

TRAINING & DEVELOPMENT PROGRAMME

Knowledge Network

Webinar Series

Public Procurement Update – Procurement in Challenging Times

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Overview

- Brexit and public procurement
- Covid-19 and public procurement
- Challenges update

Public procurement law – setting the scene

- Detailed EU law rules on the conduct of tender processes by contracting authorities and contracting entities
- Contained in Directives 2014/23 (Concessions), 2014/24 (Public Sector) and 2014/25 (Utilities) for contracts above certain **monetary thresholds**, e.g.
 - €214,000 for most supplies & service contracts (Public Sector)
 - €428,000 for most supplies & service contracts (Utilities)
 - €5,350,000 for works contracts
- Implemented in Ireland via SI 203 of 2017 (Concessions Regs), SI 284 of 2016 (Public Sector Regs) and SI 286 of 2016 (Utilities Regs)
- General EU law principles of fairness, transparency, equal treatment, proportionality for **below threshold contracts** where there is cross border interest

Brexit and public procurement



What does Brexit mean for procurement....

- In Irish tender processes:
 - If you are an Irish contracting authority?
 - If you are a tenderer (Irish or UK) bidding for Irish public contracts?
- In UK tender processes:
 - If you are an Irish tenderer bidding for UK public contracts?

Tender processes run by Irish contracting authorities which started pre-Brexit

- Processes started pre 31 December 2020
 - **Business as usual** for contracting authorities and tenderers
 - Withdrawal Agreement provides that previous rules continue to apply to processes commenced before end of transition period

Tender processes run by Irish contracting authorities which started after - Brexit

- Processes started after 1 January 2021 where there is interest from UK tenderers:
 - Mostly business as usual for above threshold competitions, although legal basis for rules has changed
 - Position is different for below threshold competitions

Above threshold - the Rules vis-à-vis UK tenderers – the TCA and GPA

- Deal or No Deal?
- The Government Procurement Agreement (**GPA**):
 - procurement agreement under WTO
 - UK and EU both members of GPA
 - requires member states to follow advertised, fair, competitive processes for procurements over monetary thresholds (same thresholds as EU)
 - scope of the GPA is generally more limited than EU law, e.g. most defence procurement and service concessions not covered
 - GPA rules are less procedurally detailed than EU Directives
- Trade & Cooperation Agreement (**TCA**) Title VI:
 - Adopts the GPA as basis of procurement relationship between EU and UK
 - takes “GPA plus” approach:
 - small number of additional sectors covered (e.g. gas and heat, hotel and restaurant services, educational services)
 - additional procedural rules over standard GPA e.g.
 - electronic procurement,
 - more robust remedies regime

What rules are relevant in above threshold procurements?

- In most cases, contracting authorities/tenderers will only need to concern themselves with the EU Directives/ Irish Regulations. Why?
 - Irish authorities bound by EU Directives/ Irish Regulations in any process to which they apply, whether or not there are UK tenderers
 - Also, there is a legal requirement to treat UK tenderers **no less favourably** than Irish/EU tenderers in any process governed by the Directives/Regulations – set out in Regulation 25 (Public Sector Regs), Regulation 42 (Utilities Regs)
 - So UK and Irish tenderers should be afforded same rights in any process governed by the Directives/Regs
 - UK tenderers will have the same rights to challenge as Irish tenderers
 - Compliance with EU rules = compliance with GPA rules
- So mostly **business as usual** for above threshold procurements

Below threshold procurements (1)

- Under EU law, general principles of transparency and equal treatment require an advertised competition where the opportunity is of “cross border interest” even where it is below threshold
- “Cross border interest” means prospect of interest from bidders in another *EU Member State*. No equivalent principle in the GPA
- UK no longer an “EU Member State” so Irish authorities no longer bound to consider UK bidders in determining whether there is cross border interest?
 - Seems correct in respect of interest from tenderers from Great Britain
 - Northern Ireland may be in a different position

Below threshold procurements (2)

- Art 7(1) of NI Protocol applies Arts 34 and 36 TFEU (Free Movement of Goods)
- UK Guidance is that this means the “cross border interest” test remains for Goods procurements involving NI
- However, Art 7(1) of NI Protocol applies Art 34+36 “*as regards goods imported **from the Union***” (emphasis added)
- So NI contracting authorities must observe a cross border interest test, but not clear that Irish authorities must do the same where goods might be coming from NI suppliers.
- Art PPROC.13 TCA “national treatment rules”. No less favourable treatment of suppliers who have a legal person established in the territory – even in below threshold procurement
- National guidance

So what does this all mean for tender processes conducted by Irish contracting authorities? (1)

- Where the Directives/Regulations apply (i.e. above threshold):
 - Irish contracting authorities will be bound by the Directives/Regulations in any event, vis-à-vis Irish (and EU) tenderers
 - Irish contracting authorities may not treat tenderers from UK less favourably than EU tenderers – Regulation 25 (Public Sector Regs), Regulation 42 (Utilities Regs)
 - UK tenderers will have the same right to challenge purchasing decisions as EU tenderers
- In below threshold competitions:
 - Irish contracting authorities no longer obliged to apply the general principles of EU law if only prospect of foreign interest is from GB
 - Irish contracting authorities arguably no longer obliged to apply the general principles of EU law if only prospect of foreign interest is from NI
 - Irish contracting authorities obliged to treat UK tenderers established in Ireland as favourably as domestic suppliers

Irish tenderers seeking to bid in UK competitions post-Brexit

- Access to UK opportunities based on **GPA plus** rather than EU rules
- UK authorities obliged to treat EU tenderers no less favourably than UK tenderers
- UK domestic law mirrors the EU rules but note proposals to change in future – Green Paper on Procurement reform
- However, for procurements not covered by GPA (e.g. below threshold), UK authorities can adopt a more **protectionist** approach– PPN 11/20. Note protectionist policy does not apply for goods procurements involving NI, because of NI Protocol
- Practically - Opportunities will be published on UK “Find a Tender” service rather than OJEU

Brexit - Practical Tips for contracting authorities

- At selection stage, pay particular attention to financial robustness
- At award stage, consider assessing tenderers' approach to e.g.:
 - risk management,
 - supply chain resilience
 - delivery milestones
- Ensure documentation is clear re standards/legal requirements - e.g. CE mark on products – no longer acceptable if certified by UK bodies; need to be certified by EU notified bodies
 - OGP Guidance Note December 2020
- Ensure contract contains appropriate risk transfer to protect against price volatility (e.g. exchange rate issues, increased cost of doing business, customs and other taxes)
- Consider whether contract needs to require certain resilience provisions e.g. a certain amount of stock to be warehoused in Ireland at any time

Brexit - Practical Tips for tenderers

- Review contracts early – can you commit? E.g. delivery timetables, fixed prices, who bears risk of change of law? If you see an issue raise it early - little chance to negotiate post tender.
- Qualifying your bid is risky - could lead to elimination for non-compliance
- Ensure that you can comply with contract e.g.: that your products are compliant with EU certification requirements (if applicable)
- Ensure you can show your compliance with selection criteria – e.g. personnel proposed for particular roles (check with regulatory body e.g. Access Pathways Agreement for engineers – EI and EC)
- Know your rights - mostly unchanged
- Challenge quickly – in most cases 30 day time limit from when you know or ought to have known of breach

Covid-19 and public procurement



Covid-19 and public procurement

- Unprecedented situation:
 - Increased demand for certain goods, works and services (e.g. PPE, tests, sanitisers)
 - Disruption to existing contracts (e.g. closure of construction sites, work from home)
 - Price volatility
 - Working from home – virtual tender preparation/ tender evaluation meetings
- Procurement law has continued to apply throughout the crisis
- Guidance has confirmed certain exemptions may be available in certain circumstances – see OGP Guidance (22 March 2020) and European Commission Guidance (1 April 2020). These include:
 - negotiated procedure without advertisement (Regulation 32/Article 32)
 - call for competition with accelerated timescales,
 - extending or modifying a contract during its term (Regulation 72/Article 72).
- The above are only available if justified – exemptions interpreted strictly

Covid-19 and urgent procurements

- Procurement law already includes some flexibility for urgent purchases:
 - Accelerated procedures for urgent purchases where normal time limits are impractical – 15 day tender period
 - Direct awards for “*extreme urgency brought about by events unforeseeable by contracting authority*” where the timeframes for an advertised process could not be complied with. Only available “*insofar as strictly necessary and where the reasons for the urgency are not attributable to the contracting authority*”
- Reg 32(2)(c) (Public Sector) and Reg 49(1)(d) (Utilities)
- In the early stages of the pandemic, this would have been broadly available for e.g. PPE, testing, anti-viral cleaning supplies etc.
- However, what was “urgent” and “unforeseeable” in early 2020 may not necessarily be so now.
- Guidance confirms that contracts directly awarded by virtue of urgency are still subject to transparency obligations – obligation to publish contract award notices and to justify decisions taken

Covid-19 procurements – pushback (1)

- Increased scrutiny – for example:
 - High value PPE contracts in UK directly awarded to companies who do not appear to have experience of previously supplying PPE
 - UK National Audit Office – investigation into government procurement during the Covid-19 pandemic 26 November 2020:
 - Concerns re management of conflicts of interest
 - Inadequate documentation maintained in many cases

Hancock's former neighbour won Covid test kit work after WhatsApp message

Alex Bourne's company producing millions of Covid vials despite no prior experience in medical supplies

- [Coronavirus - latest updates](#)
- [See all our coronavirus coverage](#)



The Guardian, 26 November 2020

Covid-19 procurements – pushback (2)

- **Good Law Project** procurement challenges
 - [2021] EWHC 346 (Admin) – Feb 2021
 - Successful challenge against late publication of contract award notices for Covid related procurements
 - (an average of 47 days instead of the permitted 30)
 - Deemed unlawful (breach of law and guidance).
 - [2020] EWHC 3609 (TCC) – December 2020
 - Leave stage in judicial review
 - Judge refused permission to argue challenge to use of “urgency” exemption
 - Judge gave permission to argue
 - “irrationality” i.e. (i) inadequate verification of financial standing/experience and (ii) “VIP lane” system
 - lack of transparency and lack of reasons justifying direct award.
- Key takeaways:
 - Exemptions strictly applied
 - More difficult now to justify exemptions than in early 2020
 - Transparency and fairness must still be guaranteed in any award, even during exceptional circumstances

Covid-19 and existing contracts

- Regulation 72/ Article 72 allow for modifications to existing contracts if they fall within defined safe harbours, including:
 - Where need for modification necessitated by unforeseen events (50% value cap)
 - Where additional deliveries required and change of contractor not possible for economic & technical reasons, and would cause substantial inconvenience or duplication of costs
 - Low value changes (value of change below thresholds and <10% of original contract value or <15% for works contracts).
 - Where the impact of change is not “material” within the meaning of Reg 72(4)
- In the context of Covid:
 - Extension in duration may have been justified to account for delay in re-procurement caused by early stages of Covid
 - Changes to contract timelines or conditions of performance of contract to accommodate remote working

Covid - Practical Tips for running/participating in processes

- For contracting authorities
 - Business case – ensure funding for project is secure
 - Reasonable timeframes to accommodate working from home
 - Streamline process to facilitate remote evaluation
 - Virtual tender evaluation – NB document management
 - Be very careful of “chat” function and emails
- For tenderers
 - Work-from-home – ensure you leave plenty of time to upload – connection issues
 - Raise queries early if you see issues – e.g. if a fixed price for a particular element is not workable because of Covid, say something asap
 - Qualifying your bid is very risky – can lead to elimination for non-compliance
 - Bear in mind very strict time limits for challenge (30 days in most cases)

Challenge Update – recent Irish cases



Payzone v National Transport Authority [2021] IEHC 212

- Important decision on standing to challenge procurement decisions under the Remedies Regulations (Order 84A)
- Payzone were a subcontractor to the unsuccessful tenderer for the Leap card operation contract, and sought to challenge the award of the contract using Order 84A (which brings with it an automatic suspension)
- NTA brought a motion to have the case dismissed on the basis that Payzone were not an “eligible person” under the Remedies Regulations, as they were a subcontractor not a tenderer
- Core elements of the definition of “eligible person” in Reg 4 of the Remedies Regulations are that the person:
 - Had/has an interest in obtaining the contract
 - Has been harmed or is at risk of harm from the conduct complained of
- Payzone argued that its level of participation in the competition elevated it beyond being a subcontractor.
- However, High Court agreed with NTA and dismissed the Or 84A proceedings because Payzone could not show an interest in obtaining the contract in its own right, as opposed to a subcontract with the successful tenderer.

Owens v Kildare County Council

- **High Court**
 - Tender eliminated for non-compliance (no quality submission) and abnormally low rates
 - Kildare successful in defending challenge
- **Court of Appeal** [2020] IECA 361
 - After HC judgment, Kildare signed new framework agreement
 - Challenger sought a stay on the operation of new framework pending appeal
 - Very useful case on circumstances in which stay will be granted
 - Court refused stay:
 - Stay application somewhat like injunction application but with benefit of High Court judgment
 - Old contract was no longer available; significant public interest in allowing new framework to go ahead
 - Position of successful tenderers was considered in weighing risk of injustice
 - Court accepted damages will not be an adequate remedy for the applicant, but still refused to grant the stay – notes *Merck Sharpe & Dohme* tempers *Word Perfect* (at least in stay applications)
 - Attitude of challenger was also taken into account – intention to delay matters to obtain negotiating advantage.
 - Merits of the appeal – “flimsy”

Word Perfect – Discovery

- **Supreme Court – September 2020**
 - Confirmed that law on discovery the same in procurement cases as in other cases
 - However, need to protect confidential information means that the following may have to be considered:
 - Redaction
 - Confidentiality rings
 - Iterated/phased approach – some documents provided upfront, others only to trial judge
- **Supreme Court – March 2021**
 - Court asked to vary the order made in September
 - WP proposed protocol for redaction of confidential information pertaining to other bidders, with confidentiality ring of lawyers reviewing unredacted info if disputed
 - Court said that the protocol approach might be appropriate in certain cases but declined to vary its order
 - Court also gave guidance on redaction – case by case decision
 - Redaction for “highly” confidential information permitted
 - redaction for relevance only to be avoided or kept to absolute minimum
 - Unredacted info to be provided to trial judge

Questions?



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