



The New EU procurement Rules

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Andrew Millross (Senior Associate)

Coverage

- Where we are now?
- Which RSL contracts are covered?
- Purchasing options - procedural options
- The consequences of getting it wrong

Where are we now?

- Progress since September 2004
- Public Contracts Regulations 2006
- OGC guidance
- Works, services, supplies distinction remains
- Minor changes to existing procedures
- New procurement methods

RSL contracts covered - works

- Works:
 - general building;
 - installation;
 - building completion
- Schedule 2 activity listing
- “Procuring” a “work”

RSL contracts covered - services & supplies

- Part A and B services
- Schedule 3 division into A and B services
- CPC codes and EU Guidance Note
- Supplies – CPV codes

RSL contracts covered - mixed contracts

- Installation is part of “supply”
- Supplies or services – greater value
- Part A or B services – greater value
- Works or services/supplies:
 - predominant purpose/main object
 - incidental

RSL contracts covered - thresholds

- Works: £3,611,319
- Services: £ 144,371
- Supplies: £ 144,371
- Net of VAT
- Next update 1 January 2008

RSL contracts covered - valuation and aggregation of works contracts

- Total amount payable
- Materials provided
- Other contracts for a “work”
- Portsmouth case

RSL contracts covered - valuation and aggregation of services & supplies contracts

- Value over contract life (max 4 years for services or hire)
- “Single requirement” – same type (same supplier test)
- “Spot purchasing” requirement over a 12 month period
- Hint:
 - value the contract;
 - then do the aggregation test.

RSL contract covered - Group structures

- “In-house” agreements
- Tighter rules for groups:
 - Teckal test:
 - “equivalent to control over departments”; and
 - “majority of business”
 - Stadt Halle – shareholding control
 - Parking Brixen – key decision-making control

RSL contracts covered – Land transfers and section 106 agreements

- Continuum between:
 - procuring a work; or
 - buying a completed building
- “Technical reasons” argument
- Draft as a land purchase
- Keep building and purchase obligations in the same agreement

RSL contracts covered - Partnering arrangements

- With Housing Corporation partner RSLs
 - who provides what to whom;
 - grant or contract;
 - services agreement for development services?
- With developers
 - same issues

RSL contracts covered - management arrangements

- Housing management is a Part A service
- Within Groups – Teckal
- Grant vs contract – supporting people

RSL contracts covered – Treaty requirements

- Equal treatment/non discrimination
- Mutual recognition
- Proportionality
- Transparency (advertising – Parking Brixen)

RSL contracts covered – Part B contracts requirements

- Treaty requirements
- Technical standards
- Specification
- Contract award notice
- Records

Purchasing options

- Individual procurement
- Framework agreement (existing or new)
- Central purchasing body
- Joint procurement/agency

Individual procurement - procedures

- Open procedure
 - use at any time – no prequalification
- Restricted procedure
 - use at any time
- Negotiated and competitive dialogue procedures
 - limited circumstances/complex procurements

Special procedures

Individual procurement - restricted procedure

- Contract notice
- PQQ and selection process
- ITT to tenderers (minimum 5)
- Tenders evaluated
- Notice of award to bidders and CAN
- Contract signature (after “Alcatel gap”)

Individual procurement - OJEU notices

- Prior information notice (optional)
- Contract notice
- Contract award notice
- Prescribed forms
- Complete on line

Individual procurement - pre-qualification

- Criteria listed in contract notice
- PQQ(?)
- Mandatory or discretionary ineligibility
- Economic and financial standing
- Technical or professional ability

Individual procurement - selection for tendering (restricted procedure)

- Objective and non-discriminatory criteria
- Listed in contract notice
- Minimum of 5 tenders
- “Sufficient to ensure genuine competition”

Individual procurement - award criteria

- Lowest price / MEAT
- Contracting authority sets criteria
- Weighting disclosed to bidders
- Social and environmental criteria

Purchasing options - framework agreements

- Meaning
- Single/multiple provider
- Supplier selection procedures
- Mini competitions (all providers)

Purchasing options - procurement consortia

- Purchasing “from” or “via”
- Effect
- Interface with framework agreements
- Risk
- Indemnity?



Purchasing options - joint purchasing/agency

- Advantages and disadvantages
- Constitutional issues
- Decision making
- Termination

Purchasing options - electronic purchasing (1)

- Dynamic purchasing system:
 - sort of “on-line framework agreement”
 - set up by open procedure
 - new tenderers can join before each call off
 - on-line tenders from all “admitted” to the system

Purchasing options - electronic purchasing(2)

- Electronic auctions:
 - following any standard procedure
 - bids must be quantifiable mathematically
 - bidders see their own rankings throughout the auction
- Electronic communications

Purchasing options - post contract award

- Contract award – Alcatel gap
- Contract award notice
- Completing the contract
- Early preparation for re-let

Challenges (1)

- Under the EU Procurement Regulations
- By the EU Commission (Article 226)
- Regulator (Housing Corporation)
- Funders or insurers

Challenges (2)

- Who can challenge
- Preconditions and time limits
- Effect
 - award set aside
 - damages

Alcatel gap

- Judicial review

Challenges (3) – by the European Commission

- Who can challenge?
- Procedure
 - Article 226 letter
 - Reasoned opinion
 - European Court of Justice Case
- Effect

Challenges (4) – by the Housing Corporation

- Regulatory Code
- Breach of law
- Breach of Capital Funding Guide conditions (clawback)

Challenge (5) – Funders & insurers

- Funders
 - breach of covenant
 - event of default
- Insurance
 - policy conditions
 - risk management

Challenges (6) – Starting again

- Concluded contract
- Retendering costs – both contracting authority & bidders
- Loss of market interest
- Increase in prices
- Costs of delay
 - security, maintenance and funding costs
 - opportunity cost of lost income