

Procurement changes: double trouble or more 'bang for our buck'?



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THE procurement of public contracts in Scotland is now subject to two sets of new rules – one imposed as a result of EU Directives and another 'second layer' introduced by the Scottish Government.

The stated aim of the legislation is to make the public spend deliver wider social, economic and environmental benefits as well as providing better access for SMEs.

Will the two-tier system mean Scotland gets more 'bang for its buck' or does it spell double trouble for contracting authorities and tenderers seeking to navigate the rules and comply?

The remedies available to aggrieved tenderers where the contracting authority gets it wrong are broadly similar for the two pieces of legislation: awarded contracts can be set

aside or a Court can award damages. So what is new?

The EU Regulations:

- A number of procedural changes have been introduced, including shorter minimum time limits for procurement exercises, clarity on pre-market consultation and the introduction of the European Single Procurement Document (ESPD) which replaces the old

'sPQQ' and cannot be changed on a project by project basis.

- To improve access for SMEs, contracting authorities must consider breaking a contract into lots and give reasons for not doing so. Further, a contracting authority may opt to make payment direct to supply chain members but need not – so not the panacea to prompt payment the supply chain may have hoped for.

- Tenders must be awarded on the basis of the most economically advantageous tender and not the lowest price or cost.

The Scottish Act:

- In carrying out any 'regulated procurements' contracting authorities must comply with the sustainable procurement duty, which includes consideration of how a procurement can improve the economic, social and environmental well-being of an area; involve SMEs, third sector bodies and supported businesses; and promote innovation.

- Those contracting authorities with a 'significant procurement expenditure' (regulated procurements in any financial year aggregated to £5m+) must prepare and publish a procurement strategy following consultation with local stakeholders. The strategy must include the contracting authority's general policy on the use of community benefits and its approach to considering the fair work practices (including payment of the living minimum wage) of bidders. Will bidders find these strategies helpful in better responding to tenders?

- Including community benefit requirements must be considered for 'major projects' over £4m.

Excluding bidders

– both the EU Regulations and the Scottish Act contain broadly similar mandatory and discretionary grounds that can be applied to exclude a business from bidding for a public contract:

- There are new mandatory grounds including a failure to meet tax or social security obligations and where the bidder is in breach of the so-called 'Blacklisting Regulations'.

- There are other discretionary grounds for exclusion. One that may concern potential bidders is the right to exclude a bidder that "has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions".

Could suffering liquidated and ascertained damages for late completion on one project, mean exclusion from

Legislation	In force	Applies to
The Public Contracts (Scotland) Regulations 2015 ("the EU Regulations")	Substantially in force 18 April 2016	'above EU threshold' procurements - roughly £4.1m+ for works or £165k+ for services
The Procurement Reform (Scotland) Act 2014 ("the Scottish Act")	Substantially in force 18 April 2016	Introduces the concept of a 'regulated procurement' where rules apply to public contracts - £2m+ for works, £50k+ for services
There is accompanying statutory guidance which is mandatory for contracting authorities to follow		

bidding for another?

Divergence from the rest of the UK?

It is worthy of note that EU member states were afforded some discretion in certain areas when implementing the EU directive into national law.

The Scottish Govern-

ment has taken a different approach from Westminster in certain areas so there are now differences north and south of the border for 'above EU threshold' procurements.

Of course, the Scottish Act is only applicable to Scottish contracting authorities.