

NEW IRISH PROCUREMENT REGULATIONS WHAT YOU NEED TO KNOW



BACKGROUND

On 28 March 2014, three new Directives were published in OJEU:

1. Directive 2014/23 relating to concession contracts;
2. Directive 2014/25 replacing 2004/17, the "Utilities Directive"; and
3. Directive 2014/24 replacing 2004/18 the "Classic Directive" that govern how public bodies in the EU can award public works, service and supply contracts.

Member States had until 18 April 2016 to implement the new Directives via domestic legislation. On 5 May 2016, Ireland transposed two of the directives into Irish law with two new pieces of legislation:

1. European Union (Award of Contracts by Utility Undertakings) Regulations 2016, implementing the Utilities Directive; and
2. European Union (Award of Public Authority Contracts) Regulations, implementing the Classic Directive 2014/24.

This briefing document outlines some of the most important aspects within the new Public Authority Contracts legislation.

European Union (Award of Public Authority Contracts) Regulations 2016 ("the Regulations"), implementing Directive 2014/24

COMMENCEMENT

The Regulations are deemed to have come into operation from 18 April 2016 and apply to procurement exercises commenced after that date.

THE REMEDIES DIRECTIVE AND REGULATIONS

Directive 2007/66 and the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (as amended in 2015) remain in force and it is necessary to read the new Regulations and the Remedies Regulations together.

DISTINCTION BETWEEN PART A & PART B SERVICES

There is now no such thing as part B services. Regulation 10 sets out a list of services that are totally exempt from the Regulations, including employment contracts, public transport contracts and legal services in relation to litigation and a new light touch regime is introduced at Regulation 74.

NEW LIGHT TOUCH REGIME

Although the heading of Regulation 74 refers to social and other specific services, the actual list is set out at Annex XIV of the Directive and includes legal services, postal services, tyre re-moulding and blacksmith services; so the full list must be checked carefully. If a service is listed at Annex XIV and the value is under €750k, then the Regulations do not apply. Whereas, if it is for over €750k it is subject to the light touch regime. The light touch regime requires publication of a call for tenders, an award notice and that the procedure adopted ensures compliance with the core principles of transparency and equal treatment.

COMPETITIVE PROCEDURE WITH NEGOTIATION

This new procedure can only be used in certain circumstances, set out at Regulation 26, including if there is a design element. The procedure, (Regulation 29), is analogous to a restricted procedure with the ability to have repeated interim tenders followed by negotiation, leading to a final tender after which the award shall be made with no further negotiation. This could be a real asset for achieving best value. Quigg Golden has successfully run such a procedure on a construction project to the benefit of all involved.

PROCUREMENT DOCUMENTS

Regulation 53 requires all procurement documents to be available from the date the contract notice is published. These documents are defined and include the conditions of contract and specification. So, in a restricted procedure, the documents for ITT stage need to be made available at pre-qualification stage.

EUROPEAN SINGLE PROCUREMENT DOCUMENT

Bidders can supply an ESPD, consisting of an updated self-declaration, as preliminary evidence that it is not subject to a ground of exclusion and that it meets the selection criteria. The ESPD has been published by the Commission under separate Regulations and is not a model of clarity or simplicity.

AWARD CRITERIA

Award criteria must be based on MEAT and a cost-effectiveness approach, such as life cycle costing. Regulation 67 is a significant provision and will have potentially far reaching consequences for the award of works contracts, where the initial capital value may be very small compared to the full life cycle cost, especially when comparing the value of the design contract to the life cycle cost of the works being designed. The small print of the Regulation still allows for an award on price only.



EXPERIENCE OF STAFF

The inclusion of staff experience in the award criteria is a welcome move and will allow public bodies in certain situations to expressly use experience as an award criterion. The provision can be found in Regulation 67. Careful thought has to be put into how this should be assessed in practice.

DISCRETIONARY EXCLUSION FOR POOR PERFORMANCE

Where the bidder has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract which led to early termination, damages or a comparable sanction, it may be excluded from a procurement exercise under Regulation 57(8)(g). In practice, such an exclusion may be difficult to exercise.

SELF-CLEANSING

Regulation 57(12)-(16) allows that a bidder who might be subject to grounds for exclusion described can “self-cleanse” to show that despite the grounds it has remedied the situation and changed its practices to demonstrate its reliability.

EARLY MARKET ENGAGEMENT

This is expressly allowed under Regulation 40 so long as it does not distort competition.

Regulation 41 also allows a tenderer to give advice and help draft documents so long as steps are taken not to distort competition.

DIVISION INTO LOTS

This is not mandatory, however, an authority that does not do so has to set out its main reasons for not doing so in the procurement documents or in the procurement report (see Regulation 46). If it is split into lots the authority can limit the number of lots any individual tenderer can win. The award can also be made on the most economical overall outcome, taking into account discounts offered for multiple lot awards.

TIME LIMITS

These have been revised and it is now possible to allow as little as 15 days for a tender in an open procedure or 15 days to request to qualify and 15 days to tender in a restricted procedure, as long as a prior information notice has been published. See Regulations 27 and 28. However, the requirement in setting time limits (Regulation 47), to take into account the complexity of the contract or time needed to tender, should not be ignored.

LIMITS ON SUBCONTRACTORS

This is done in two ways. Firstly, Regulation 71 provides that a contracting authority can require

the removal of a subcontractor who is subject to one of the grounds of exclusion in Regulation 57. Secondly, at Regulation 63(7) an authority can require certain elements of a contract to be performed by the tenderer itself and not by a subcontractor.

MODIFICATIONS TO CONTRACTS

Regulation 72 sets out the rules as to what is and is not permitted by way of a change to a contract during its term. These rules include:

- a de minimis threshold of an increased value of 10% (for services and supply contracts and concessions) and 15% (for works contracts), below which changes will not be considered substantial enough to be prohibited. This is provided the general nature of the contract remains the same and provided the value of the change does not by itself exceed the thresholds;
- where the changes have been unequivocally provided for in the initial procurement documents (irrespective of their monetary value);
- changes in the contractor, in certain limited circumstances;
- additional necessary work, or a change brought about by unforeseeable circumstances, provided certain conditions are met; and
- where the modification is not “substantial”, when tested against tests set out in current case law on prohibited changes.

AUTHORITY CLARIFICATIONS

Regulation 56(4) attempts to provide some clarification in relation to clarifying tenders. It provides that where information or documentation appears to be incomplete or erroneous or where specific documents are missing, authorities may request the economic operator concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit. However, the authority is to ensure that such requests are made in full compliance with the principles of equal treatment and transparency. Although this paragraph is to be welcomed, it does not provide as much clarity as could be wished for. Authorities will have to rely on existing case law to determine whether or not seeking the specific clarification from a tenderer would comply with the principles of equal treatment and transparency, or not.

IN-HOUSE AND INTER-AUTHORITY COOPERATION

This is another area where the text of the Directive now codifies the existing case law, the so called “Teckal exemptions”. The rules are fully set out at Regulation 12. Essentially, where an authority has control over the entity being awarded the contract, or where the contract represents true co-operation between authorities, the Regulations do not need to be followed.



Detailed training and a full guide is also available from Quigg Golden. If you would like more information on this, then please contact Pauric Marray at Pauric.Marray@QuiggGolden.com