a contract. In the landmark case of *Alcatel*,[6] the ECJ decided that where there is a breach of the Regulations, a disappointed tenderer must be able to set aside the contract award decision, else he will have been denied an effective remedy. However, there is a problem in the UK in regulation 47(9), which provides that once a contract has been concluded, the court can only award damages, and not an injunction. The purpose of this rule is to ensure that any ongoing litigation does not interfere with the performance of a concluded contract. To strike a balance between the *Alcatel* ruling and regulation 47(9), the UK Regulations now provide for a 10-day standstill period during which no contract may be concluded, and during which the tenderer has the opportunity to apply to the court for an injunction to restrain the conclusion of the contract.

It is likely that the standstill period will become the focus of procurement-related litigation in the UK. There is already at least one reported case in which a contractor persuaded the High Court during the standstill period that the award of the contract should be restrained until its requests for further information had been addressed (*Rapiscan v. HMRC*).[7] To bolster further the position of the unsuccessful tenderer, the 2006 Regulations also provide that they are entitled to a debriefing during the standstill period, so that they can understand why they have been unsuccessful. Any contractor considering a challenge to the award decision will obviously want to take full advantage of the debrief process before doing so.

One further point is worth making in relation to the application of the standstill period in the private finance initiative (PFI) context. Before the Regulations were passed, the Government's Office of Government Commerce (OGC) conducted a consultation regarding the introduction of the standstill period. One theme in the responses it received was that in complex procurement exercises, such as for PFI contracts, contract award may in practice happen at the stage when a preferred bidder is selected, even though a contract award notice is not issued until later. To deal with this point, the OGC has issued guidance[8] that in a protracted procurement under the negotiated or competitive dialogue procedures, the standstill period may start when the contracting authority ceases dialogue with other bidders and announces the appointment of a preferred bidder.

There may be practical sense behind this guidance, but it is not what is envisaged by the 2006 Regulations, under which the application of the standstill period is tied to the contract award notice. Contractors will therefore need to be wary that time is not running against them before they have received formal notice of contract award.

3. NEW THRESHOLDS AND CONCESSIONS

The 2006 Regulations simplify and slightly reduce the thresholds below which the regulations will not apply. All thresholds are now expressed in euros, and the regulations explain how the threshold amounts should be converted to pounds sterling. For works, the threshold is now €5 278 000. For the procurement by central government bodies of supplies and certain services (known as 'Part A services'), the threshold is €137 000. Otherwise, the threshold is €211 000.

However, the position is complicated by an EU Commission Interpretive Communication issued in August 2006[9] which deals with contracts that fall outside the Regulations, including contracts below the thresholds. Basing itself on the decision of the ECJ in *Telaustria*,[10] the Commission has indicated that even where the Regulations do not apply, a contracting authority has obligations to advertise tender processes and to adopt an impartial procedure when awarding the contract. These positive obligations are said to be based on the general principles of transparency and non-discrimination under the EC Treaty, and apply to all contracts that might potentially be of interest to economic operators in other member states. This expansive interpretation of the Treaty obligations undermines the 'bright line' thresholds established by the Regulations, and also renders other contracts excluded from the Regulations, such as service concessions, subject to the same positive obligations.

This is all bad news for contracting authorities, which can no longer rely on the scope of the Regulations as a guide to the limits of their procurement responsibilities. From a contractor perspective, however, the outcome is more mixed. The Commission's guidance may mean that competitions outside the Regulations become more expensive and drawn out for those seeking to secure the work. However, one should recall that the positive obligations on authorities are there to protect tenderers, rather than to hinder them, and the Commission's guidance is likely to increase the scope for claims against authorities that have arguably failed to comply with the Commission's somewhat inconclusive guidance.

If the position in relation to low-value contracts is likely to remain somewhat unclear, the Commission intends to pass further legislation stipulating what is required when procuring concessions.[11] This legislation will have significant implications for PFI and public–private partnership (PPP) contracts, which will often have the status of concessions and so (at present) are outside or partially outside the Regulations. It is not yet clear how far new legislation will bring concessions into line with other public contracts.

4. WEIGHTING OF AWARD CRITERIA

The 2006 Regulations retain the two familiar bases for evaluating and awarding contracts—lowest price and most economically advantageous offer. However, an important change brought about by the new Regulations is that, where a contract is to be awarded to the most economically advantageous offer, the various criteria by which tenders will be evaluated must be weighted and notified in advance, either as an exact number or within a meaningful range. The jury is still out as to whether this change will reduce the scope for complaints, as the process of evaluation is tightened up, or whether authorities will struggle with the discipline imposed on them by the new Regulations.

5. COMPETITIVE DIALOGUE

One of the key modernising aims of the Directive is to introduce a new and more flexible procedure for the award of complex contracts. Where a contract has a technical subject matter, the contracting authority may struggle to identify a solution to its requirements without input from potential contractors. In this situation, the solution may be best identified through a process of dialogue with a number of contractors, following which the authority can conduct a competition on the basis of the various solutions identified.

The two main procedures under the Regulations, the open and restricted procedures, do not accommodate this sort of dialogue, but require the authority to issue contract documents against which the contractor must put forward its tender. The Regulations have long contained a third form of procedure, the negotiated procedure, under which discussions regarding the specification are a key part of the process. The negotiated procedure is, however, only available in very limited circumstances, one of which is where the authority cannot draw up a specification that it can sensibly use to award the contract. This is a high threshold test, and does not accommodate the case in which the authority is able to draw up a specification, but is not sure whether that specification is actually its preferred solution.

To plug this gap, the Directive adds a fourth procedure—the competitive dialogue (CD) procedure. The key features of CD are listed here.

(*a*) It is limited to 'particularly complex contracts' for which the open and restricted procedures will not allow the award of the contract. A 'particularly complex contract' is defined as a contract where the authority is not objectively able to define the technical means capable of satisfying its needs or objectives, or to specify the legal or financial make-up of a project. This test is wider than the test for the negotiated procedure, but is still fairly restrictive. The European Commission gives, as examples of such contracts, integrated transport infrastructure projects, large computer networks and projects involving structured financing such as PPP.

(*b*) The procedure involves a dialogue stage, during which solution(s) are identified, and a final stage, where contractors tender on the basis of the proposed solutions.

(*c*) Once the authority has advertised its needs or requirements and expressions of interest are received, at least three participants must be selected to participate in the process.

(*d*) The participants will be issued with contract documents, and on the basis of those documents, the authority will open a dialogue with each '*to identify and define the means best suited to satisfying its needs*'. During the dialogue, the authority may discuss with the contractors all aspects of the contract, save that it must keep the various proposed solutions confidential.

(*e*) Like the negotiated procedure, the CD may take place in successive stages, whereby proposed solutions are gradually eliminated on the basis of the contract award criteria. The authority must, however, ensure that the number of participants finally invited to tender for the contract is sufficient to ensure genuine competition.

(*f*) Eventually the dialogue stage will be declared complete, discussions will stop and final tenders will be invited on the basis of the solutions identified. In this regard, the process differs from the negotiated procedure, under which negotiations may continue until contract award. The scope for discussions after final tenders is limited, even with the successful tenderer.

(*g*) The contract must be awarded on the basis of the most economically advantageous offer, and not simply on the basis of the lowest price.

In principle, the introduction of greater flexibility through the CD procedure is welcome. The intention appears to be that it will take its place third in the pecking order, below the open and restricted procedures but above the negotiated procedure, which is available only in exceptional cases.

However, critics of CD complain that what was really needed was the removal of the restrictions on the negotiated procedure, and that the introduction of CD will rather cement those restrictions in place. In that sense, the introduction of CD may be seen as a conservative solution to a perceived lack of flexibility, rather than a truly liberalising measure. For this reason, many see CD as an opportunity missed, rather than the modernisation that the industry was calling for.

It is also right to say that from both the contractor's and the contracting authority's points of view, increased flexibility in the process comes at a cost—namely, an increased burden during the dialogue phase. CD places a significant burden on the contracting authorities, which are required to devote significant management time and resources to dialogue with both successful and unsuccessful tenderers. The position is perhaps still worse for tenderers, which are called upon not only to prepare a substantial tender package, but also to develop a bespoke technical solution with no guarantee of any return. This risk for tenderers was recognised by the Commission, and to oil the wheels of CD, the Directive explicitly reminded contracting authorities that they may pay contractors for their participation in a CD. This provision has not been replicated in the 2006 Regulations, and although there is nothing to prevent authorities from offering payment on a non-discriminatory basis, it may be that the regulations reflect a disinclination on the part of the UK government to share the risk of the CD process with the industry.

6. FRAMEWORK CONTRACTS

A further important development under the 2006 Regulations is that framework contracts have been placed on a clear statutory footing. Framework agreements differ from traditional procurement in two important respects. First, rather than place a defined package of work with a contractor for an agreed price, a framework agreement does what it says: it creates a framework within which subsequent contracts may be awarded. This allows work to be 'called-off' as and when the need arises, avoiding the need for a full competition at that stage. Second, framework agreements may be entered into with more than one contractor, again giving the authority greater flexibility when it comes to placing a particular package of work.

The advantages of framework agreements are therefore clear, and for that reason they have been a familiar feature of UK public procurement for some time. The new Directive removes any doubt as to how and where frameworks fit into the scheme of the Regulations. However, the price of legal certainty is a reduction in flexibility, as framework agreements are now regulated by regulation 19. The approach taken is described in the following items.

(*a*) The advert published must contain certain information in relation to the framework agreement, including estimated value and likely frequency of call-offs. The subject matter of the framework must therefore be thought through carefully.

(*b*) The framework agreement must be awarded on the basis of one of the four procedures provided for by the Regulations.

(*c*) Where possible, a framework agreement with several contractors must include at least three contractors.

(*d*) Where work is called-off the framework contract, it must be awarded on the basis of the criteria laid down in the framework. There is a degree of flexibility about these criteria, but under general principles, the award of work must be consistent with equal treatment and must not distort competition. Thus an authority cannot favour one of a number of parties over the others without good reason.

(*e*) Where a specific contract is awarded, the terms applied must not be substantially amended from those laid down in the framework.

(*f*) Where the framework includes more than one contractor, and not all relevant terms for a particular package are laid down in the framework, the authority must conduct a 'mini-competition' before awarding the package. The timetable for this will be determined by the authority. All those party to the framework and capable of performing the contract must be invited to tender. This represents a tightening up of practice before the Directive was passed, whereby authorities might well have considered only a sub-set (or even just one) of the parties to the framework for a particular call-off.

(*g*) A framework contract must not be more than 4 years long, except in exceptional circumstances. Call-offs towards the end of the duration should not be used to circumvent this provision.
(*h*) The standstill period applies to the award of the framework agreement, but not individual call-offs.

Regulation 19 contains no great surprises. Perhaps the one weakness is found in the 'mini-competition' provisions, which give the authority a (perhaps unwelcome) discretion as to what steps are necessary before work is called-off. However, overall the new provisions regarding framework agreements are welcome. For authorities and contractors which have worked with framework agreements for some time, the challenge is simply to take stock of the new provisions and to ensure that they are observed in practice.

7. ELECTRONIC PROCUREMENT

One of the key modernising themes of the 2006 Regulations is an increased emphasis on electronic procurement. This has three main aspects.

First, the Regulations give contracting authorities an incentive to use e-mail for the purposes of communicating with tenderers, by shortening the minimum duration of the competition by 7 days. This can have the effect of knocking a week off a process that would otherwise last at least 5 to 8 weeks. The Regulations also confirm that e-mail may be used for all communications with tenders.

Second, the Regulations create a new statutory dynamic purchasing system (DPS), which is an entirely electronic system used to purchase commonly used goods and services. In fact, the DPS is a familiar concept, and is similar to the well known catalogue-based systems, G CAT and S CAT (now replaced), used by government to procure information technology and other services.

A DPS must be established by a competition under the open procedure, whereby tenderers are required to submit an indicative tender in relation to the subject matter of the DPS. The system is dynamic in at least two respects. First, new operators who meet the necessary criteria must be free to join the system at any time; and second, contractors must be free to improve their indicative tender as and when they wish. The DPS must be re-established every 4 years save in exceptional circumstances.

The most significant feature of the system is that every time an authority wishes to award a contract under the DPS, it must re-advertise the DPS to ensure that contractors not yet admitted have the chance to participate. Then, following a 15 day period, the authority must invite all members of the DPS to submit a tender. Although this period is considerably shorter than the shortest open or restricted procedure, the obligation to advertise each time a contract is awarded seems out of step with a system designed to simplify routine procurement, and may mean that the DPS does not realise its full potential.

Finally, the Regulations introduce the concept of the e-auction, an electronic procurement tool which may be used for contracts capable of automated evaluation. An e-auction works in the following way: following receipt of tenders, the authority will evaluate the tenders, and will then conduct an online auction (consisting of a number of phases) during which bidders are given the opportunity to improve their bids. The authority will communicate simultaneously and instantaneously with the various tenderers in each phase, telling each tenderer where it is ranked, and the tenderers may amend their bids accordingly. At the end of the auction, the best bid (as amended) will be awarded the contract.

The Regulations specify that e-auctions are not suitable for contracts for intellectual performance (such as design work), but may be used where the elements of the bid to be evaluated are 'quantifiable'. E-auctions can be used as part of the open, restricted or negotiated procedures, or when calling contracts off under a framework agreement or a DPS. The tool is therefore widely available, and its potential for driving down prices is obvious. There will obviously be a learning curve and the need for initial investment in information technology solutions, but of the various changes to electronic procurement given effect by the 2006 Regulations, the e-auction provisions are perhaps the most likely to make their presence felt.

8. CONCLUSION

This article has not described all of the changes brought about by the 2006 Regulations, but it has identified the most notable. Has the law been simplified? To an extent, but the overall effect is not what one would describe as simple. It is perhaps fair to reflect that all things are relative, and any real simplification of the public procurement regime (if that is desirable) will not be achieved by the sorts of 'bolt-on' amendments we have seen this time around.

Has procurement been modernised? There have certainly been some notable developments, but life in practice under the 2006 Regulations is little different. Framework agreements will remain widely used, albeit properly regulated. Competitive dialogue, although welcome in principle, is likely to be used for many contracts that would previously have been awarded under the negotiated procedure (rightly or wrongly). Dynamic purchasing systems may well prove unpopular. Overall, the 2006 Regulations represent a 'pop' rather than a 'bang' for UK public procurement but, with the Commission due to bring forward proposals concerning remedies and concessions shortly, it seems that reform of the Regulations will continue to occur in fits and starts. Construction professionals working for the public sector will therefore have to remain on their toes for some time to come.

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