

Workshop 3a:

All you need to know about the new EU Procurement Directive and the changes to the TUPE rules

Speaker Andrew Millross, Anthony Collins Solicitors
Chaired by Alex Dixon
Room Blenheim Room



National Housing Maintenance Forum

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New EU Directive and TUPE changes

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Andrew Millross, Partner
Anthony Collins
solicitors

Coverage

'W' questions	Key changes
What is it?	Application of the rules
Why are they doing it?	Group structures
Who is implementing it?	Development Agreements
When will it hit us?	Variations
Where can I find out more?	Procedures
and	Competitive procedure with negotiation
What's happening (and not happening) on TUPE?	Innovation partnership
	New "Part B" – health and social services
	Single aggregated procurement
	Lots, prequalification and selection
	On-line tendering
	Compulsory e-procurement
	Availability of procurement documents
	Centralised and on-line purchasing
	Social and environmental considerations

What is it?

3 new Directives:

- Public procurement – "Classical Directive"
- Utilities
- Concessions – new Directive

Will need to be transposed into UK law by new Public Contracts Regulations

"Write across" drafting approach
It's happening now!

"The basic principles of the EU Treaty have not changed so contracts still have to be competed and awarded transparently and without discrimination"

Cabinet Office
PPN 5/13

Why?

Deliver "Europe 2020" strategy

- better efficiency and VfM
- simplification
- flexibilisation

Easier support of common societal goals

- environmental
- climate change
- innovation

Part of the process of moving to:

"competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion"

Lisbon Strategy 2000

When and who

Current position on Directives

- passed by European Parliament 15th January 2014
- come into force 20 days after publication in OJEU

Implementation period

- Two years for most of the Directive
- 54 months for compulsory e-tendering

Cabinet Office "early implementation" PPN5/13

Whole raft of consultation papers issued before and after Christmas

"Cabinet Office is preparing ambitious plans for early transposition so the UK can take advantage of the additional flexibilities in the new rules as soon as possible"

Where to find out more

“Classical Directive” – 15 January 2014 text

- <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=20140115&secondRef=TOC&language=EN>
- Minor changes (including Article number) from 12 July 2013 version

Procurement Policy Note 05/13 “Further Progress update”

<https://www.gov.uk/government/publications/procurement-policy-note-0513-modernising-eu-procurement-rules>

Key changes

Coverage – Groups, Development, Variations

Procedures, Part B, Single PIN

Limits on Lots

Prequalification and selection

E- tendering

Sustainability

Coverage - Group structures (Art 12)

Contracts for works/services provided by parent also exempt from tendering

Joint control exemption

- VAT cost sharing groups/shared services

Codification may lead to greater focus

- so check group structures now

Beware “20% test” for DLO

- greater freedom to work for third parties if DLO is part of the provider

Public sector co-operation (Hamburg waste)

“Teckal” test codified

“Control test”
parent controls strategic objectives and significant decisions of subsidiary

“Activities Test”
80% of activities for parent authority

“Capital Test”
no private capital in subsidiary

Coverage – Development Agreements (Arts 2 & 10)

“Pure land transactions” exempt

Issues since *Roanne* about works obligations in Development Agreements

Helmut Muller and subsequent cases reduced concern

Definition of a “public works contract” still unclear in Directive

What is a “decisive influence”

- does it include a “right of veto” over Spec changes
- or does it apply only if you can insist on the Developer making changes?

Works contract includes a contract for :

“the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work” (Art 2(6))

Variations (Art 72)

Permitted where variation:

- is provided for in contract “in clear precise and unequivocal review clauses... stating the scope and nature of possible modifications or options and the conditions under which they may be used” - may not “alter the overall nature of the contract”
- is a new contractor “following corporate restructuring including takeover, merger, acquisition or insolvency” including “step-in” to subcontracts
- has a value below both
 - applicable EU tendering threshold; and
 - 10% of initial contract value for services/supplies or 15% of original contract value for works (plus inflation, if contract includes an inflation clauses) – value assessed cumulatively
- is not “substantial” within Presetext (see box)

“Substantial” changes – Presetext

Changed contract would have attracted other tenderers or changed the tender result

Variation changes the economic balance of the contract in favour of the contractor in a way not provided for

“Considerable” extension to scope

New contractor (other than as left)

Procedures (Arts 26 & 29-31) – CPN, CD & IP

Competitive procedure with negotiation (CPN) and competitive dialogue (CD) both available where

- requirements “cannot be met without the adaption of readily available solutions”
- contract “includes design or innovative solutions”; or
- contract cannot be awarded without negotiations eg on “legal or financial make-up”

Innovation partnership

- covers initial product development and subsequent purchases
- tendered procedure – similar to CPN

Part A & B Services (Art 74)

Light touch regime for

- health and social services
- legal services
- educational services (but not training)

Threshold EUR 750 000 (Approx £630K)

Must

- publish OJEU contract notice and CAN
- comply with Treaty obligations (transparency, equal treatment etc)

“Other services” residual category

- eg grounds maintenance
- will be fully regulated

Contracts now subject to “full” tendering regime

- Grounds maintenance
- Agency staff (other than in care or health sectors)
- Rail transport

Single aggregated procurement (Art 48)

PIN

- lists a number of procurements over next 12 months
- submitted 35 days before first procurement
- potential bidders “express interest”
- applies only to restricted and competitive procedure with negotiation

At start of each procurement

- each bidder that has “expressed an interest” is sent a “notice to confirm interest”

BUT – can you forecast your 12 month procurement programme?

Lots and contract limits (Art 46)

Will be able to limit the number of Lots a tenderer

- can bid for, and/or
- can win

Number must be stated in OJEU notice

“Divide or explain”

- must justify decision not to break down contracts into separate lots
- justification set out in the procurement documents

Current system

- no authority to reject winner on MEAT criteria because of exceeding “lots allowance”
- “risk factor” as an award criterion – no express authority for this

Prequalification/selection (Arts 56-65)

Terminology changes

- Art 58 “selection criteria” – to prequalify “suitable” bidders
- Art 65 can limit the number of bidders “meeting the selection criteria” that are invited to tender

Self – declaration

- in “European Single Procurement Document”
- standard form from Commission
- can include link to website for accounts etc
- checked just before contract award
- but what if incorrect - challenge risk

National database

Prequalification – new exclusion grounds (Art 57)

Can exclude for

- “sufficiently plausible” indication of collusion/ attempt to unduly influence process / obtain confidential information
- conflict of interest/prior involvement that “cannot effectively be remedied by less intrusive measures”
- “significant or persistent deficiencies in the performance of a prior public contract ... resulting in early termination, damages or comparable sanctions”
- violations of environmental or employment legislation

“Self-cleansing” provisions

- involves “active collaboration” and payment of compensation
- for other “offences or misconduct” measures required to “self-cleanse” depend on gravity and circumstances
- default exclusion period of 5 years without “self-cleansing”

Conflicts of interest (Art 21)

- financial, economic or personal interest of procurement team (including consultants)
- that might be perceived to compromise their independence or impartiality

Prior involvement

- “appropriate measures”
- communication of information
- adequate time limits
- exclude only where “no other means” to ensure compliance

“Selection” - financial (Art 56, 58 & Annex XII)

Economic and financial standing information limited to

- bank reference & insurance details
- published accounts
- turnover statement

Can still rely on group companies

Impact

- no use of credit reference agencies?
- greater contractor insolvency risk
- consider appropriate protections (performance bond, payment in arrears, retention) to reduce impact of insolvency

Financial

Annual turnover no more than 2 times contract value unless “special risks”

Minimum turnover in “area” (of work) covered by the contract
Can be higher for multiple lots

Financial ratios

Minimum insurances

“Selection”– technical (Arts 56, 58 & Annex XII)

References

- can use only to establish a “sufficient level of experience”, which is
- demonstrated by “suitable” references

Contractor’s staff qualifications

- can be considered at either “selection” or award but not both

Limit on information that can be required to “prove selection criteria” are met – (Art 60)

Technical ability

- List of previous contracts
- 5 years works “certificates of satisfactory execution”
- 3 years services / supplies

Technicians, technical facilities and workforce & managerial staff

Supply chain management & tracking systems (new)

Environmental management

Quality assurance certificates

Limiting the number of tenderers (Art 65)

Must state in OJEU notice

- minimum and (“where appropriate”) maximum number of tenderers; and
- “objective and non-discriminatory criteria or rules” to be applied to select tenderers

Not limited to financial strength or technical ability

Link to “subject matter of the contract” might be implied by future case law

So don’t throw out the PQQs yet – but they may need to be renamed

Major move to electronic tendering (Arts 22 & 53)

Compulsory e-tendering & communications

- limited exceptions (eg physical designs)
- extended implementation period (54 months) – but consultation whether to implement sooner
- must document verbal communications impacting on tender submission or evaluation
- data integrity requirements (eg no access to tenders until after deadline)

Availability of procurement documents,
“Contracting authorities shall by electronic means offer unrestricted and full direct access to the procurement documents from the date of publication of the OJEU notice” - Art 53(1)

- meaning?
- only limited exceptions

Procurement documents”

- Specification
- Contract conditions
- Payment mechanism/cost model
- ITT and supporting documents
- OJEU notice & PQQ

Collective/electronic purchasing (Art, 34, 36 & 37)

Dynamic purchasing system (Art 34)

- notice to suppliers on the DPS replaces need for OJEU notice on each purchase

Electronic catalogues (Art 36)

- still require “adequate” notice to suppliers to “update catalogue” before each call-off
- suppliers can choose not to participate in individual tenders

Buying clubs (Art 37)

- contract with buying club not subject to OJEU
- all buying club purchasing must be electronic (from implementation)

DPS

- Procured through restricted procedure
- 10 days for first ITT
- 10 working days to assess new suppliers
- Suppliers cannot be charged for participating

Sustainability (1) (Arts 42 & 43)

Technical specifications (Art 42)

- can include “method of production” provided linked to subject matter of contract and proportionate to its value and objectives eg “wood from managed forests”
- must include accessibility criteria for people with disabilities

Labels (Art 43)

- environmental, social or other characteristics eg “fair trade” – label is the “means of proof”
- must be objectively and independently verified
- must accept “equivalent labels”
- must be “linked to subject matter of contract”

Sustainability (2) (Arts 67 & 70)

Award Criteria (Art 66)

- can include “qualitative, environmental and/or social aspects” provided “linked to the subject matter of the contract”
- “linked to the subject matter of the contract” = related to works, services or supplies to be provided - at any stage of their lifecycle (including production) – but applies only to award criteria

Contract performance conditions (Art 70)

- can include “environmental, social or employment-related considerations”
- must still be “linked to the subject matter of the contract”

Other changes

Soft market testing specifically permitted

Some reductions to tender periods

- eg restricted procedure now 30 days for tenders

Award criteria

- MEAT can now be lowest price or cost – lifecycle costing
- Government consulting on banning "lowest price"
- can consider "organisation, qualification and experience of staff assigned to the contract"

Direct payment of subcontractors (subject to national law)

Short term "spin outs" to local authority mutuals

Abolition of "statistical return"

Commitment to review thresholds

TUPE changes – application

Service provision changes

- abolition not going ahead now
- restriction to where activities carried on are "fundamentally or essentially the same" as those carried on before the change

Redundancies

- can now start redundancy consultation (for 20 or more redundancies) pre-transfer if transferor and transferee agree

Dismissals

- "automatically unfair" now only if the reason is "the transfer"
- BUT - can make it fair if dismissal is for an ETO reason (economic technical or organisational reason entailing changes in the workforce)
- automatic unfairness for "reason related to the transfer" – repealed

The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 SI 2014/16

Effective from 31st January 2014

TUPE – terms & process

Changes to terms

- automatically unfair now only if the reason is "the transfer"
- can make the change fair if it is made for an ETO reason; or permitted by the employment contract
- automatic unfairness for "reason related to the transfer" – repealed
- changes in place of employment can be an ETO reason

Collective agreements

- "static approach" confirmed
- can renegotiate after 12 months provided revisions are "no less favourable"

Process

Employee liability information

- must now be provided 28 days before transfer
- still doesn't help with tendering
- express provisions still required

Consultation

Can be with employees direct (rather than appointing employee reps) for employers with less than 10 employees

Questions

Free e-briefings:

www.anthonycollings.com/news-and-events/briefings.aspx

Advice:

andrew.millross@anthonycollings.com
0121 212 7473

Anthony Collins
solicitors