

IT'S THE LAW:

EU Public Procurement Regulations:

'what?', 'when?' and 'oh dear God, why?'

What? The EU Public Procurement Regulations are derived from European Treaties and European legislation. Their full title is the Public Contracts Regulations 2015, though they are more commonly known and referred to as the "OJEU Regulations" or the "Procurement Regulations".

Why, oh, why? The Regulations open up public procurement to EU-wide competition by ensuring that contracts procured by public sector bodies are awarded fairly, transparently, without discrimination on grounds of nationality and with all bidders being treated equally.

When (and a bit of the who)? The Regulations apply whenever a "contracting authority" wishes to award a works, services or supply contract with a value in excess of the relevant threshold.

"Contracting authorities" are, essentially, public and quasi-public bodies and include central government bodies, NHS bodies, local authorities, registered housing providers and schools. Registered housing providers are included because they are deemed to be "bodies governed by public law" by virtue of being regulated by the Homes and Communities Agency (HCA).

The thresholds at which the Regulations apply are as follows:

- Works contracts: £4,104,394
- Services and supply contracts awarded by central government authorities: £106,047
- Services and supply contracts awarded by "non central" authorities (which includes local authorities and registered providers): £164,176
- Contracts for social, health, educational, catering, security and legal services: £589,148

All of these sums are exclusive of VAT. They are revised every 2 years. The next revision is due in January 2018.

If the Regulations apply to a contract, then the contracting authority

must advertise it in the Official Journal of the European Union (OJEU) and run a competitive procurement process in accordance with one of the special sets of procedures.

Notable exclusions: It's important to note that certain types of contracts are excluded from the Regulations altogether, irrespective of their value. These include contracts for the acquisition or disposal of land, loans, employment contracts and contracts for the provision of "legal litigation services".

The key principles: In procuring a contract in accordance with the Regulations, the contracting authority must act in a non-discriminatory, transparent and proportionate manner. This means that (amongst other things):

- All bidders must be treated equally. Requirements cannot be waived for one bidder and not others. All bidders must be given equal access to information;
- Qualification requirements (such as annual turnover thresholds) must be proportionate to the value of the particular contract being procured;
- All criteria that will be applied to evaluate tenders must be fully disclosed to all bidders in the tender documents; and
- There must be mutual recognition of products and services supplied in other EU states, together with mutual recognition of diplomas, certifications and other evidence of formal qualifications.

Choice of procurement procedure: At the outset, the contracting authority must choose to run the procurement using one of the procedures set out in the Regulations. Four main procedures are prescribed by the Regulations:

1. **Open Procedure:** under which all those interested may respond to the OJEU advertisement by submitting a tender for the contract;



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2. **Restricted Procedure:** under which a “shortlist” is made from those who respond to the advertisement and only they are invited to submit a tender. This allows contracting authorities to avoid having to deal with an overwhelmingly large number of detailed tenders;
3. **Competitive Dialogue Procedure:** where, following an OJEU advertisement and a shortlisting process, the contracting authority then enters into dialogue with bidders to discuss and develop their solutions for its requirements before inviting detailed tender submissions from them; and
4. **Competitive Procedure With Negotiation:** where, following an OJEU advertisement and a shortlisting process, the contracting authority invites the shortlisted bidders to submit their “initial tender” for the contract which will form the basis of subsequent negotiations with them. These negotiations are designed to improve the content of the initial tenders and once they have concluded, the contracting authority invites the bidders to submit their final tenders.

For the majority of “non-complex” or “standard” contracts, it will generally be most appropriate to use either the open or restricted procedure. Where the contract is more complex, the competitive dialogue or competitive procedure with negotiation will usually be more appropriate - as both of these procedures allow the contracting authority to discuss its requirements with the bidders.

Under restricted, competitive dialogue and competitive procedure with negotiation - there must be a sufficient number of bidders to be shortlisted for the tender stage to ensure genuine competition. The Regulations require a minimum of five for the restricted procedure, and three for the competitive dialogue and competitive procedure with negotiation.

Electronic availability of “procurement documents”: Under the Regulations, all “procurement documents” must be ready and made available electronically (via the internet) to bidders from the date of the OJEU advertisement. “Procurement documents” is very widely defined and includes the pre-qualification questionnaire, the tender documents, the proposed form of contract and the works and services specifications. This means that, before commencing any procurement process, the contracting authority must do a lot of preparatory work to ensure that all of its procurement documents are ready and fit for purpose.

The pre-qualification - ‘shortlisting’ stage: All procedures, other than the open procedure, include a separate pre-qualification or “shortlisting” stage. This stage is used to exclude bidders that are not capable of meeting the contracting authority’s needs or who have committed acts of past misconduct.

Bidders are required to respond to a pre-qualification questionnaire to demonstrate their economic and financial standing, technical and professional ability and integrity (for instance requiring confirmation that the bidder has not committed acts of bribery, fraud or money laundering).

In essence, the pre-qualification stage is about assessing the bidders’ previous experience and track record to ascertain whether they are suitably equipped to perform the contract. An important point to note is that the pre-qualification stage should not be used to seek and evaluate the bidders’ proposals for carrying out the particular contract that is being procured. An evaluation of the bidders’ proposals (including their proposed price) should occur at the tender stage of

the process. A contracting authority may find its procurement open to challenge if it seeks to evaluate proposals at the pre-qualification stage.

The tender stage: At the tender stage the contracting authority must disclose the criteria on which it will evaluate tenders (and the weighting to be applied to each criteria). The Regulations state that the contracting authority must base the award of the contract by assessing the “most economically advantageous tender.” In practice, this normally means that the contracting authority will assess tenders against a mix of price and qualitative criteria.

De-briefing and standstill: Once the contracting authority has evaluated tenders and decided who to award the contract to it must send the successful and unsuccessful bidders the “Award Decision Notices” (ADNs). These are notices that are sent to the bidders to inform them of the outcome of the procurement process. The ADNs sent to the unsuccessful bidders must set out the “characteristics and relative advantages” of the successful bidder’s tender. In other words, it must provide the unsuccessful bidder with the reasons why the successful bidder’s tender scored more highly than theirs did.

The contracting authority is not allowed to sign the contract with the successful bidder until a 10 day “standstill” period, starting when they send out the ADNs, comes to an end. This is so that the unsuccessful bidders have an opportunity to query or challenge the award decision if they wish to.

Remedies: If a bidder believes that a contracting authority has breached its obligations under the Regulations it can:

- apply for an injunction against the contracting authority (to prevent it from awarding the contract) and seek a court declaration setting aside the award decision; and/or
- bring a damages claim against the contracting authority to compensate it for its wasted tender costs and the profit that it would have earned had it been awarded the contract.

If a bidder wants to bring a legal challenge in the courts, it must do so within 30 days of the date it knew (or ought reasonably to have known) about the grounds for bringing a challenge. Whilst rare, this period can be extended by the court to as long as 3 months. This means that bidders cannot adopt a “wait and see” approach. They must act quickly.

In the most serious cases of breach (namely where the contracting authority has awarded a contract without advertising it in the OJEU first, or has failed to honour a 10 day standstill period), a bidder may be able to apply to the court to have the contract declared “ineffective.”

Such a declaration would result in the cancellation of the contract and the contracting authority being liable to pay a court fine.

The tiny print

This is one of a series of leaflets published by Devonshires Solicitors LLP’s Real Estate & Projects Department aimed at our developer clients. No action should be taken on the matters covered by this leaflet without taking specific legal advice.

Find out more

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