The final implementation date for the three new EU procurement directives is 18 April 2016 - so things are hotting up in terms of getting to grips with new legislation. Cabinet Office has reviewed the responses to its consultation on the draft Concessions Contracts Regulations, 2016 and the draft Utilities Contracts Regulations, 2016 - concluding that the suggested wording will remain broadly the same. Implementing legislation for the Utilities and the Concessions Directives was laid before the Scottish Parliament on 2 February and 28 January respectively; both will come into force on 18 April 2016. In this edition we look at the Scottish implementing legislation for the Public Sector Directive, and some of the ways in which it differs from implementing legislation for England and Wales. In future editions of Procurement Pulse, we will look at implementation approaches in a number of key jurisdictions across Europe - to assist economic operators bidding for government contracts across Europe. Implementation brings with it new practices intended to increase the efficiency of the procurement process; the new Commission template for the ESPD is reviewed below. And the first declaration of ineffectiveness has been made in the UK by the Scottish Court of Session - in the context of a framework call off contract.

Public Contracts (Scotland) Regulations, 2015 (PCSR'15): Scotland's implementing regulations for Directive 2014/24 were laid before the Scottish Parliament on 18 December 2015, and will come into force on 18 April 2016. Whilst in England, Wales and Northern Ireland we must look to:

- the Edenred Supreme Court decision to determine whether the material change provisions at regulation 72 of PCR'15 apply to modification of contracts signed before 26 February 2015 (in force date for PCR'15); and
- the October 2015 Crown Commercial Service guidance on amendments to contracts during their term, for an understanding of the extent to which the termination provisions in regulation 73 apply to contracts entered into before 26 February 2015,

in Scotland, PCSR'15 clarifies the point from the start. Regulation 98(5) states:

"Nothing in these Regulations, except regulations 72 (modification of contracts during their term) and 73(1)(a), (2) and (3) (termination of contracts), affects a contract awarded (a) before 18th April 2016 ..."

The CCS guidance states that PCR'15 "regulation 73(1) does not require contracts awarded before 26 February 2015 [implementation date] to be changed. But regulation 73(3) will apply and a termination clause will be implied."

Whilst the terminology in PCSR'15 is open to interpretation, it seems likely that the courts will interpret regulation 98(5) in the same way as the approach taken in the CCS guidance.

The Scottish drafting differs from PCR'15 in relation to regulation 72(1)(b) - which allows additional works and services to be procured from an incumbent supplier without a new procurement, if there are economic and technical reasons for doing so and where not to do so would cause significant inconvenience or duplication of costs. The
same provision in PCR’15 combines the two justificatory limbs with the word "or" rather than "and", which is not in line with the original Directive 2014/24/EU. Cabinet Office has acknowledged this in the Government response to the consultation on the Utilities and Concessions implementing legislation, and confirmed that PCR’15 will be amended accordingly.

PCSR’15 does not take the "copy out" approach to implementation exhibited in PCR’15. It refers to contracting authority in the singular rather than plural throughout, and makes other adjustments to remedy potential areas of ambiguity caused by committee drafting in a number of different languages at EU directive stage. Its provisions follow the same order until regulation 7, and then inserts (rightly) a specific exclusion for contracts covered by the concessions rules, but combines provisions relating to award of contracts at regulation 66, so that it is back in synch with PCR’15 from regulation 67-76. We will all therefore be on the same page when discussing contract modification provisions at regulation 72!

In terms of policy decisions, generally Scotland has sought to retain as much flexibility as possible. In limited scenarios it has taken a different approach to England, Wales and Northern Ireland; for example, it has chosen to exclude the right to award a contract on the basis of lowest price or cost (promoting deeper analysis of the real cost of contracts through life-cycle costing or other cost effectiveness approaches), and provisions allowing contracts to be reserved to public service mutual organisations are not included.

Commission issues template for European Single Procurement Document: As from 18 April 2017, contracting authorities must accept pre-qualification responses from bidders in the electronic ESPD format; before that date paper based ESPDs must be used. The ESPD is a self-declaration (much like a PQQ) by an economic operator, that it is not in one of the situations in which it might be excluded; that it meets the relevant selection criteria and that, where applicable, it fulfills the objective rules and criteria that have been set out to limit the number of candidates to be invited to participate in a procurement. Contracting authorities must indicate in the contract notice or the procurement documents which of the standard questions require an answer. The UK has well developed pre-qualification standard forms, so it seems likely that, rather than having one comprehensive document, we will now have the ESPD and a separate "amending schedule" in the procurement documents, setting out which ESPD questions must be answered, and where enhanced information will be required - for example, relating to national grounds/legislation for exclusion. Once issued in connection with one procurement, each ESPD will be stored on-line by the European Commission free of charge, so that it can be edited and re-used on future bid applications.

Streamlining pre-qualification in the rail sector: DfT is introducing a "passport" system for franchise bidding, replacing the current requirement for bidders to prequalify separately for each competition. The new system is intended to reduce the time and cost involved in providing detailed technical information for multiple franchise competitions.

- Rail Franchising Passport Process Document 2015
- Rail Franchising Passport Pre-Qualification Questionnaire

First declaration of ineffectiveness awarded: Regulation of frameworks requires that only economic operators who are party to the original framework agreement can be invited to bid for call off arrangements. In this case "PPL" was named on a Scottish framework, but the call-off contract was awarded mistakenly to another company in the same group of companies. Proportionality was pleaded as grounds for allowing rectification (in the form of a novation to the correct group company), but was disallowed. The principle of proportionality exists to ensure that contracting authority actions are not disproportionate to the object to be achieved, and, the Court held, "cannot be turned around and relied upon by a contracting authority which has failed to act within its statutory powers." The call-off contract was therefore declared ineffective. Exactly why a company not on the framework bid for a call off contract is not clear, but there are lessons here to the public and private sector. Within the four year period of a framework agreement, group restructurings often occur, with the effect that familiar assets and people transfer to new operating vehicles. Where a new contractor replaces the one to which the contracting authority had initially awarded the contract, due to genuine corporate restructuring reasons, there is no requirement to run a new procurement procedure, and if that had been so in this case, there would have been no requirement to adjust the framework arrangement. However - as the judge pointed out - " LLP and OW were very different entities with their own employees, assets and businesses. OW had no business presence in Scotland. It had not been invited to
tender and had not tendered."

PPN01/16 - Ensuring compliance with wider international obligations when letting public contracts: Those of you who have been following the Commission's proposal on an International Procurement Instrument - to address the lack of a level playing field in world procurement markets - will be aware that some member states did not support certain of the Commission's proposed measures to "encourage" participation for EU bidders in third country public procurement markets. One of those measures was to allow contracting authorities to determine autonomously whether they would allow non-EU and GPA bidders to participate in their procurement processes. The proposal has now been amended so that only the Commission - through a centralised investigation - will decide whether third country bidders should be excluded from a particular procurement. This supports concerns expressed by certain EU member states, that rejection of third country bids could raise the risk of retaliation by third country trading partners. This PPN supports the EU policy change, and confirms UK contracting authorities' duties to treat equally EU suppliers, and suppliers from countries which are signatories to the Government Procurement Agreement, and not discriminate against them. Suppliers from outside the EU and GPA countries may offer solutions which offer best value for money, and the policy note requires that they should be treated in the same way as EU and GPA suppliers - acknowledging that, if they are not, they will not be entitled to any remedy for breach of the procurement rules.

Contact us

If you have any comments, or would like to find out more about any of the topics covered in this newsletter, please send an email to: [email protected]

AUTHORS

Dr Sharon Fitzgerald
Partner
Edinburgh | T: +44 (0)20 7349 0296
[email protected]

Louise Huson
Sheffield | T: +44 (0)20 7349 0296
[email protected]