Guidance on Public Procurement for SMEs

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BSc, LL.M, PG.Dip.Law, PG.Dip.Adj, MCIPS, ACI Arb, ICIOB, GILEx

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About the author

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Connaught collapse raises legal fears over maintenance contracts. *Guardian*, September 2010.

Procurement in the credit crunch. *CES Construction Law Review*, 2011.

Below the belt. *Procurement & Outsourcing Journal*, July/August 2011.

One for me, none for you ... *Procurement & Outsourcing Journal*, September/October 2012.

Waiting for no man. *Procurement & Outsourcing Journal*, September/October 2013.

About this book

Small and medium-sized enterprises (SMEs) often struggle to grapple with the complexities of tendering for public sector work, and often find the processes both daunting and burdensome. By contrast, larger organisations will often have dedicated bidding teams that have the advantage of familiarity and experience with these processes.

The aim of this guide is to demystify what is involved in tendering for public sector work for SMEs, and to assist in opening the door to this stream of potential work.

What does Brexit mean for public sector procurement and EU law?

The EU treaty principles of free movement of workers and goods have for years underpinned the legal and economic relationship between the UK and other EU members. The same principles are at the heart of the rules governing public sector procurement. So what will happen to the principles given that it implements an EU directive?

The answer is going to depend on the terms of the UK's exit.

The Lisbon Treaty provides a five-point mechanism for exit in Article 50. It is untried, and there is much debate about how it will operate: in particular, how long it will take.

The UK is required to negotiate an exit framework with the European Council that is supposed to take 2 years. However, leading European Union law professor Michael Dougan commented:

The overwhelming consensus is that these things do not take 2 years to negotiate; the rough guide that we are all talking about in the field is around 10 years.

The treaty said that you have two years within which to make your divorce settlement. But the divorce settlement is completely separate from the

framework agreement for your future relations with the EU.

Though under different provisions, Switzerland signed its first framework agreement with the EU in 1972 and is still negotiating.

The potential terms of exit have been another hotly debated area. There are three obvious models. The Norway model allows the UK to remain a member of the European Economic Area (EEA), though as a non-member of the EU. It would permit full access to the single market in return for a financial contribution and such obligations as accepting the majority of EU laws.

Under the Switzerland model, the UK would be a member of the European Free Trade Association but not the EEA. Access to the EU market would be governed by series of bilateral agreements. This model also has obligations to make a financial contribution and accept EU laws, but to a lesser extent than under the Norway model.

Using the World Trade Organization (WTO) model, the UK would utilise its membership of the WTO to govern the basis of trade with the EU. The WTO favours transparent and competitive tendering for public contracts through a regime that mirrors that of the EU.

Whether the divorce terms follow one of the above models, another or a hybrid, there seems a strong likelihood that the deal will exert outside influence on having public sector procurement rules that are at least similar to the current ones, since that would align with the requirements of the EEA, the WTO or whichever organisation alliances are made through.

The only thing that seems broadly agreed on is that things will take time. Even if the framework agreement can be concluded in 2 years, it is doubtful that the first thing the government will want to change is public sector procurement, and there seems to be little political pressure in that direction.

On top of that, we should remember that the UK procurement regulations go some way beyond the minimum required by the EU and added a new level of requirements. That would seem to suggest that the UK government is not only aligned with the EU public sector procurement regime but seeks to take the same principles further.

When all this is taken into account, I do not anticipate any significant change in public sector procurement or UK law that has been influenced by the EU in the coming few years.

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	process or aspect of it operating in accordance with the procurement law.
Contract	A contract is an agreement giving rise to obligations that are enforced or recognised by law.
Contracting authority	Procurement law terminology for public sector buyers. The definition is wide and includes central government, local authorities, associations formed by one or more contracting authorities and other ‘bodies governed by public law’ (e.g. universities and housing associations).
Contractor	Typically the party providing the works, services or supplies under a contract, especially in construction-related contracts.
Contracts Finder	A new, free-to-use, web portal for the UK on which the majority of contract opportunities must be advertised.
Common Procurement Vocabulary (CPV) codes	A system of categorising types of works, services and supplies for the purposes of advertising aspects of the procurement in the <i>Official Journal of the European Union</i> .
E-procurement	E-procurement involves the online conduct of procurement processes. This is the base standard nowadays.
Economic operator	An EU procurement law term for a party, whether an individual, a corporation or otherwise, providing works, goods and/or services.
Expression of interest	The means of an economic operator registering a potential willingness to engage in a procurement process with a view to potentially being awarded a contract.
Feedback	A form of debriefing on an economic operator’s scores in pre-qualification or tender marking. There are strict legal requirements about what level of information should be given and when.
Invitation to tender	Also known as a ‘call for tenders’, this is a document setting out what is required from an economic operator from whom a bid is sought. Typically, it will include questions about quality and price to allow the contracting authority to assess and score

	<p>the tender. This, or one of the other procurement documents, should also identify the rules of the competition, such as deadlines for submissions and limitations on what can be submitted. Any guidance on how marks will be allocated should be followed strictly by the contracting authority when it is assessing the tender, and it may not award marks where it was not disclosed that they would be given.</p>
Joint venture	<p>An agreement through which two or more economic operators may join forces to tender. Joint ventures are often used to achieve the standards required in cases where one of the economic operators cannot do so alone. Contracting authorities are prohibited from requiring that joint ventures take a particular form (e.g. being incorporated).</p>
Life-cycle costing	<p>A procurement evaluation technique which determines the total cost over the lifespan of something. It can be assessed using a combination of factors such as the cost of acquisition, operation, maintaining and disposal. It is useful for understanding total cost, and can differentiate between, for example, the total cost over 10 years of a building, photocopier or otherwise that is cheap to buy but expensive to run, from a more expensive purchase that will actually save money in the long term due to efficient operating costs.</p>
Lump sum	<p>A lump sum contract is the traditional means of procuring construction, and still the most common form of construction contract. Under a lump sum contract, a single ‘lump sum’ price for all of the works is agreed before the works begin; as opposed to, for example, a remeasurable contract under which the total contract sum is determined at the end by reference to pre-agreed unit rates. It is also a popular pricing model in public sector procurement, partly due to the ease of comparing one tender against another.</p>
Most economically advantageous tender (MEAT)	<p>This is a means of assessing tenders that takes account of factors other than just acquisition cost. For example, a contracting authority might take account of criteria that reflect qualitative, technical and</p>

	sustainable aspects of the tender submission, as well as price, when reaching an award decision.
<i>Official Journal of the European Union (OJEU)</i>	An awarding authority will publish a notice, referring to its invitation to tender and the prospective project, in the OJEU (pronounced 'oh ju').
Pre-qualification	Pre-qualification describes the evaluation of potential bidders, before tenders are invited, against a list of criteria to ensure that only economic operators that meet defined standards are eligible to bid.
Pre-qualification questionnaire (PQQ)	The initial questionnaire that is used when seeking information about an economic operator.
Public Contracts Regulations 2015 (PCR 2015)	The UK's implementation of the PCR 2015 took effect on 26 February 2015, concluding the transposition process, led by the Crown Commercial Service, of the EU Public Sector Directive 2014/24/EU into domestic law. The purpose of PCR 2015 is to govern the purchasing of supplies, services or works for central government, non-ministerial departments, executive agencies and non-departmental public bodies, all of which must follow procedures laid down in the Public Contracts Directive before awarding a contract to an economic operator.
Request for information	A market enquiry prepared by the buyer and issued to one or more prospective suppliers. The purpose is to gather information about the category, the supplier's solutions, capacity and/or capability, and key market intelligence.
Small or medium-sized enterprise (SME)	The European Commission defines SMEs as businesses with a headcount below 250.
Standstill period	This provides for a short (at least 10 calendar days) pause between the point when the contract-award decision is notified to tenderers and the final contract conclusion, during which time suppliers can challenge the decision. It is a legal requirement imposed through EU directives.

Tenders Electronic Daily (TED)	This is the supplement to the <i>Official Journal of the European Union</i> dedicated to European public procurement. It gives information on public procurement contracts, according to the EU rules on public procurement, of notices published in EU member states, the European Economic Area and beyond.
Terms and conditions	These are usually used to refer to contractual terms, often standardised, that will govern a commercial agreement.
Threshold	European directives and UK regulations set out detailed procedures for contracts, the value of which equals or exceeds various financial thresholds. These thresholds are set in euros, and every 2 years the European Commission publishes the equivalent values in pounds sterling.
Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)	These can have the effect of a new party having to take over a previous employment contract when a contract is won. For example, if party A has been providing catering services to a council canteen and when the contract is near its end party B wins the procurement process for the new contract the TUPE may require that B takes on the existing staff on the existing terms of employment.