

Procurement basics



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Getting work is an absolute necessity for any company. In order to keep trading, there must be work to do. As to how a firm wins work, there are volumes written about marketing, positioning and tactics. Selling is an art and science all of its own. However, what we are interested in is either assisting firms to navigate the law to maximise winning work, or to assist procurers to get the right contractual partner on board. This is a tricky legal area and a big and extremely relevant part of our practice.

How work is tendered falls into two broad and distinct categories. The first is work tendered and awarded within the private sector. That is where both the buyer and contractor are private organisations. The second, and much more complicated, is where the procurer of the work is in the public sector.

Private sector procurement

Winning work in the private sector is all about reputation and getting the price right. The law interferes very lightly in this and really only two significant factors cross my desk regularly:

1. **Record the deal** – in any agreement, but particularly when there have been protracted negotiations, make sure you get the deal recorded properly. All too often, private sector organisations reach an agreement on a handshake but don't properly record exactly what has been settled between them. That leaves gaps in the agreement and uncertainty which can be expensive and difficult to resolve. It is money well spent to have someone with commercial and legal nous look over where you are with an agreement and ask the obvious questions to make sure it is all tied down; and
2. **Playing by the tendering rules** – when a purchaser decides that he is going to tender work in a particular way, by (for example) adopting a set of rules for tendering, then he is bound to follow those rules. So if a purchaser says he will accept the lowest price, he is obliged to not take the second highest. The law behind this is called "*the two contract theory*". The bidder, by putting in a tender for a contract, is accepting the terms the purchaser has publicised. The tenderer and buyer are agreeing, in an enforceable way, to treat the tenderer as the buyer has said he would. This simple rule is dwarfed by the rules associated with public sector procurement but it remains an important issue especially where one of the parties is a large corporation with a bureaucratic system who have said they will deal with bids in a particular way.

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Public sector procurement

The rules associated with public sector procurement are complex. The Procurement and Utility Regulations, require procurers to follow rules on how they procure all work over a certain value threshold. In public sector organisations, there will often be additional internal rules which oblige them to procure contracts in a particular way. This leads to a number of issues that are very familiar to us:

1. **Assisting procurers to get the system right.** Because the rules are reasonably difficult to manage and the desire for efficiency is ever-increasing, public sector organisations often struggle to buy exactly what they want in the most efficient way. How public sector organisations will get the most economically advantageous tender in a way that complies with the Regulations is not straight forward. It requires a good deal of insight and a lot of experience to ask the right questions of the tenderers in the right way to deliver the right quality standard. Setting the right model for establishing what the cost will be can also be challenging. A model is often needed to get the right answer rather than simply hoping that a lowest price will lead to the lowest out turn cost. How quality if measured is also dramatically changing as the real implications of BIM are gradually felt across the industry;
2. **Assisting tenderers** in how they answer quality questions. Most public sector procurements now involve some aspect of “*quality question*”. This is the way that the procurer tries to identify the quality of the work it is buying. Very often the way these questions are answered is crucial to winning the work and frequently the questions themselves are poorly drafted. This requires answering skills which are not routinely part of most tenderers skillset. We assist contractors to answer quality questions in both pre-qualification and at tender stage to secure work efficiently. This often dramatically improves contractors success rates in tendering; and
3. **Assisting parties in procurement disputes.** There is a considerable body of regulation and case law around how the public sector must procure contracts and, as a result, tenderers have considerable power to hold public sector organisations to account where they fail to follow the rules properly. A particular area of expertise of ours is how to navigate the law in this area. The timeframes from a tenderer discovering there is a problem with a procurement until it must raise the issue are short. Tenderers need accurate and helpful advice on when to take issue with a public sector error. This is something that we are particularly well geared to do with our unique grasp of both the legal and the commercial and construction aspects of a tender process. It needs this level of grip and commercial focus to ensure that the resolution is achieved efficiently for both tenderer and the contracting authority.

Despite the uncertainty surrounding the UK’s future use of EU regulations, there are unlikely to be any real changes that will affect the law around procurement. This means that for the foreseeable future in the UK and Ireland there is going to continue to be the potential for difficulties in the procurement of work. We remain ideally placed to assist both procurers and tenderers to resolve those differences.



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