The 2014 EU Procurement Directives

16 JAN 2014

Three new procurement directives will become part of EU law in 2014: public sector, utilities and concessions.

Regulated procurement has undergone a significant review. Save for the rules on remedies, which remain unchanged, everyone involved in procuring and tendering government contracts must now familiarise themselves with revised rules for utilities and public sector purchasing, and with a new approach to procuring both goods and services concessions.

The EU Parliament debated final amendments to the draft directives on 14 January, and voted to approve the final versions on 15 January. The approved directives must now be published in the Official Journal, and are expected to be in force by March 2014. Each member state has two years to implement the new rules into national law, with the option to pursue individual policy choices, in connection with certain provisions. Global contractors may therefore see a more marked difference in procurement approaches when bidding for contracts in different jurisdictions.

The UK Cabinet Office has indicated that it intends to follow an "ambitious transposition timetable". It has already issued a number of discussion documents, to allow debate with interested stakeholders on policy choices in the directives - for example, how the new social services "light touch" regime will be implemented to replace part B services.

Separate legislation will be required to implement the directives in Scotland. In addition, a Procurement Reform (Scotland) Bill has been introduced and is currently being considered by the Scottish Parliament.

We see a number of areas which will require changes to day-to-day procurement practice.

Codification of case law

- Provisions in all three directives regulating public:public contracts and cooperation, clarify key scenarios where contracting authorities are not obliged to advertise in-house arrangements, though reverting to case law guidance is still likely to be necessary - codification only goes so far. Although health, social and cultural sector employee-led mutuals, will not be exempt from the procurement rules, procurements may be reserved solely for their participation, under the new "light touch" regime.
- Key principles from the Pressetext-related case law are codified to clarify the circumstances where contracts can subsequently be modified. In particular, de minimis modification values below which change is allowed, an "unequivocal" review clause option and provisions defining changes which are "not substantial" will be of assistance to those looking to reduce novation risk and future contract management issues.
Changes to procurement procedures

- In the public sector directive, four criteria (broadly premised on inability to scope an accurate technical specification) permit use of either the Competitive Dialogue (CD) or the new Competitive Procedure with Negotiation (CPN), which replaces the negotiated procedure with advertisement. Revised time scales and an enhanced role for the Prior Information Notice are intended to introduce efficiencies into the procurement process.
- CD is now available to utilities, as well as the negotiated procedure. The conditions which restrict use of CD and CPN in the public sector directive, do not apply to the utilities sector.
- The new Innovation Partnership is available to utilities and the public sector to help to provide a route to market for any “product, service or works” which is still at R&D stage.
- The concessions directive “procedural guarantee” process, allows negotiation of concessions contracts, if conditions aimed at guaranteeing genuine competition are fulfilled.

Best practice

Best practice guidance is now provided on managing preliminary market involvement (eg with incumbents or consultants who advise on the form a future procurement might take), and on how to identify and manage conflicts of interest.

Good procurement practice, such as lifecycle costing, developing award criteria which can be applied to variants as well as conforming bids, the structuring and awarding of lots to ensure that contract requirements are delivered, and ensuring confidentiality are now explicitly included in the new directives.

How we can help

Drafting objective change provisions is one of the areas which we see requiring earliest attention - the new “Pressetext” provisions are likely to govern post-implementation changes to pre-implementation contracts.

DLA Piper offices in Europe are working closely to analyse how each member state implements the directives, and in particular the timing for implementation - this is relevant for those who procure and tender contracts in different jurisdictions.

POQ documentation and award methodologies will require review, most importantly to accommodate revised exclusion and award criteria, and ultimately to prepare for rules on electronic communications (to be implemented 2018/19).

Bidders will be keen to analyse the new procurement procedures to assess potential changes to tendering strategy. Bidders with consultancy divisions may wish to put protocols in place to guard against participation in future contracts being prejudiced by pre-market scoping advice.

Once final texts are available, we will provide detailed summaries of each directive, and related webinar training. As ever, we welcome your feedback on the practical implications, as you see them, in helping your organisation to comply with the new rules.