

The new procurement rules: One year on

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The Public Contracts Regulations 2015 came into force just over a year ago - so what impact have they had and are we seeing huge differences in the way authorities are procuring? The short answer is probably no, but there are some subtle changes that are having an impact.

Timescales

The timescales for expressions of interest and minimum tender periods have been shortened. This is to some extent having the intended impact of making procurement quicker, but in most cases by days rather than weeks, and has had little impact on negotiated and dialogue processes, which are the most regular culprits of long drawn out procurement processes generally.

New procedures

A new procedure, snappily entitled the “Competitive Procedure with Negotiation” or “CPN” is having some impact in terms of making procurement more streamlined. Hailed as a panacea to drawn out intensive dialogues, we are seeing processes run using CPN being completed in less than six months with successful negotiation with bidders incorporated. This process is a half-way house between competitive dialogue and restricted procedure and, after submission of initial tenders, allows for a brief period of discussion in order to refine those tenders with bidders to suit the authority’s needs. Provided this negotiation period remains controlled within clearly defined parameters, this is a solution to processes which need some consultation with bidders to ensure that their proposals and the requirements of the authority are aligned.

Pre-qualification

Most procurements now require use of the Crown Commercial Service standard PQQ, which contains standard questions that cannot be changed without an explanation being provided to the Cabinet Office. However, authorities still need to create their own evaluation and scoring methodology, and add this to the standard set of questions, meaning that although suppliers can re-use information used to respond to the standard questions, the standards required for selection to tender are, necessarily, going to be different depending on the procurement in question.

We await guidance from the Crown Commercial Service on use of the European Single Procurement Document (ESPD), which will further standardise self-certification by suppliers of compliance with minimum PQQ requirements across Europe.

Electronic procurement

E-procurement will be mandatory for all authorities by April 2018. This simply means that all communication with tenderers and essential elements of the tender process must be conducted by electronic means. In many cases this will mean no change from current practice as use of portals and e-mail submission are now commonplace. However, compliance with Regulation 22 requires some consideration in relation to parts of tender processes conducted in person, for example, bidder presentations and interviews that should be documented in the form of audio or written records.

Light Touch Services

Procurement of what used to be known as “Part B” services now requires advertisement where the contract value exceeds £589,148. This brings high value procurement of this type into the remedies regime in a way it was not previously, and we are therefore likely to see more challenges on this basis. Conversely, the Regulations have also provided clarity that procurement of such “light touch” services below this threshold can be assumed not to have cross-border interest (and are therefore not subject to the requirements of the TFEU principles) unless there are “concrete indications to the contrary”.

What changes are on the horizon?

Next month the Concession Contracts Regulations 2016 come into force on 18th April. These will regulate all opportunities for works and services concessions valued in excess of the £4.1 million threshold for public authorities and utilities. Next month also sees the Utilities Contracts Regulations 2016 coming into force. Some key changes that will impact utilities procurement include a limit on framework duration and use of the competitive dialogue procedure.

From April the application of the 2015 Regulations will be extended to NHS England and CCGs for health procurement.

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