

What will EU Directives mean for Construction Procurement in Wales

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The New Procurement Directive – How does it affect construction ?

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What has the EU ever done for us ?





Well, apart from...

- Leaner, more efficient procedures
- More flexible tendering
- Measures to make life easier for SMEs
- Environmental factors given more prominence

What have they ever done for us ?



Current status

- Formal adoption by EU likely in February/March
- UK Govt looking to implement early
- Will completely replace Public Contracts Regs 2006
- Will aim to replicate text of Directive as closely as possible in Regs – no “gold-plating”
- Remedies will not change in substance



Broad objectives

- “Significant potential for enhancing growth, innovation and job creation, while supporting the most efficient use of public funds” – Introduction
- “Smart, sustainable and inclusive growth”, “increase efficiency of public spending”, “Participation of SMEs”, “common societal goals” – Recital 2



Outline of presentation

- This is a summary only of some of the key changes – Directive is very wide-ranging and detailed
- Concentrating on issues with particular relevance for construction
 - New timescales
 - New procedure for major projects
 - SME-friendly measures
 - Past performance
 - Abnormally low bids
 - Variations
 - Environmental matters

Contracting authorities

- Lighter regime for “sub-central” contracting authorities
 - Welsh Govt, LHBs and Welsh NHS Trusts are “central”
 - Local Govt is “sub-central”
- Benefits of being “sub-central”:
 - Higher thresholds (E200k vs E130k)
 - PINs as call for competition – valid for up to 12 months, invite all who responded to confirm interest, then run as restricted/competitive procedure with negotiation
 - Flexible time limits – can be set by agreement with bidders (minimum 10 days)



Shorter timescales

- Open procedure (single-stage) - 40 days (down from 52)
- Restricted procedure – 30 days for selection (37), 35 days for tender (40)
- Competitive procedure with negotiation and Competitive Dialogue – 30 days for selection (37), no fixed time for negotiation/dialogue stage
- Sub-central bodies can agree shorter time limits with bidders (minimum 10 days)



Competitive Procedure with Negotiation (1)

- Aim – more flexible/cheaper than Competitive Dialogue
- EITHER CD or CPWN can be used where –
 - Adaptation of existing solutions required
 - Includes design or innovative solutions
 - Specific issues like complexity, legal/financial structures
 - Can't establish tech spec with sufficient precision
- Can also use CPWN where open/restricted procedure failed to produce compliant/acceptable bids
- Basically similar to CD but simpler/more flexible



Competitive Procedure with Negotiation

- PQQ stage (30 days)
- Invitation to submit initial tenders (can limit to 3).
- Tender docs - describe subject matter well enough to allow EOs to decide whether to participate, and set out award criteria (can't change). Specify any mandatory requirements (can't change)
- Negotiate on initial/subsequent tenders (but not final tenders) to improve their quality
- Can reduce numbers by applying award criteria
- Can award on basis of first tender (if stated at outset) to save going through whole process
- Otherwise, end negotiations and set deadline to submit new/revised tenders
- Evaluate in accordance with award criteria stated at start



SME-friendly measures (1)

- Simplification of information requirements at selection –
 - Self certification (like SQuID)
 - Re-use already submitted information
 - Documentary evidence – EU Single Procurement Document (when available) – states no exclusions apply and sets out standard info
- Lots
 - *“to enhance competition, contracting authorities should in particular be encouraged to divide large contracts into lots”*
 - Choice is with CA, but must give reasons if not using Lots
 - Can limit number of Lots tendered for / awarded. Must state criteria / mechanism to be used

SME-friendly measures (2)

- Limits on requirements for participation (selection)
 - MUST relate to suitability for professional activities, financial/economic standing and/or technical/professional capability and nothing else
 - Turnover – maximum 2x contract value unless exceptional reasons
 - Groups/consortia – any conditions imposed must be objective and proportionate
- Direct payments
 - Sub-contractors may request direct payment from CA. Main contractor has right to object to undue payments. Does not affect liability of main contractor



Past performance (1)

- New discretionary ground for exclusion –
 - Contractor "*has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract...which led to early termination of that prior contract, damages or other comparable sanctions*"
- What is “significant” or “persistent”, and “substantive requirement” ? Could lead to subjectivity
- Some obvious examples – blacklisting, systematic overcharging (as alleged in “tagging” cases)
- But what about less serious matters ? Delays/LADs ?



Past performance (2)

- Possibility of “self cleansing”
 - Contractor can provide evidence of remedial measures taken to demonstrate its reliability despite existence of a ground for exclusion
 - If contracting authority considers measures are insufficient, must provide reasoned decision
- So – if you have skeletons in cupboard, need to prepare evidence of remedial measures / explanations why it is unlikely to recur



Abnormally low bids (1)

- Dilemmas for contractors and authorities –
 - Contractors want to win bids – negative profit margins
 - Authorities – low prices attractive but will it lead to failure to perform/claims, or “sweating” subcontractors
- No clear definition of what is “abnormally low”
- Case law suggests various tests “serious and genuine”, “viable”, or likely to provide authority with the works / services it seeks ?
- Large degree of subjectivity – Directive does not impose clear tests



Abnormally low bids (2)

- But New Directive places some duties on authorities –
 - Must require bidder to explain pricing – can't simply exclude
 - Must assess info given and only reject where it doesn't stack up
 - Must reject where reason for low bid is bidder not complying with environmental, social or labour law
- Authorities may exclude bids where –
 - Bid artificially low because of state aid and bidder isn't able to prove aid is compatible with EU law



Variations (1)

- Has been grey area since “Pressetext” case (2008) – said “material” changes to a contract could = new contract which needs re-procuring – but what is “material” ?
- “Legal Services Commission” case in 2010 made matters worse – the mere fact there has been a variation clause apparent since tender stage isn’t enough
- Each variation was therefore a question of fact and degree – how much change could have been reasonably understood from the initial tender docs ?
- New Directive attempts to remove the uncertainty

Variations (2)

- Variations allowed where –
 - Set out in tender docs in clear, unequivocal terms – e.g. price variation/fluctuation clauses or options
 - Not included in original tender but can't change contractor for economic or technical reasons, or where would cause serious inconvenience or duplication (e.g. site management/safety issues or duplication of prelims). BUT subject to maximum of 50% of original contract value (cumulative)
 - Need unforeseen, variation doesn't alter nature of contract – 50% cap

Social and Environmental issues (1)

- Directive aims for “*better integration of social and environmental considerations in procurement*” – Recital 41 & 42
- Criteria can include environmental and social, if linked to subject matter
 - Subject matter - any part of lifecycle (production process, disposal etc) but NOT general corporate social responsibility
 - Not just cost to CA, but also environmental costs if can be objectively verified. MUST use common EU methodology when developed.
- Labels: much wider – environmental social or other characteristics
 - Must be linked to subject matter and drawn up on basis of scientific information established transparently and accessible to all interested parties
 - E.g. environmental performance/emissions, or non-use of child/trafficked labour, health and safety of workforce, fair trade

Social and Environmental issues (2)

- Breaches of social, labour or environmental law –
 - MAY exclude bidders. MUST exclude if bid is abnormally low because of non-compliance. Mandatory exclusion for child/trafficked labour
- Supported Businesses –
 - Can reserve participation to those whose main aim is integration of disabled and disadvantaged persons, or provide contract to be performed in this context, provided at least 30% of workers are disabled or disadvantaged

Conclusion

- New Directive touches every detail of procurement practice
- Have picked out what's most relevant – but many other changes
- Won't be safe to assume “business as usual”
- On plus side –
 - Clarifies the often confusing and contradictory case law
 - Makes life easier for procurement officers and bidders alike
 - Particular benefits for SMEs
 - Much wider potential for use of environmental and social factors
 - Shorter, more flexible time limits
 - New, more flexible procedures



Any Questions ?

