



# Guide to EU Procurement Rules

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# Relevant EU procurement rules

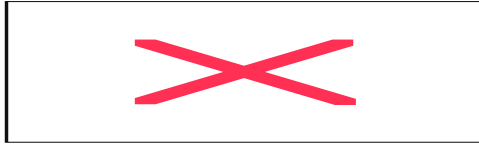
## Scotland

- Public Contracts (Scotland) Regulations 2006  
Make sure to use updated version (procedures after 20/12/09)

## EU

- EC Directive 2004/18 – “Public Contracts Directive”
- EC Treaty – applies to any public authority contract award potentially affecting trade in EU
- EC “Remedies” Directives – important amendments came into force on 20 December 2009

Case law of EU and UK courts



But don't worry...

We can just call them “the procurement rules...”



## Procurement law is simple:

- Everyone should get to know what contracts are available
- Everyone should be assessed on an objective and fair basis as to their capability
- Predictable procedures should be followed allowing equal treatment
- Minimum timescales should be respected to allow bidders time to prepare
- Criteria should be set in advance and publicised
- Bidders should have an opportunity to ensure their rights are respected



## Public bodies cannot:

- Award without tender (unless exceptional grounds)
- Favour local suppliers
- Require local existing premises (unless strictly relevant)
- Require disproportionate or irrelevant capability / capacity / experience
- Negotiate with bidders post-tender (in open or restricted procedure)
- Use selection criteria as award criteria
- Abuse framework agreements
- Award to another public body without a tender (narrow exceptions exist)



## What contracts are affected?

- Contracts awarded by central government, local authorities or “other public sector bodies” for
  - works, supplies and/or services; **and**
  - a value over certain thresholds
- Certain subsidised contracts i.e. >50% funded by public money



# When do the full rules apply?

## Value thresholds

- **£3,927,260** for all **works** contracts (construction and civil engineering)
  - **£101,323** for **supplies** and **services** contracts awarded by central government bodies
  - **£156,442** for **supplies** and **services** contracts awarded by other public sector bodies e.g. local government
- All net of VAT
- Contract must not be split with a view to avoiding the rules
  - Thresholds change every 2 years – last on 1/1/2010



## Are the thresholds met?

- Aggregation, Aggregation, Aggregation
- Add together value of all contracts which:
  - have similar characteristics;
  - are for the same type of goods / services;
  - could be supplied by the same provider(s);over the financial year.
  - If a contract is indefinite or has no specified duration its value is deemed to be the monthly consideration x 48, i.e. 4 years;
  - Include value of all options



# What do the rules require?

## Above threshold:

- Advertising in the OJEU → tender process
- Minimum information in Notices
- Equality of treatment – no favouring local tenderers
- Minimum timescales
- Upfront disclosure of selection and award criteria
- Minimum 10 day “standstill” before conclusion of contracts
- Debriefing of unsuccessful tenderers
- Social and environmental issues can be taken into account in the procurement process if linked to the subject matter of the contract



# What are the different procedures?

- **Open procedure**
  - All interested parties may submit tenders
  - Suitable where subject matter and award criteria are fairly simple
  - Often awarded on basis of lowest price
- **Restricted procedure**
  - 2 stages: Shortlisting of bidders before final tenders actually submitted
- **Negotiated procedure**
  - With/without call for tender (in cases of “extreme urgency”, no OJ notice required)
  - More flexible procedure, to be used exceptionally
  - May involve price negotiations with short-listed bidders
- **Competitive dialogue procedure**
  - For “particularly complex contracts”: Not possible to specify, at the outset, the required technical /financial /legal solution.
  - More flexible procedure, more correspondence between buyer and bidders – allows contract specifications to take shape gradually
- **Frameworks**
  - Maximum duration 4 years (unless exceptional circumstances)
  - Important to get on the panel, or face a 4-year “desert walk”



# What do the rules require?

## Below threshold / Part B services:

- Potential cross-border interest?
- If so, general EU principles apply:
  - Equal treatment
  - Non-discrimination between nationalities
  - Transparency
  - Proportionality



# Types of service: Part A or Part B

- Part A services: Full Regulations apply (if value is above threshold)
  - Telecommunications services; Computer and related services; Architectural services; Engineering services; Property management services; etc
- Part B services: Only a handful of provisions in the Regulations apply
  - Legal services; Education and vocational health services; Health and social services; Recreational, cultural and sporting services; etc
  - EU principles may still apply (transparency, equal treatment etc)



# Part A and Part B Services

## Part A examples

- Window cleaning
- Janitorial services
- Residential property management
- Repair of household appliances

## Part B examples

- Health services
- Social services
- Personnel placement services
- Educational services
- Other services



# Advertisement of contracts not covered by the full rules

- Covers both contracts below the value thresholds and those that do not require full process (e.g. “Part B” services)
- EU principles apply to contracts of potential cross-border interest
- No OJEU notice necessary, but “adequate” publicity (e.g. on procurement portal, own website)
- No fixed lower value limit – EU law kicks in as soon as a contract is potentially of interest to suppliers in other member states
- Scottish Procurement Directorate: contracts above £50K to be advertised on Procurement Scotland (NB: guidance only)



# Contracts not covered by the full rules

- Not subject to the Regulations
- EU principles are transparency, equal treatment, non-discrimination etc) still apply if there is a potential cross-border interest in the contract
- If so:
  - advertising necessary
  - all tenderers must be given equal opportunities
  - fair and transparent procedures required
- For the authority to consider (and record) on a case-by-case basis



# Some issues for smaller providers

- Difficult and time-consuming to keep track of OJEU opportunities
- Expense of bidding
- Public buyers often tend to favour the incumbent provider and / or larger suppliers
- Increasing use buying consortia / centralised purchasing
- Portals / websites can given access to smaller contracts
- Can providers challenge direct awards between public/semi-public bodies?
- Advertising duties, standstill rule and new remedies rules empower smaller bidders



# Best Value

- Not EU procurement law, but exists alongside it
- Local Government In Scotland Act 2003
- Multi-faceted: balancing quality/cost, accountability and transparency, culture of continuous improvement etc
- Does not necessarily imply competitive tendering, but....
- Internal / external audit pressure to achieve best value, reviewing existing arrangements and tendering is clearly demonstrable step, other methods can be less clear cut.



# TUPE

- Transfer of Undertakings (Protection of Employment) Regulations 2006 - a notorious legal minefield
- Where there is a “relevant transfer” all rights, powers and liabilities of employees transfer
  - Protects employees’ employment, terms & conditions and working conditions
  - Employees can “object” to a transfer
- Workforce matters can be taken into account in tender process insofar as they concern performance of contract e.g. whole life cost, risk-sharing, transitional costs, impact on delivery. Subject to usual rules on award criteria (transparency / disclosure)



# TUPE

- Likely to be relevant to outsourcing, externalising, partnerships (public, private, third, voluntary sectors), joint delivery etc
- Application is very wide.
  - Some limited exceptions include a) services ancillary to provision of goods; b) where contract relates to one-off project of short-term duration
- May not apply where “activity” being tendered is not fundamentally and essentially the same.



# Framework Agreements

- Establishes the terms and conditions which will apply to subsequent contracts (“call-offs”) under the framework
- Framework OJEU-advertised, but call-offs do not need to be publicly tendered
- Direct call-offs to, or “mini-competitions” between, providers on the framework
- Maximum duration of framework: 4 years (unless exceptional circumstances)
- Contracts awarded must not go beyond the scope and terms of the framework



# Assessing Tenders

- Two methods of assessing offers:-
  - Lowest price
  - Most economically advantageous tender
- When using the second method, authorities must be prepared to:
  - Decide in advance the criteria to be used in judging the tenders
  - Disclose the criteria and indicate the relative weighting of each criterion (or in exceptional cases, the relative ranking only).



# Common mistakes

- Failure to publicise
- Cut and paste jobs
- Too many cooks
- Award criteria not published early
- Award criteria not suitable for the contract in question
- Mixing up of qualification and award criteria
- Location criteria



# Challenging an unfair procedure

If aggrieved:

- Raise issue with authority as soon as cause arises
- Seek re-tendering/freeze procedure
- Seek court intervention if necessary (automatic freeze if contract not yet concluded)
- Seek damages
- Seek information through FOI request
- Involve Scottish Procurement Directorate
- Complain to European Commission
- New rules (procedures after 20 December 2009) make it easier to open up unadvertised contracts



# Remedies

- Pre and post award challenges
- Post-award Part B challenge primarily about damages (probably....)
- Standstill (obligatory for supplies and Part A services above threshold)
- Debrief requirements
- Forthcoming Scottish Procurement Directorate Guidance on remedies relationship to Part B services



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