The Government Procurement Review

Second Edition

Editors
Jonathan Davey and James Falle

Law Business Research

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EDITORS' PREFACE

We are delighted to introduce this, the second edition of *The Government Procurement Review*. It brings even wider geographic coverage than the first edition, now covering six continents and 24 national chapters (including the EU chapter).

The political and economic significance of government procurement is plain. Government contracts are of considerable value and importance, often accounting for 10 to 20 per cent of GDP in any given state. Government spending is often high profile and has the capacity to shape the future lives of local residents.

While the economic climate has improved since we wrote the preface to the first edition, we are far from seeing a return to the boom years. In light of the economic climate, it is perhaps no surprise then that governments seek to demonstrate more effective, better value purchasing; nor that many suppliers view government contracts as a much-needed revenue stream with the relative certainty that they will be paid.

While economic downturns have in the past coincided with protectionist national measures, we are heartened to see some notable examples of free trade-oriented policy-making in the past year. In particular, the World Trade Organization's revised Agreement on Government Procurement (GPA) came into force on 6 April 2014, having received the requisite number of ratifications. With the new GPA, it is estimated that there will be new procurement opportunities worth US$80-US$100 billion per year for firms from other GPA states.

At the same time, 10 additional states are in negotiation with a view to accession to the GPA, including China, Ukraine and New Zealand. In addition to the pluralistic GPA, there is an increasing number of bilateral trade agreements covering procurement.

This is not to say that firms looking to supply foreign governments necessarily always enjoy perfect equality when bidding for contracts. We should mention that there are also potential new, protectionist clouds on the procurement horizon: in January 2014, the European Parliament approved measures that will prevent firms from bidding for larger public contracts unless their home country allows reciprocal access to EU firms. While the European Parliament views the measure as encouraging third countries to reciprocate in

opening markets, some fear it will have the opposite effect, provoking trade wars. We very much hope that the proposed EU measures do not have such a nefarious outcome.

Regardless of these possible difficulties, we expect that the principles of transparency, value for money and objectivity enshrined in the UNCITRAL Model Law on Public Procurement and in the national legislation of many states will continue gradually to have a positive effect. This will particularly be the case where international agreements (be it the GPA or bilateral treaties) offer equal access.

One sometimes overlooked beneficial side effect of transparency and objectivity is that opportunities for local suppliers may be opened up where previously they have struggled to compete with incumbent providers for new contracting opportunities. This in turn can drive value for money for the taxpaying public.

Some national authors have reported significant increases in challenges to contract award decisions. While it is clear that there are considerable variations between jurisdictions in the willingness or ability of suppliers to challenge, it seems to us that the increased risk of challenge can help hold awarding authorities to account and is likely to encourage greater compliance with national procurement rules.

When reading chapters regarding European Union Member States, it is worth remembering that the underlying rules are set at EU level. Readers may find it helpful to refer to both the European Union chapter and the relevant national chapter, to gain a fuller understanding of the relevant issues. As far as possible, the authors have sought to avoid duplication between the EU chapter and national chapters.

Finally, we wish to take this opportunity to acknowledge the tremendous efforts of the many contributors to the second edition as well as the tireless work of the publishers in ensuring a quality product is brought to your bookshelves in a timely fashion. We hope you will agree that it is even better than the first edition, and we trust you will find it to be a valued resource.

Jonathan Davey, Addleshaw Goddard LLP • James Falle, Solicitor (England & Wales)
London
May 2014

Chapter 6

EUROPEAN UNION

James Falle and Clare Dwyer[1]

I INTRODUCTION

Within the EU, the total value of invitations to tender for public and utilities contracts is an estimated €447 billion.[2]

EU procurement law is set out in three principal directives, namely the Public Sector Directive, the Utilities Directive and the Defence Directive.[3] Additionally, the Public Sector Remedies Directive and the Utilities Remedies Directive[4] set out the remedies available to complainants. The remedies rules for defence are written into the Defence Directive. In this chapter, 'Directives' means all five of these procurement directives.

On 17 April 2014, three new directives came into force (New Directives). Member States must transpose these into national law within two years. This means that for a transitional period, the Directives referenced in the previous paragraph continue to be in force. The New Directives, which will come into force at different times in different jurisdictions depending on when the national implementing measures are adopted, are

1 James Falle is a solicitor in England and Wales. Clare Dwyer is a legal director at Addleshaw Goddard LLP.

2 Commission Staff Working Document: Annual Public Procurement Implementation Review 2012 (SWD (2012) 342 final), p. 6. These figures relate only to the value of invitations to tender in 2010 for contracts above the relevant financial thresholds. As such, total government purchasing will be higher than this figure.

3 Directive 2004/18/EC, Directive 2004/17/EC and Directive 2009/81/EC respectively.

4 Council Directive 89/665/EEC (as amended by Directive 92/50/EEC and Directive 2007/55/EC) and Council Directive 92/13/EEC (as amended by Directive 2006/97/EC and 2007/66/EC) respectively.

the New Public Sector Directive, the New Utilities Directive and the New Concession Contracts Directive.[5]

While the New Concession Contracts Directive sets down substantive regulation for all types of concession contracts for the first time, the other New Directives replace the corresponding existing Directives. In this chapter, references to the Directives are to the Directives in force before 17 April 2014; we refer to the New Directives only where there are significant changes.

Overriding principles of EU law, referred to as the 'Treaty principles', have been developed by the Court of Justice of the European Union (CJEU) on the basis of freedoms in the Treaties. These principles include free movement of goods and services within the EU, freedom of establishment, non-discrimination on grounds of nationality, equal treatment, transparency, proportionality (i.e., fairness) and mutual recognition.

EU directives require the Member States to adopt national legislation transposing them into national law. Nevertheless, the national courts must interpret the national legislation insofar as it is possible in accordance with the Directives.[6] If national rules do not properly implement the Directives, then the national courts are required to directly apply the directive as against the state.[7]

The EU is a signatory to the Agreement on Government Procurement (GPA) adopted under the auspices of the World Trade Organization. As such, economic operators from the GPA states benefit from most of the provisions set out in the Directives (and, therefore, national laws derived from them).

Additionally, the EU has entered into various free trade agreements, so economic operators from certain other countries also benefit from the Directives.

The European Commission is the 'guardian of the Treaties'. As such, it adopts guidance on procurement law (often by way of non-binding communications or notices). It initiates changes to the Directives. It can also take enforcement action against Member States that are in breach of the Directives or Treaty obligations.[8]

Rules similar to the Directives apply to purchasing by the institutions of the EU such as the Commission, the Council and the Court of Justice. This chapter does not further consider those special rules.

II YEAR IN REVIEW

The most noteworthy development in EU procurement in 2013/2014 is undoubtedly the adoption of the New Directives. In the authors' view, the New Utilities Directive and the New Public Sector Directive do not radically alter the law, although they will bring about many small changes to procurement practice. A stated aim of the New Directives is to simplify procurement, but practitioners would be forgiven for questioning whether

5 Directives 2014/24/EU, 2014/25/EU and 2014/23/EU respectively.

6 C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentacion SA*.

7 C-91/92 *Paula Faccini Dori v. Recreb Srl*.

8 Articles 258 and 260 TFEU and remedies directives (e.g., Article 3 of the Public Sector Remedies Directive).

this aim has really been achieved, particularly given that the new texts are around 30 per cent longer than those they replace.

Many more contracts will now be more fully regulated with the arrival of the New Concession Contracts Directive and the abolition of the Annex II.B services carve-out.

Meanwhile, case law has provided some important clarity as a result of a series of CJEU judgments about the extent to which authorities may provide each other with services without a competitive process.[9] More cases are expected in 2014[10] and, combined with codification in the New Directives, authorities will have far greater clarity about their rights and obligations in this area in the near future.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The Directives regulate most public sector entities as well as a significant number of privately owned utility companies. For convenience, we refer to all such entities as 'authorities'.

The Public Sector Directive applies to most public law bodies,[11] and includes any bodies that:

a have a separate legal personality;

b are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; and

c are more than 50 per cent funded, managed or controlled by other public sector authorities.[12]

Private operators may in limited circumstances have to procure in accordance with the Public Sector Directive, for example, where they award certain works contracts that are more than 50 per cent subsidised by contracting authorities,[13] in which case the contracting authorities are obliged to secure compliance.

The Utilities Directive applies to contracts for utilities activities awarded by entities regulated by the Public Sector Directive plus entities operating on the basis of special or exclusive rights.[14]

Where a utilities market is directly exposed to competition, Member States may apply to the Commission for a derogation from the Utilities Directive for firms operating on the basis of special or exclusive rights.[15] Derogations have been granted to a number of Member States in respect of postal services, electricity, oil and gas, for example.

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9 For example, C-386/11 *PiepenBrock Dienstleistungen GmbH & Co KG v. Kreis Duren*.

10 For example, C-15/13 *Datenlotsen Informationssysteme GmbH v. Technische Universität Hamburg-Harburg*.

11 Annex III of the Public Sector Directive contains a non-exhaustive list of regulated bodies.

12 Article 1(9).

13 Article 8.

14 Article 2.

15 Article 30.

The Defence Directive applies to defence and security contracts awarded by entities governed by the Utilities Directive and the Public Sector Directive.

ii Regulated contracts

Generally, contracts for construction of works, supply of goods and provision of services awarded by authorities are subject to the Directives if they are above the specified minimum financial thresholds:[16]

Goods, services, design	Public Sector Directive	€134,000 (central government authorities listed in Annex IV*) or €207,000 (all other authorities)
Goods, services, design	Defence Directive, Utilities Directive	€414,000
Works	All Directives	€5.186 million
* Except for Annex II.B services and certain subsidised service contracts, telecom services and research and development (R&D) services, where the threshold is €207,000.		

Anti-avoidance rules prevent artificial splitting of contracts to bypass the Directives.[17]

Contracts for certain services (referred to as Annex II.B services) are currently only regulated to a very limited extent and, in particular, the obligation to publish a contract notice in the Official Journal of the European Union (OJEU) does not apply to hotel and restaurant services, certain transport services, legal services, personnel placement, investigation and security services, education, health and social services, recreational services, or cultural and sporting services.[18]

Some types of contract are not regulated by the Directives, such as contracts for:

a the acquisition or rental of land;[19]
b service concessions[20] (but the Directives do apply to works concessions);
c employment;[21]
d certain research and development services;[22] and
e certain financial services.[23]

There have been a number of recent CJEU cases deciding whether a transaction was properly classified as an (unregulated) land agreement or a (regulated) works contract.[24] Often, the distinction turns on whether the economic operator is obliged to undertake the works or whether, while the parties envisage certain works being carried out, the

16 See Commission Regulation (EU) No. 1336/2013, 13 December 2013.
17 For example, Public Sector Directive, Article 9.
18 Public Sector Directive, Annex II B. Utilities Directive, Annex XVII B. Some (but not all) of these services are also subject to lighter regulation under the Defence Directive, Annex II.
19 For example, Public Sector Directive, Article 16(a).
20 For example, Public Sector Directive, Article 17.
21 For example, Public Sector Directive, Article 16(c).
22 For example, Public Sector Directive, Article 16(f).
23 For example, Public Sector Directive, Article 16(d).
24 For example, C-220/05 *Jean Auroux and others v. Commune of Roanne*.

economic operator is at liberty to construct something different or to leave the land undeveloped.[25]

The New Directives make some important changes. All types of concession contracts (both works and services) are regulated by the New Concession Contracts Directive. Additionally, while the very lightly regulated category of Annex II.B services has been removed, this has largely been replaced by a more heavily (but not fully) regulated category of 'social and other services'.[26]

Under the New Directives, the following additional thresholds will apply:

Works concessions, service concessions	New Concession Contracts Directive	€5,186 million
Social and other services	New Public Sector Directive	€750,000
Social and other services	New Utilities Directive	€1 million

In some cases, authorities may negotiate contracts with economic operators without prior advertisement;[27] for example, in the case of extreme urgency, following a failed procurement process or where, for technical reasons, the contract may be awarded only to a particular economic operator. These exceptions are narrowly construed. Many of the infraction proceedings brought by the Commission against Member States relate to the misuse of these exceptions.[28]

Where a public contract is materially amended, this may amount to a completely new contract, which the authority must competitively tender under the Directives.[29] In exceptional cases, changes to the identity of a nominated subcontractor may trigger this re-procurement obligation, even where the contract allows changes.[30]

Where the Directives do not apply, some form of advertisement is generally required if there may be a certain cross-border interest in the resulting contract.[31] This rule will become less significant as fewer procurements will be outwith the scope of the New Directives.

The Utilities Directive applies to the regulated activities listed in Annexes I to X in the fields of gas, heat and electricity, water, transport services, postal services, ports and airports, and exploration for or extraction of oil, gas, coal and other solid fuels. A utility's

25 C-451/08 *Helmut Muller GmbH v. Bundesanstalt für Immobilienaufgaben*.

26 For example, Articles 74 to 77 New Public Sector Directive. Some former Annex II.B services will now be fully regulated.

27 For example, Public Sector Directive, Article 31.

28 See *Procurement Implementation Review* (1st edition) 2012, p. 29.

29 C-454/06 *pressetext Nachrichtenagentur GmbH v. Austri*a. The New Directives codify and amplify the case law: e.g., the New Public Sector Directive, Article 72.

30 C-91/08 *Wall AG v. Stadt Frankfurt-am-Main*, Paragraph 39.

31 See C-324/98, *Telaustria Verlags GmbH v. Telekom Austria AG*, Paragraph 62 and Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provision of the Public Procurement Directives, OJEU 2006 C 179/02.

other activities are unregulated unless the utility is also a contracting authority for the purposes of the Public Sector Directive.[32]

The Defence Directive applies to contracts for military equipment and equipment, works or services involving, requiring or containing classified information. Where it applies, neither the Utilities Directive nor the Public Sector Directive apply. The most sensitive defence contracts may still be awarded outside the scope of the Defence Directive.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

The Directives permit (but do not require) Member States to adopt certain rules aimed at reducing the burden on authorities when awarding contracts. These include permitting:

a framework agreements (Defence Directive,[33] Public Sector Directive[34]);

b purchasing through or from central purchasing bodies (all Directives[35]);

c dynamic purchasing systems (DPS) (Utilities Directive,[36] Public Sector Directive[37]); and

d official lists of approved economic operators (Defence Directive,[38] Public Sector Directive[39]).

The Utilities Directive permits all utilities to use framework agreements[40] and qualification systems.[41]

Framework agreements are widely used and account for one-seventh of advertised opportunities published in the OJEU. They are most popular with utilities and national or federal agencies.[42]

Authorities must not use framework agreements or DPS improperly to prevent, restrict or distort competition. DPS may not last longer than four years. Framework agreements may not last longer than four years (public sector) or seven years (defence). There is currently no express restriction on the duration of frameworks for utilities, but the New Utilities Directive will restrict the duration to a maximum of eight years.

In defence and the public sector, framework agreements may be concluded with a single supplier or with multiple suppliers. When calling off from a multi-supplier

32 C-393/06 *Ing Aigner, Wasser-Wärme-Umwelt GmbH v. Fernwärme Wein GmbH*, Paragraph 59.

33 Article 29.

34 Article 32.

35 For example, Public Sector Directive, Article 11.

36 Article 15.

37 Article 33.

38 Article 46.

39 Article 52.

40 Article 14.

41 Article 53.

42 *Procurement Implementation Review* (1st edition) 2012, p. 26.

framework, the authority either runs a 'mini-competition' to award each call-off contract or awards a call-off contract directly based on the terms of the framework agreement.

For utilities, the rules on framework agreements are less prescriptive, but utilities must still act transparently and in a non-discriminatory manner when setting up and calling off from framework agreements.

Central purchasing bodies must be contracting authorities as defined by the Public Sector Directive.

If registered on an official list of approved economic operators, economic operators need only provide a certificate showing registration. However, economic operators from other states cannot be required to be registered as a condition of tendering.

In practice, DPS do not seem to be widely used.

ii Joint ventures

In principle, the setting up of a joint venture (whether public-public or public-private) is not of itself subject to the Directives. However, if the joint venture is to supply goods, works or services to the authority or to other authorities, then the Directives become relevant.

A Commission Interpretative Communication[43] makes clear that it is not necessary for the authority to undertake a double tendering procedure first to select the private partner to the institutionalised public-private partnership (IPPP) and second to award a contract to the IPPP or joint venture; however, there must be a fair and transparent procedure for one of these two stages. The Commission recommends that authorities should simultaneously advertise the selection of the joint venture partner and award of a contract to the joint venture.[44]

Contracts between authorities are in principle subject to the Directives. There are certain exceptions, although these all prohibit private participation or shareholdings.[45]

The Utilities Regulations have separate rules on joint ventures between utilities and on intragroup supplies.[46]

V THE BIDDING PROCESS

i Notice

Most procurement processes are formally commenced by publication of a contract notice.

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43 Commission Interpretative Communication on the application of Community law on Public Procurement and Concessions to Institutionalised PPP (IPPP), C (2007) 6661 (5 February 2008).

44 Paragraph 2.2.

45 C-107/98 *Teckal Srl v. Comune di Viano*, C-324/07 *Coditel Brabant v. Commune d'Uccle*, Hamburg Waste (C-480/06 *Commission v. Germany*) and Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities (public-public cooperation), SEC (2011) 1169 final. This case law is codified and amplified under the New Public Sector Directive, Article 12.

46 Article 23.

All official notices under the Directives must be sent for publication in the OJEU, which is accessible free of charge at Tenders Electronic Daily.[47] Apart from contract notices, the following are published in the OJEU:

a prior information notices, which may be used to announce future requirements. In some cases, utilities can use these in lieu of a contract notice;[48]

b contract award notices, which are published within 48 days following the award of a contract under the Directives; and

c voluntary *ex ante* transparency notices, which may be published at least 10 days before entering into a contract where a contract notice was not published. These voluntary notices, if published, must give the justification for not having published a contract notice (e.g., because the contract is considered to be a land transaction).

ii Procedures

The Directives envisage various contract award procedures:

a open procedure:[49] a one-stage process where bidders must show their good standing and their tender proposals in a single bidding round;

b restricted procedure:[50] a two-stage process where, based on financial standing, qualification and past experience, at least five bidders are shortlisted to tender;

c competitive dialogue procedure:[51] a process that may be used for particularly complex procurements;

d negotiated procedure with advertisement:[52] a process that is now rarely used except under the Utilities Directive and the Defence Directive; and

e negotiated procedure without advertisement:[53] a process that is used only exceptionally: for example, in cases of extreme urgency.

Competitive dialogue is not currently available in all Member States or under the Utilities Directive.

Across the EU, the open procedure is by far the most widely used procedure.[54]

There are minimum timescales for key stages in most procedures, particularly as regards the minimum period between contract notice and bidders' initial expressions of

47 Utilities Directive, Article 42.

48 http://ted.europa.eu. For example, Public Sector Directive, Article 28.

49 For example, Public Sector Directive, Article 28.

50 For example, Public Sector Directive, Article 28.

51 For example, Public Sector Directive, Article 29.

52 For example, Public Sector Directive, Article 30.

53 For example, Public Sector Directive, Article 31.

54 *Procurement Implementation Review* (1st edition) 2012, p. 11. Seventy-three per cent of contract award notices relate to the open procedure, accounting for 47 per cent by value of advertised awards.

interest. These time periods may be shortened in some specified cases and vary depending on the procedure adopted and which Directive applies.[55]

The New Directives make a number of changes:

a all procedures will be available in all Member States, both for the public sector and utilities;

b the conditions for use of competitive dialogue and negotiated procedure will be identical; there will be greater flexibility for authorities under the New Public Sector Directive to use these procedures, which will not be limited to particularly complex procurements;

c the main timescales can be reduced in many cases; and

d there is a new innovation partnership procedure to encourage innovation and R&D.

iii Amending bids

Once bids have been submitted, equal treatment and fairness significantly limit the scope for bid amendments.

Under the restricted procedure (and probably the open procedure), authorities may in certain cases seek clarification or allow bidders to correct obvious errors.[56] However, this does not allow negotiation or the submission of what should be viewed as a new tender.

The competitive dialogue procedure is slightly more flexible: the authority may, before tender evaluation, request that bids be clarified, specified and fine-tuned. However, this must not involve changes to the basic features of the tender.[57] After selection of the winning bid, clarification or confirmation of commitments must not have the effect of modifying the tender.[58] These processes must not distort competition or have a discriminatory effect.

VI ELIGIBILITY

i Qualification to bid

Authorities may reject bidders at the selection stage where they do not meet certain objectively evaluated minimum standards. They may also restrict the number of bidders invited to the next stage of competition under restricted, competitive dialogue and negotiated procedures. Under the Public Sector Directive and the Defence Directive, these standards (which must be non-discriminatory) must be set out in the contract notice published in the OJEU and may relate to the bidder's:

a personal standing (e.g., has the bidder been declared insolvent or convicted of money-laundering or corruption offences);[59]

55 For example, Public Sector Directive, Article 38.

56 C-599/10 *SAG ELV Slovensko v. Úrad pre verejné obstarávanie*, Paragraphs 33 to 45.

57 For example, Public Sector Directive, Article 29(6).

58 For example, Public Sector Directive, Article 29(7).

59 For example, Public Sector Directive, Article 45.

b enrolment on a professional or trade register as required in the bidder's state of establishment;[60]
c financial standing;[61] and
d technical and professional ability.[62]

A bidder may rely upon the technical ability or financial standing of other entities, which could include other members of a bidding consortium or nominated subcontractors.[63]

The Utilities Directive allows utilities greater flexibility,[64] but operates in broadly the same way as the Public Sector Directive.

The New Directives are intended to reduce the burden of the qualification stage. In particular bidders may use self-declarations and a reusable European Single Procurement Document is to be created, reducing the need for bidders to provide the same responses in every public procurement.

ii Conflicts of interest

The Directives do not currently contain express provisions on conflicts of interest. However, to comply with the obligation of non-discrimination, authorities must investigate possible conflicts of interest where a member of the authority's award panel is connected with a bidder, although they have some discretion as to how to deal with such conflicts.[65]

Where an economic operator was involved in design work before the start of the award process and then wishes to bid for the contract, it could have a knowledge advantage having prepared the designs and it could, even without intending to, have influenced the design of the specification or procurement process in such a way as to favour itself. Authorities must consider these issues on a case-by-case basis and permit the economic operator opportunity to explain why there is no conflict of interest in a given case; a blanket ban on involvement of those with prior knowledge has been held to be disproportionate and in breach equal treatment.[66]

iii Foreign suppliers

Non-EU suppliers may generally bid for public contracts since the Directives do not prohibit them from tendering. The GPA requires providers from GPA states to be given the same treatment as is afforded to national providers. This does not apply to certain

60 For example, Public Sector Directive, Article 46.
61 For example, Public Sector Directive, Article 47.
62 For example, Public Sector Directive, Article 48.
63 For example, Public Sector Directive, Articles 47(2) and 48(3).
64 See Articles 51 to 54.
65 See T-160/03 *AFCon Management consultants v. Commission*, Paragraphs 75 and 90. The case was conducted under internal Commission rules, but the same principles are likely to apply under the Directives. See also, for example, the New Public Sector Directive, Article 24.
66 See C-21/03 *Fabricom v. Belgium*, Paragraphs 25 to 36. See also, for example, the New Public Sector Directive, Articles 41 and 57(4)(f).

types of contract, such as Annex II B contracts, or to defence contracts. Except for central government procurement, which is open to all GPA businesses, other procurements are only open to the extent that the bidder's home state allows EU undertakings access to government procurement. GPA states include Armenia, Aruba, Canada, Taiwan, Hong Kong Special Administrative Region, Israel, Japan, the Republic of Korea, Singapore, Switzerland, and the United States. Following entry into force of a revised GPA text on 6 April 2014, it is anticipated that a number of further states will accede to the GPA, such that their nationals will benefit from the protection of the GPA when bidding for EU government contracts; this includes China and the Ukraine.[67]

Special rules apply to utilities for the supply of goods (but not works or services). Where more than half the products (including software in telecommunications network equipment) in a bid are from third countries with which the EU does not have reciprocal agreements and the bid is equivalent in price and quality to an EU bid, then the utility must favour the bid comprising EU products.[68]

Although EU rules do not prevent non-EU access to public procurement, the Commission has noted that recently a number of Member States have started to restrict third-country access to government procurement.[69] Nevertheless, in practice, foreign-owned businesses may be able to overcome any protectionist national rules if they bid through a subsidiary established within the EU.

VII AWARD

i Evaluating tenders

Authorities may assess bids on the basis of price alone or to determine which is the most economically advantageous tender (i.e., weighing price and quality).

Authorities must disclose, before receiving bids, the criteria that they will use for bid evaluation and the weightings of the criteria chosen.[70] The criteria must not be changed during the process.[71]

National law may permit the use of an electronic auction process.[72]

The authority must, if a tender appears to be abnormally low, request explanations from the bidder, and may then reject such abnormally low tender.[73]

67 Commission press release IP/14/381, 4 April 2014.

68 Regulation 58.

69 MEMO/12/201 (21 March 2012) External public procurement initiative – Frequently Asked Questions, Paragraph 6.

70 For example, Public Sector Directive, Article 53. C-532/06 *Emm G Lianakis AE v. Dimos Alexandroupolis*, Paragraphs 36 to 38.

71 C-226/09 *Commission v. Ireland*.

72 For example, Public Sector Directive, Article 54.

73 For example, Public Sector Directive, Article 55, as applied in C-292/07 *Commission v. Belgium* and C-599/10 *SAG ELV Slovensko v. Úrad pre verejné obstarávanie*, Paragraph 33.

ii National interest and public policy considerations

Authorities must act in a non-discriminatory manner; therefore, any 'buy local' policy is unlawful. The exception is that they may discriminate against suppliers from outside the European Economic Area where there is no applicable international agreement (e.g., the GPA).

Indirect means of discrimination are also prohibited. For example, if the specification is written in a particular way in order to favour national suppliers, this infringes the requirement of non-discrimination. Therefore, an authority should normally use a national technical specification transposing European standards; it can only use other national standards if there is no European standard and, in this case, it must accept evidence of equivalent product performance.[74]

The procurement may take account of social or environmental considerations, but this must be non-discriminatory and proportionate to the objectives being pursued.[75] Any requirements must be relevant to the contract.[76]

There are limited 'national interest' exceptions in the Directives. For example, the Defence Directive does not apply to contracts for the purpose of intelligence activities or that would oblige the Member State to supply information contrary to the essential interests of its security.[77] These exceptions are construed narrowly.

VIII INFORMATION FLOW

As a result of the principle of transparency, during the procurement process authorities must ensure that they give sufficient information to bidders to enable them to properly understand the authority's requirements and to ensure a level playing field. They must also disclose the award criteria that they will use to mark bids.

Under the Directives, authorities are required to notify bidders of decisions and supply certain information. When they make an award decision, they must then 'stand still' for a minimum of 10 calendar days before signing the contract.[78] This period allows unsuccessful bidders time to bring a legal challenge to prevent contract signing if they consider that the award decision is unlawful. Notices of award decisions to bidders must include scores and a narrative summary of the characteristics and relative advantages of the winning bid. The New Concession Contracts Directive will impose equivalent information and standstill requirements.[79]

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74 For example, Public Sector Directive, Article 23(3), (4) and (5).

75 This is codified in, for example, the New Public Sector Directive, Articles 18(2) and 56(1), which permit authorities to exclude bidders that do not comply with their obligations in the fields of environmental, social and labour law.

76 See C-448/01 *EVN AG & Wienstrom v. Austria*, where the bidder was required to show it supplied volumes of 'green' electricity that went far beyond the authority's actual requirement. The CJEU held this was unlawful.

77 Article 13(1) and (2). See also Public Sector Directive, Article 14.

78 For example, Public Sector Remedies Directive, Article 2a.

79 Articles 40, 46 and 47.

Authorities may withhold information from bidders on a number of grounds such as public interest, legitimate commercial interest or prejudice to fair competition, and in some cases must not disclose information reasonably stipulated by a bidder as confidential or trade secrets.[80]

IX CHALLENGING AWARDS

Challenges to procurement decisions may be brought in the national courts. The cost, complexity and duration of these processes vary considerably from Member State to Member State.

i Procedures

Rules governing challenges are dealt with in the two Remedies Directives – the Public Sector Remedies Directive and the Utilities Remedies Directive – with those governing defence in the Defence Directive itself. In this section, the general provisions common to all are considered, so all references are to the Public Sector Remedies Directive. These Remedies Directives will also apply to awards under the New Concession Contracts Directive.

Member States must ensure that decisions taken by authorities 'may be reviewed effectively', and 'as rapidly as possible', in accordance with the provisions of the Directive.[81] Member States may decide who is to carry out such reviews: the 'review body'. The Directive also contemplates that there can be separate bodies to grant the main remedies, and that of ineffectiveness.[82] The nature of these review bodies varies considerably from Member State to Member State, and it should not be assumed by any bidder that the relevant review body will be the national court. Member States may provide that a bidder first seek review with the authority, or that a bidder be required to notify the authority of its intention to seek review.

The review body must be independent of the authority, and the Member State must provide that the decisions of the review body can be effectively enforced. If the review body is not the national court, then written reasons for the decision of the review body must be given, and there must be a further right of review by a court that is independent of both the review body and the contracting authority.

The review procedures must be available as a minimum to any person 'having or having had an interest in obtaining a particular contract' (i.e., to bidders themselves) who can show that it has been or risks being harmed by an alleged infringement. This leaves scope for interpretation of what a risk of being harmed might mean: for example, as to whether it requires that the bidder show it would have good prospects of being awarded the contract but for the breach, or merely that but for the breach the bidder would have had a more than minimal prospect of being awarded the contract.

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80 For example, Public Sector Directive, Article 41(3) and C-450/06 *Varec v. Belgium*. See also Defence Directive, Article 6.

81 Article 1(1).

82 Article 2(2).

It is for the Member State to decide on the relevant limitation period within which any application for review must be made, although any such period must include the standstill period of 10 calendar days referred to above.[83] A Member State is permitted to set a limitation period for claiming the remedy of ineffectiveness, of at least 30 days from publication of a contract award notice, and at least six months from the contract being concluded.

The Directive also includes a corrective mechanism for the Commission to notify a Member State prior to a contract being concluded, if the Commission considers that a serious infringement of Community law has been committed during a contract award procedure.[84] If so, the Commission will notify the Member State concerned, giving reasons. The Member State must then either correct the infringement, give a reasoned submission as to why no correction has been made, or suspend the contract award procedure pending a decision as to whether to correct.

ii Grounds for challenge

The Directive has (in contrast to what it says about procedures and remedies) very little to say about the grounds for challenge by bidders, and simply provides that infringements of 'Community law in the field of public procurement or national rules transposing that law'[85] can be challenged. The grounds for challenge can therefore include breaches of national rules implementing the Directives, together with the Treaty principles such as equality, non-discrimination and transparency.

The number of challenges and prospects of likely success vary considerably from state to state.[86]

As noted above, the Commission may invoke a corrective mechanism when it 'considers that a serious infringement of Community law in the field of public procurement has been committed during a contract award procedure'.[87]

iii Remedies

There are four main types of remedies that must be available to the review body under the review procedures. The first three are:[88]

a interim suspension of the award of the contract pending review by the first instance review body. This must continue at least for the standstill period. The review body's decision as to whether to uphold this interim suspension can take into account the consequences of the continued suspension for all interests likely to be affected, as well as any public interest, so the review body may decide not to continue the suspension if the negative consequences could exceed the benefits, although this should not affect any other claim being made by the bidder;

83 Article 2c and 2f(2).

84 Article 3.

85 Article 1(1).

86 See national chapters for details of numbers and prospects for challenge.

87 Article 3(1).

88 Article 2(1).

b set aside of unlawful decisions. This includes the power to amend the invitation to tender, the contract documents and other documents relating to the contract award procedure. It also includes the power to stop the procurement, and to order a new procurement; and

c the power to award damages (compensation) to a person harmed by the infringement.

The fourth and arguably most powerful remedy is that of ineffectiveness. Ineffectiveness must be available in three situations:[89]

a if an authority has illegally awarded a contract without prior publication of a contract notice;

b if an authority has awarded a contract in breach of the standstill period or suspension of contract award, and a bidder has thereby been deprived of the possibility to complain about some other infringement that has affected the bidder's chance of obtaining the contract; and

c where a Member State has permitted award of contracts without a standstill period under a framework or DPS.

Where the ineffectiveness remedy is not available, then Member States may provide that once the contract has been concluded, the only remedy available is damages.

Member States can provide that the consequence of ineffectiveness is retroactive cancellation of all contractual obligations, or may limit cancellation to future obligations only. If the latter option is chosen, the Member State must provide for the application of alternative penalties. If the general interest is in upholding the contract, so that the review body decides not to declare a contract ineffective, it must provide for alternative penalties.

Alternative penalties have to be effective, proportionate and dissuasive, and must be either the imposition of a fine on the authority, or shortening the duration of the contract.

X OUTLOOK

2015 and 2016 will see significant national activity across the EU as Member States seek to transpose the New Directives into national law. Historically, some Member States have failed properly to implement new directives on time, and we may therefore see the European Commission commencing infraction proceedings against a number of Member States in 2016 for failure to adopt adequate implementing measures.

Commission officials have expressed an intention to review the Remedies Directives as the next step in legislative reform. Such reform may seek to ensure faster, lower-cost resolution of disputes across the EU.

89 Article 2d.

Chapter 23

UNITED KINGDOM

James Falle and Clare Dwyer[1]

I INTRODUCTION[2]

The key procurement legislation applicable in England, Wales and Northern Ireland is set out in the Public Contracts Regulations 2006 (PCR), the Utilities Contracts Regulations 2006 (the Utilities Regulations) and the Defence and Security Public Contracts Regulations 2011 (the Defence Regulations). In this chapter, 'procurement regulations' refers to the PCR, the Utilities Regulations and the Defence Regulations.

The procurement regulations implement the corresponding EU directives. Additionally, the case law of the Court of Justice of the European Union (CJEU) and the General Court applies.[3]

While Member States must implement most provisions in the EU directives, there are a number of optional provisions. The procurement regulations adopt most of the options, including allowing use of the competitive dialogue procedure, framework agreements, dynamic purchasing, central purchasing, electronic auctions and provisions on sheltered workshops.

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2 Please note that, except for defence and security procurement where the rules are UK-wide, this chapter focuses on the legislation in England, Wales and Northern Ireland.

3 The corresponding EU directives are 2004/18/EC, 2004/17/EC, 2009/81/EC, 89/665/EEC and 92/13/EEC. On 17 April 2014, three New Directives came into force (2014/23/EU, 2014/24/EU and 2014/25/EU), but these do not currently apply in the UK since they have not yet been transposed into national law. References in this chapter to the EU directives are to those EU directives currently in force in the UK, unless otherwise stated.

The PCR and Utilities Regulations do not apply to Scotland, which has its own procurement legislation. The Defence Regulations apply throughout the United Kingdom (including Scotland), but not Gibraltar.[4]

The Cabinet Office (part of HM Treasury) has responsibility for central government procurement policy and publishes guidance notes and procurement policy notes (PPNs) on a range of issues. These notes and PPNs do not have the force of law, but they are considered to be binding on central government departments and are often taken into account by other authorities. Various other departments also publish guidance. In Northern Ireland, policy and guidance are issued by the Central Procurement Directorate. In Wales, the Minister of Finance has issued the Wales Procurement Policy. The Scottish government issues its own guidance under the equivalent Scottish legislation.

Formal legal challenges to procurement decisions are made through the High Court. However, less formal options exist, such as the Cabinet Office's recently extended 'mystery shopper' scheme, which allows bidders to make complaints anonymously. Monitor, the health regulator, can determine complaints in the health-care sector.[5] The local government ombudsman also occasionally deals with procurement-related complaints.

II YEAR IN REVIEW

The past year has been rather overshadowed by the legislative process for the New Directives and numerous UK consultations on the draft texts. These EU texts are seen by the government as facilitating better, leaner procurement and being helpful for small and medium-sized enterprises (SMEs) bidding for public contracts, and therefore furthering current UK policy in these areas.

2013 saw the intervention of Monitor with a number of investigations into procurement practices under the National Health Service (Procurement, Patient Choice and Competition) Regulations 2013.[6] There have not yet been any decisions declaring existing contracts ineffective, but we expect to see continuing intervention by Monitor in the coming year.

The wider trend towards increasing challenges to procurement decisions has continued over the past year, with many cases being started in the courts and, it seems, more authorities being willing to abandon or revise their award decisions where they identify serious flaws in their process following a complaint.

Although the English courts tend to be 'authority friendly', claimants have had two notable successes in England in 2013. In the first case, the court granted an injunction,

4 Gibraltar has its own defence regulations, which were adopted after the European Commission commenced infraction proceedings against the UK for failure to implement the Defence Directive in Gibraltar.

5 National Health Service (Procurement, Patient Choice and Competition) Regulations 2013.

6 Complaint into commissioning of radiosurgery services in the Yorkshire and Humber area (case closed and guidance to commissioners issues); complaint into commissioning of cancer surgery services in Greater Manchester (case closed and guidance to commissioners issued); complaint into commissioning of elective services in Blackpool (ongoing investigation).

preventing the authority from signing a contract, the first time an injunction has been granted by an English court in a procurement matter in a number of years.[7] The injunction is significant as it keeps open the possibility that if the final judgment finds errors in the procurement, the authority may correct those errors and award the contract to the claimant. In a second case, the court ordered early specific disclosure of documents to the claimant to assist it in putting together its claim. The judge recognised that the complainant was in a 'uniquely difficult position' and held that the challenger should in general terms promptly receive documents relating to the evaluation.[8] It remains to be seen whether these two cases mark a lasting improvement in the complainant's prospects of success.

Finally, 2014 will see the Scots go to the polls in a referendum on independence. Procurement has been one of the points of debate, with hints from Westminster that Scottish independence would harm the Scottish defence industry and cost thousands of jobs, while the Scottish government says it expects cross-border procurement to keep the sector secure after independence.[9] Certainly, a 'yes' vote would create an interesting dynamic for procurers and bidders both north and south of the border.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The PCR regulate most public sector entities. Many are specifically listed in the PCR (e.g., government departments, local authorities). Other entities are regulated on the basis that they were established for the purpose of meeting needs in the general interest, not having an industrial or commercial character, where there is sufficient state financing, control or management.[10]

In practice, there seems to be uncertainty, under this latter category, as to whether certain entities are subject to the procurement regulations. For example, most universities have historically been viewed as regulated by the PCR; however, following changes to their funding, the government considers that more higher education institutes will fall outside the PCR;[11] nevertheless, a number of commentators question the accuracy of the government view.[12]

A number of private firms are regulated in limited circumstances in relation to certain projects. This regulation may arise contractually (e.g., an agreement for grant

7 *Covanta Energy Limited v. Merseyside Waste Disposal Authority* [2013] EWHC 2922 (TCC).

8 *Roche Diagnostics Limited v. The Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC). See in particular paragraph 20.

9 See, for example, *Financial Times*, 5 February 2014.

10 See PCR 3(1)(w).

11 Department for Business Innovation & Skills, *Government response Consultations to 'Students at the Heart of the System' and 'A new fit for purpose regulatory framework for the higher education sector'*, June 2012, paragraph 2.4.11.

12 For example, Dilley: www.sghmartineau.com/publication_event/updates/Universities-and-the-EU-Public-Procurement-rules-Whose-Money-Is-It-Anyway-June-2012.pdf and Mills & Reeve: www.procurementportal.com/blog/?entry=128.

funding may require contracts let by the recipient to be competitively tendered). It may also arise under specific provisions of the PCR[13] or the Defence Regulations.[14]

The Utilities Regulations apply to utility activities carried out by a utility that is publicly owned or that operates on the basis of special or exclusive rights granted by a public authority.[15] Thanks to EU derogations, the Utilities Regulations do not apply to exploration for and exploitation of oil and gas and to the supply (but not transmission) of electricity and gas, on the basis that these are competitive markets.

The Defence Regulations apply to utilities and contracting authorities as defined in the Utilities Regulations and the PCR respectively.

ii Regulated contracts

Generally, contracts for construction of works, supply of goods and provision of services awarded by the regulated authorities referred to above are subject to the procurement regulations.

A number of exceptions are set out in the procurement directives, and these have been transposed into national law. For example, contracts whose estimated value is below the following thresholds are not subject to the procurement regulations:[16]

Goods, services, design	PCR	£111,676 or £172,514*
Goods, services, design	Utilities Regulations Defence Regulations	£345,028
Works	PCR Utilities Regulations Defence Regulations	£4,322,012
* Broadly, the lower threshold applies to central government and the higher threshold to all other authorities.		

Where the procurement regulations do not apply, some form of advertisement is generally required if there may be a certain cross-border interest.[17]

The Utilities Regulations apply only to the regulated activities listed in Schedule 1 of the Utilities Regulations. A utility's other activities are unregulated unless the utility is also a contracting authority for the purposes of the PCR.[18]

The Defence Regulations apply to contracts for military equipment and equipment, works or services involving, requiring or containing classified information.

13 For example, a contractor letting subcontracts under a works concession contract under PCR 37.

14 See Defence Regulation 37(3) and Part 7.

15 See *Alstom Transport v. Eurostar International Limited* [2012] EWHC 28 (Ch) Paragraphs 70 and 71, where the court held Eurostar was not a utility.

16 PCR 8, Utilities Regulation 11, Defence Regulation 9. See PPN 10/13.

17 See Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provision of the Public Procurement Directives, OJEU 2006 C 179/02.

18 C-393/06 *Ing Aigner, Wasser-Wärme-Umwelt GmbH v. Fernwärme Wein GmbH*, Paragraph 59.

One area that has caused particular difficulties is land redevelopment. Land redevelopment often requires cooperation between a local authority and a private developer, and these arrangements are negotiated directly between a major local landowner and the authority without a competitive process. In practice, a number of local authorities have achieved this by avoiding imposing any legally binding obligation upon the developer to build.[19]

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Framework agreements are extensively used. Many are multi-supplier frameworks, typically involving a mini-competition among all framework panellists at the call-off stage. The Government Procurement Service frameworks for central government are an example of this type of framework. Single-supplier frameworks are also common.

Framework agreements are often established by one authority on behalf of itself and a number of others. It is common for the OJEU notice to list sometimes very large numbers of authorities entitled to buy through the framework.

Dynamic purchasing systems are not widely used at present.

Utilities widely use both framework agreements and qualification systems to reduce the burden of procurement processes. Utilities often establish single-supplier framework agreements for one or two control periods (i.e., five or 10 years).

ii Joint ventures (JVs)

Public-public JVs are common. They typically rely on the *Teckal* exception[20] or the *Hamburg Waste* exception,[21] in which case they cannot include any private ownership or participation. By relying on *Teckal* or *Hamburg Waste*, the authorities and any JV company can contract without having to comply with the PCR.

JVs have sometimes been used in public-private partnerships (PPPs), but typically the appointment of the JV partner is advertised and tendered. This form of PPP JV is expected to become more common once the government proposals for a revamped private finance initiative (dubbed PF2) take effect, since the authority will typically be a part owner of the project company set up by the private sector partner to operate the project. However, the JV company will not itself become a contracting authority.

PPPs are typically procured under the competitive dialogue procedure.

The Utilities Regulations have separate rules on JVs and intra-group supplies. In practice, however, these rules are not as widely used as the public sector rules embodied in the *Teckal* exception and the *Hamburg Waste* exception.

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19 This relies on the CJEU decision in C-451/08 *Helmut Muller GmbH v. Bundesanstalt für Immobilienaufgaben*. See also *R (on the application of Midlands Cooperative Society Limited v. Birmingham City Council* [2012] EWHC 620 (Admin); *AG Quidnet Hounslow LLP v. Mayor and Burgesses of the London Borough of Hounslow* [2012] EWHC 2639 (TCC).

20 C-107/98 *Teckal Srl v. Comune di Viano*.

21 C-480/06 *Commission v. Germany*.

V THE BIDDING PROCESS

i Notice

Where the procurement regulations apply, contracts must be advertised in the OJEU. For contracts under the PCR or Defence Regulations, details are often also published on government portals, such as Contract Finder (England), Sell2Wales and eSourcingNI (Northern Ireland).

Voluntary *ex ante* transparency (VEAT) notices are increasingly used where authorities directly award a contract without a competitive process. The VEAT notice is designed to overcome the risk of the contract being declared ineffective due to failure to properly advertise, but it is unclear whether this works unless the authority has a reasonable belief that the procurement regulations do not apply.

ii Procedures

Where the procurement regulations apply, authorities must use one of the procedures prescribed by the relevant procurement regulations (i.e., open, restricted, competitive dialogue or negotiated procedure).

Historically, under the PCR, the competitive dialogue procedure has been widely used. However, as part of the drive towards lean procurement, since January 2012 there has been a presumption against the use of the competitive dialogue procedure in central government, and departments are encouraged to use the open procedure.[22]

Under the Defence Regulations and the Utilities Regulations, authorities generally use the negotiated procedure with prior publication of a contract notice in the OJEU.

iii Amending bids

In a number of recent court cases, bidders have sought to challenge the authority's refusal to allow them to correct their bid, for example by submitting missing documents late. The courts have repeatedly found that the authority was entitled to refuse the application to amend.[23]

A question that has not often arisen in the courts is whether the authority may allow correction of bids. In the authors' experience, authorities take different approaches to this issue.

By contrast, it is fairly common for authorities to seek clarification of bids. Under the competitive dialogue procedure, the authority may seek clarification or confirmation of the bidder's commitments after final tender. Under open and restricted procedures, in practice authorities also seek clarification, although there is no statutory basis for this. In either case, authorities should ensure that clarification does not result in amendments to tenders and that bidders are treated equally.

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22 Government Sourcing: A New Approach using LEAN.

23 For example, *R (on the application of Harrow Solicitors and Advocates) v. The Legal Services Commission* [2011] EWHC 1087 (Admin); *R (on the application of All About Rights Law Practice) v. Legal Services Commission* [2011] EWHC 964 (Admin); *Hossacks (A Firm of Solicitors) v. The Legal Services Commission* [2011] EWHC 2700 (Admin).

VI ELIGIBILITY

i Qualification to bid

The procurement regulations replicate the grounds for assessing bidders' fitness to contract set out in the relevant directives.

Recent Cabinet Office guidance has focused on the qualification stage. In particular:

a as part of the agenda of promoting SMEs and making public contracts more accessible to mutuals and the not-for-profit sector, authorities should avoid setting requirements that are unnecessary, particularly in terms of financial standing;

b bidders convicted of tax offences or successfully challenged under the General Anti-Abuse Rule are to be excluded from public procurements;[24] and

c authorities are encouraged to consider past performance more robustly and to examine whether bidders have failed to properly complete past projects.[25]

ii Conflicts of interest

General public law rules together with general Treaty principles mean that in practice authorities have to manage conflicts of interest on a case-by-case basis.

Additionally, in some cases there are sector-specific rules or guidance on conflicts of interest.[26]

iii Foreign suppliers

Foreign suppliers may generally bid for public contracts since the procurement regulations do not prohibit them from tendering. However, utilities may (or in some cases must) reject certain bids to supply goods from outside the European Economic Area (EEA).[27, 28]

While the procurement regulations do not prevent foreign tenders, they only confer a right to challenge a breach of the regulations upon:

a a person who is a national of and established in the EEA; and

b a person from a World Trade Organization Government Procurement Agreement (GPA) state (i.e., Armenia, Aruba, Canada, Hong Kong Special Administrative Region, Israel, Japan, Republic of Korea, Singapore, Switzerland, Taiwan and the United States). However, these GPA economic operators do not have a right to challenge certain types of contract[29] or any awards under the Defence Regulations.

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24 PPN 03/14 Measures to Promote Tax Compliance, 6 February 2014.

25 See PPN 09/12.

26 Local Government Act 1972, Section 117; NHS Commissioning Board's Code of Conduct: Managing conflicts of interest where GP practices are potential providers of CCG-commissioned services.

27 Utilities Regulation 31.

28 The EEA comprises the EU Member States plus Liechtenstein, Norway and Iceland.

29 See, for example, PCR 47B(2) and (5).

Arguably, persons who do not have a right to challenge under the procurement regulations may seek to bring a similar challenge by way of judicial review or for breach of an implied contract. However, the authors are not aware of any reported cases.

In practice, many foreign-owned businesses have rights to challenge because they bid through a subsidiary incorporated within the EEA.

VII AWARD

i Evaluating tenders

Most contracts are awarded based on award criteria implementing a blend of quality and price. Approaches to setting award criteria vary. Many authorities, particularly on PFI projects, use a very detailed marking scheme with each small element of the project receiving a predefined mark (e.g., 0.3 per cent for proposals on staffing levels). Other authorities take a much broader approach, with no sub-criteria and a global figure for each criterion of say 15 or 20 per cent.

Authorities must disclose the marking criteria at the latest when issuing the contract documents (e.g., the invitation to tender). This allows bidders to understand what is important to the authority and to tender accordingly.

The courts tend to hold it sufficient for the authority to disclose the main criteria and sub-criteria, and that disclosure of the finer detail would not in fact affect the content of bids. Nevertheless, in practice many authorities disclose full details of the marking scheme, regardless of whether this is strictly required by law.

ii National interest and public policy considerations

Under the procurement regulations, national interest can be taken into account only to a limited extent. The procurement regulations do not permit authorities to favour local business. For example, while specifications may refer to British Standards, they must expressly permit equivalent standards from other jurisdictions, such as ISO. Nevertheless, authorities may take account of social and environmental considerations, and European Commission guidance in both of these areas is relevant.[30]

The government has adopted and updated a policy on how procurers should deal with businesses that have adopted certain aggressive tax avoidance measures.[31]

The announcement of significant job losses at Bombardier's Midlands plant when it failed to win a major new train contract led to calls from some to favour British bidders. Following review, government ministers spoke of 'levelling the playing field' and of an 'anti-UK bias' in UK public sector purchasing.[32] New policies emerged, including:

a making procurement more accessible to SMEs by dividing contracts into small lots and requiring large government suppliers to subcontract;

30 *Buying green! A handbook on green public procurement*, 2nd Edition and *Buying Social – A Guide to Taking Account of Social Considerations in Public Procurement*.

31 See Section VI.i, *supra*.

32 www.gov.uk/government/news/the-crown-and-suppliers-a-new-way-of-working.

b proposed new legislation aimed at assisting SMEs by abolishing or standardising qualification stages in public procurement and ensuring prompt payment of sub-contractors;[33]

c greater market engagement pre-procurement and greater focus on social enterprise (the not-for-profit sector);

d obtaining commitments from suppliers to provide training and apprenticeships;

e a requirement in at least one major project (Crossrail – as announced in Parliament by the Secretary of State for Transport) to state how each element of the contract will be sourced so that Department for Transport could understand the benefit of the contract to the UK economy;[34] and

f entry into force in January 2013 of the Public Services (Social Value) Act 2012.

VIII INFORMATION FLOW

During the procurement process, authorities must ensure that they give sufficient information to bidders to enable them to properly understand the authority's requirements and to ensure a 'level playing field'. This is particularly important where a new procurement is run and the incumbent service provider will be in a privileged position, possessing additional information. As explained above, they must also disclose the award criteria that they will use to mark bids.

Where bidders do not consider that they have been supplied with adequate information, it is generally recommended that they make formal requests to the authority as soon as possible after they receive the invitation, and this is sometimes done through the authority's process for clarification.

Authorities may withhold information from bidders on a number of grounds such as the public interest, the legitimate commercial interest of any person or possible prejudice to fair competition between economic operators.[35] Additionally, under the Defence Regulations the authority must not disclose information reasonably stipulated by the bidder as confidential or trade secrets, and it may impose measures to protect classified information.

Under the procurement regulations, authorities are required to notify bidders and supply certain information when they make an award decision. They must then 'stand still' for a minimum of 10 calendar days before signing the contract.[36] This period allows unsuccessful bidders time to bring a legal challenge to prevent the contract award if they consider that the award decision is unlawful. The standstill requirement often proves to be onerous for authorities, which must supply scores and a narrative of the characteristics and relative advantages of the winning bid.

33 *Small business: GREAT ambition*, 7 December 2013.

34 www.parliament.uk/documents/commons-vote-office/February_2012/28-02-12/11-DfT-Crossrailtrainprocurement.pdf.

35 See, for example, PCR 31(2) and 32(13).

36 See, for example, PCR 32 and 32A.

During and after 'stand still', bidders sometimes request information under the Freedom of Information Act 2000 (FOIA) or the Environmental Information Regulations 2004 (EIR). There are limited grounds for refusing to disclose information under the FOIA and the EIR.

A more aggressive approach by bidders is to seek early specific disclosure through the courts. In 2013, a claimant for the first time succeeded in obtaining a court order for early specific disclosure in a public procurement case, obtaining documents relating to the evaluation process, instructions sent to the evaluation team, contemporaneous records of the evaluation process and an independent audit report.[37]

Many authorities consider that best practice is to give fulsome details in the standstill notice of the reasons, so as to be seen to be transparent, to flush out any complaints as soon as possible, to be sure time is running on any complaints, and to reduce the risk of delay where a bidder asks for more information and claims that the standstill notice is defective.

IX CHALLENGING AWARDS

The EU directives set out special rules enabling disappointed bidders to challenge procurement decisions, and these have been implemented in the procurement regulations.

The directives include various optional provisions. The main options that have been adopted nationally are:

a there is no standstill obligation for framework call-offs or unregulated procurements;[38]

b courts shall not make a declaration of ineffectiveness where overriding reasons relating to the general interest require the contract to be maintained; and

c in certain circumstances courts may shorten the contract instead of declaring it ineffective.

Legal proceedings in the UK are invariably costly and time-consuming, and the losing litigant is generally required to pay the other party's costs. The courts generally seek to expedite procurement cases, which means that a typical first instance judgment may be handed down within six to eight months following commencement of proceedings. The cost and delay may help explain why many cases are settled without a trial.

i Procedures

Procurements can provide for complaints procedures, but High Court litigation is the main method of challenge to awards due to the limitation period of 30 days, which does not allow time for other procedures before litigation.

Each High Court jurisdiction (England and Wales, Scotland, and Northern Ireland) is separate, and has its own case law, save that the Supreme Court is the highest

37 *Roche Diagnostics Ltd v. The Mid Yorkshire Hospitals NHS Trust* [2013] ECHC 933 (TCC).

38 For example, contracts below the relevant financial thresholds.

appellate court for all UK jurisdictions. Each court will take the case law of the others into account.

At 30 days, the limitation period is the shortest in English law. Most claims must now be brought within 30 days from when the claimant knew or ought to have known of grounds for bringing a claim. The limitation period can be extended to three months where the court determines that there is a good reason. The trend in England has been to uphold the limitation period strictly,[39] but in Northern Ireland the courts are more flexible.[40]

Claims under the procurement regulations can be brought by economic operators, including contractors, suppliers and service providers.

Some bidders and third parties bring claims in judicial review in the High Court, if they do not enjoy protection under the procurement regulations. Judicial review is a court review of decisions by public authorities. To bring a claim in judicial review, bidders must have standing (an interest). Examples include concessionaires and subcontractors to unsuccessful bidders. Where claims are made under the procurement regulations, the High Court is the only appropriate route.[41]

Beyond litigation and contractual procedures, other bodies may be able to hear public procurement related complaints: for example, Monitor in relation to health care. There is also the possibility of making a complaint to the European Commission.

ii Grounds for challenge

Claims may be brought for breach of a duty owed to the bidder under the procurement regulations if the bidder either suffers or risks suffering loss. Examples include:

a undisclosed evaluation criteria and weightings, in breach of the obligation to disclose them under the procurement regulations, in breach of transparency under the TFEU, or both.[42] This is often raised, and sometimes successful;

b manifest error in evaluation. The error must be obvious, and expert evidence is not permitted to prove it.[43] While often raised, it is rarely successful;[44]

c failure to exclude abnormally low tenders;[45]

d unlawful abandonment of procurement;[46] and

e post-award material changes to contracts, in reliance on *Pressetext Nachrichtenagentur*.[47]

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39 See *J Varney & Sons Waste Management Ltd v. Hertfordshire CC* [2011] EWCA Civ 708.

40 See *Henry Brothers (Magherafelt) Ltd v. Department of Education for Northern Ireland* [2011] NICA 59.

41 *Cookson and Clegg Ltd v. Ministry of Defence* [2005] EWCA Civ 811.

42 See, for example, *McLaughlin & Harvey Ltd v. Department of Finance and Personnel* [2011] NICA 60; *Lettings International Limited v. London Borough of Newham* [2007] EWCA Civ 1522; *Lion Apparel Systems Ltd v. Firebuy Ltd* [2007] EWHC 2179 (Ch).

43 *BY Development Ltd v. Covent Garden Market Authority* [2012] EWHC 2546 (TCC).

44 *Clinton (t/a Oriel Training Services) v. Department for Employment and Learning* [2012] NICA 48 is a rare success.

45 *Morrison Facilities Services Ltd v. Norwich City Council* [2010] EWHC 487 (Ch).

46 *Montpellier Estates v. Leeds City Council* [2013] EWHC 166 (QB).

47 C-454/06. *In J Varney*; the claim was unsuccessful.

There are three grounds for judicial review of decisions:

a error of law;

b irrationality or *Wednesbury*[48] unreasonableness, the closest that judicial review comes to a review of the merits; and

c procedural unfairness or breach of natural justice.

The trend is towards increased challenges. Pre-action correspondence challenging a decision is frequently written and often successful. In England, it is rare for a bidder to be successful in a court challenge. The reason may be that fully litigated cases are those that are weaker. Where there are strong grounds for challenge, it is cheaper and less risky for an authority simply to commence a new competition, as for example occurred in the Virgin Rail challenge to a Department for Transport rail franchise contract award in 2012. Northern Ireland is more claimant-friendly, but the case of *Lowry Brothers*[49] shows that the authority can succeed.

iii Remedies

The procurement regulations provide three main remedies: injunctions, ineffectiveness and damages.

Unique in English law, the 'automatic' suspension provided for by the procurement regulations arises without the need for a court hearing. Once in place, the authority cannot award the contract until the court ends the suspension by interim order, at trial, or the parties end it by discontinuance or a consent order. This powerful weapon requires the issue of a short claim form, that the authority is aware of this (service is required within seven days) and that the contract has not yet been entered into. If an application is made to court to set aside the suspension, the usual test for granting interim injunctions is applied.[50] For the suspension to continue, there must be a good arguable case, damages must not be an adequate remedy, and the 'balance of convenience' must favour the suspension. In England, automatic suspensions have invariably been lifted.[51] However, in 2013 the High Court granted an injunction for the first time since the new rules came into force,[52] and the authors believe that if the automatic suspension had been applicable to the procurement in that case, the Court would have maintained it. It remains to

48 *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223.

49 *Lowry Brothers Ltd v. Northern Ireland Water Ltd* [2013] NIQB 23.

50 See *Indigo Services (UK) Ltd v. Colchester Institute Corp* [2010] EWHC 3237 (QB), applying *American Cyanamid Co v. Ethicon Ltd* (No. 1) [1975] A.C. 396.

51 For example, *Halo Trust v. Secretary of State for International Development* [2011] EWHC 87 (TCC); *Newcastle Upon Tyne Hospital NHS Foundation Trust v. Newcastle PCT* [2012] EWHC 2093 (QB).

52 *Covanta Energy Limited v. Merseyside Waste Disposal Authority* [2013] EWHC 2922 (TCC). The automatic suspension did not apply because the procurement was subject to the 'old' remedies regime.

be seen whether this may lead to increased success for claimants. In Northern Ireland, suspensions have generally been maintained.[53]

Under the procurement regulations, the court may also set aside the decision, or amend a document.

A declaration of ineffectiveness may be made when one of the grounds for ineffectiveness is satisfied. These are:

a cases where a contract is awarded illegally without advertisement;

b the awarding of a contract in breach of the standstill period or automatic suspension if there is another breach of the procurement regulations; and

c the awarding of a specific contract under a framework agreement when the reopening of the competition is required.

Ineffectiveness has the result that a contract is prospectively, but not retrospectively, ineffective from the date of the declaration. The court can also award penalties and damages, and can deal with matters consequent on the contract being declared ineffective. For this reason, where a declaration of ineffectiveness is sought, the proceedings are served on the party to which the contract has been awarded.

Some public contracts include provisions dealing with the consequences of a declaration of ineffectiveness. This is expressly permitted by the procurement regulations,[54] and government guidance encourages it.[55]

There is only one reported case where a declaration of ineffectiveness was claimed. The court struck out the claim because the grounds had not been made out, as the authority had correctly advertised.[56] Nevertheless, anecdotally, declarations for ineffectiveness are being claimed in some issued proceedings.

Unless one of the narrow grounds for ineffectiveness exists, damages are the only remedy that can be awarded under the procurement regulations after the contract has been entered into. Damages may only be awarded to a bidder that has suffered loss as a consequence of a breach of the procurement regulations. The usual principles for determining damages apply: the breach must have caused the loss, and not be too remote. The usual claims for damages are for wasted bid costs and for loss of profit. Wasted bid cost claims are often relatively modest, and are routinely resolved informally. As to loss of profit, the test is whether the claimant had a real or significant chance of being successful but for the breach of the procurement regulations.[57]

The remedies available in judicial review are a quashing order (to set aside the decision made) and a mandatory order (to send the decision back to the authority to make it again). Damages may also be sought, although not as a sole remedy.

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53 *First4skills Ltd v. Department for Employment and Learning* [2011] NIQB 59; *Traffic Signs and Equipment Ltd v. Department for Regional Development* [2010] NIQB 138.

54 For example, PCR 47M(5) and (6).

55 *Implementation of the Remedies Directive: OGC Guidance on the 2009 amending regulations Part 3: The new remedies rules*, paragraphs 43 to 48.

56 *Alstom Transport v. Eurostar International Limited* [2012] EWHC 28(Ch).

57 *Mears Ltd v. Leeds City Council* [2011] EWHC 2694 (TCC).

X OUTLOOK

On 17 April 2014, three New Directives[58] came into force. The New Directives replace the existing Public Sector Directive and Utilities Directive and, for the first time, formally regulate concession contracts. They must be transposed into national law within two years. For brief details of the New Directives, see the EU chapter.

The UK government has welcomed these changes. In order to allow UK authorities to benefit from the new rules, such as through reduced timelines, flexibility to negotiate and rules on staff mutuals, the Cabinet Office has 'ambitious plans for early transposition' of the New Public Sector Directive.[59] Indications are that this could mean the new English public sector regulations come into force in 2014. It seems that the utilities and concessions regulations will follow at a later date.

The UK has stated it will adopt the 'copy-out' approach to transposing the New Directives, so the English regulations will use the same text as the New Directives where possible. This means there will be significant textual changes to the English regulations, although substantively many of these changes will be insignificant.

One interesting feature will be the abolition of 'part B services',[60] with the result that the full remedies regime will apply to many more procurements. This will be particularly relevant to the health sector, and it remains to be seen whether complainants will prefer to challenge procurement decisions in the English courts or to seek the remedies available through Monitor, the health-care regulator.

58 The New Concession Contracts Directive, the New Public Sector Directive and the New Utilities Directive.

59 See Procurement Policy Note 05/13 25, July 2013.

60 In many cases, a new 'light touch' regime will apply to what were previously 'part B services', rather than the full procurement regulations.

Appendix 1

ABOUT THE AUTHORS

JAMES FALLE

Solicitor, England and Wales

James Falle has been a solicitor in England and Wales since 2000. He has a wealth of experience working with central and local government, universities, health trusts and regulated utilities, to design effective procurements processes and to mitigate the risk of legal challenge.

He handles challenges to contract award decisions for both claimant and defendant, and has an excellent understanding of the tactical considerations that arise from the very short limitation periods and new English remedies regime.

Mr Falle speaks at a number of key events. He recently co-wrote the Procurement Lawyers' Association response to the Cabinet Office consultation on shortening limitation periods. This influential response warned the Cabinet Office of the risk that shorter limitation periods could lead to increased litigation and directly resulted in a number of important changes to the initial legislative proposals.

CLARE DWYER

Addleshaw Goddard LLP

Clare Dwyer is a commercial litigator, described by *Chambers* in 2014 as 'very bright, very able, and very approachable', with 'particular expertise in public procurement litigation'. She has been involved in several high-profile cases in this field, including two widely reported Northern Ireland cases, *Henry Bros v. Department of Education* and *Mclaughlin & Harvey v. Department of Finance and Personnel*. She regularly advises on procurement challenges, both for and against public authorities.

She is a member of the Procurement Lawyers' Association (PLA), and was involved in drafting the PLA response to the government consultation on shortening limitation periods for public procurement claims. She also trains clients in dealing with

problems arising from the conduct of public procurement processes, and other issues of public law such as human rights.

Mrs Dwyer deals with a wide range of other disputes, from multimillion-pound warranty claims to trust and tax litigation, arbitration and judicial review. Her clients range from those in the public sector (such as educational institutions, NHS trusts, local authorities and other public bodies) to leading manufacturers, retailers and service providers.

She is a CEDR-accredited mediator, and has higher rights of audience in civil proceedings.

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