



Briefing

Procurement



Procurement law in the nuclear industry: overview of the processes and common pitfalls

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Patrick Parkin, a senior associate in Burges Salmon's public procurement team, provides an introduction to EU procurement law for the nuclear industry. This article focuses on the key legal and practical implications that you need to know, as well as the opportunities and threats that procurement law presents. The issues covered include the creation of express and implied contractual obligations and how to engage the market before commencing a procurement process. It also addresses the procurement procedures available under the new Public Contracts Regulations 2015 (and new Utilities Contracts Regulations, which will come into force next year); when they are best used; and what happens if a procurement process is challenged. The article also briefly considers the key differences between regulated and non-regulated procurement.

What is EU procurement law and why do I need to know about it?

In the UK and across Europe, when certain public and quasi-public bodies and utilities purchase goods, services and works from third parties, they must do so in accordance with EU procurement law.

Whether or not a particular purchase is subject to EU procurement law, there are also other legal issues that need to be considered. These are dealt with in more detail below.

The principal purpose of procurement law is to open up the EU market to competition by ensuring certain public bodies and utilities make purchases in a way that is fair, transparent and does not discriminate on grounds of nationality. These EU rules are implemented into UK law by the Public Contracts Regulations 2015 (the "**PCR**"), as well as the Utilities Contracts Regulations 2006 (the "**UCR**") (the UCR will itself be updated over the next few months).

The PCR (which applies to government bodies and 'bodies governed by public law' - together known as contracting authorities) are closely aligned to the UCR (which applies to utilities, such as electricity distributors) but are less prescriptive.

Both the PCR and UCR establish rules on how contracts must be advertised, the procedures that may be used to run a tender process, and how the purchasing body may evaluate tenders.

In the UK, for example, the Nuclear Decommissioning Authority and its site licence companies (such as Magnox Ltd, LLWR and Dounreay Site Restoration Ltd) are considered to be contracting authorities and subject to procurement law. Electricity distributors must comply with the UCR. In the UK, electricity generators and suppliers are exempt from the UCR, but elsewhere in the EU, they may be subject to procurement law.

Whether your role is in purchasing, marketing or as a contract manager in the nuclear industry – indeed, if your role is in any way affected by purchasing goods, services or works, or tendering to supply such requirements – an understanding of procurement law will be useful.

From the perspective of a purchaser, you will:

- be better placed to engage with the market before the procurement process commences, so that you can make sure that you go out to market with an informed procurement strategy;
- be able to choose the most appropriate procurement process to deliver your requirement in a time and cost efficient manner; and
- mitigate the risk of a third party bringing a procurement challenge and the potentially severe consequences that it may bring for a purchaser.

If your role is to tender to contracting authorities or utilities in regulated procurement procedures, an understanding of EU procurement law will assist in understanding:

- why the purchasing body is conducting the process in the way that it is – enabling you to shape your strategic approach accordingly;
- the way in which your tender will be evaluated, so that you can:
 - maximise your score in the bidding process, improving your chance of winning; and
 - avoid inadvertently missing out on marks or being rejected from the process for failing to comply with the terms of a tender, or failing to fully understand the evaluation criteria; and
- if there has been a breach of procurement law and whether you have grounds to bring a procurement challenge.

Considerations for non-regulated procurement

Whilst the focus of this article is on regulated procurement, it is worthwhile to consider the key differences between regulated and non-regulated procurement. If your organisation is not a contracting authority or a utility, procurement activities will not be regulated. You will have the freedom to purchase goods, services and works as you see fit, unconstrained by the procedures that must be used in regulated procurement, the minimum timescales involved, the detailed rules relating to the fairness and transparency of a tender process or the standstill requirements (all of which are explained in more detail below).

Instead, you may award contracts directly, without competition (subject to any internal procurement guidelines). You may still choose to run competitive tender processes to try to achieve better value or innovation through procurement – but you will have absolute freedom to design the form and structure of that competition.

However, it is important to remember that whilst the procurement activities of organisations that are not contracting authorities or utilities are not subject to procurement law, contract law will still apply.

Therefore, you will need to make sure that you do not inadvertently create binding contractual obligations through the statements that you make in tender documents or other correspondence. At the most basic level, it will always be advisable to reserve the right to amend a process, the timescales, any criteria for award and the right not to award a contract. If your organisation breaches a contractual obligation created in a tender document or other correspondence, a bidder may have the right to bring a legal claim for losses it suffers as a result.

For suppliers, tendering in a non-regulated environment will have its advantages and disadvantages. A purchaser will be less concerned about maintaining the fairness of a process and there may be more opportunity for direct engagement with purchasers and for upselling. However, this cuts both ways – there may be less certainty as to how the process will run and committing resource to tender may be more of a risk if there is less assurance that your organisation will be treated fairly alongside other bidders.

When does EU procurement law apply?

When considering whether EU procurement law applies, it is necessary to consider three key elements:

- **Who is awarding the contract?** As referred to above, in the UK the Nuclear Decommissioning Authority and its site licence companies are considered to be subject to EU procurement law under the PCR, as are any other bodies that meet certain tests relating to the public functions and public control of financing.

The analysis is less straightforward under the UCR, as it can apply to both public and private entities depending on the scope and nature of their activities. As mentioned above, whilst transmission and distribution licensees fall within the scope of the UCR – UK generation and supply licensees are not. However, equivalent EU procurement laws may mean that generators and suppliers elsewhere in Europe are subject to procurement law.

- **What is the subject matter of the contract?** Does the contract involve the supply of services, supply of goods or of construction-type works and if so, what type are they? Decommissioning activities, for example, are services which are fall within the scope of the PCR. So are other generic services that may be purchased by the industry – such as nuclear site management and nuclear site security – or less specialist services, such as administrative functions (HR, IT etc) and facilities management.
- **What is the value of the contract?** The Regulations only apply to contracts that are above prescribed financial thresholds (see the tables below). If the value is below these thresholds, it is still necessary, however, for a contracting authority or a utility to tender for its requirements in a manner that is fair and transparent.

Public Contracts Regulations 2015 - financial thresholds

	Central Government	Other contracting authorities
Services or Supplies	£111,676	£172,514
Works	£4,322,012	£4,322,012

Utilities Contracts Regulations 2006 – financial thresholds

Services or Supplies	£345,028
Works	£4,322,012

What does an EU regulated procurement process involve?

One of the key decisions to take for a purchaser is which of the procurement procedures to use for a particular procurement. The PCR provides for five procedures – some of which are new and whilst unfamiliar, may be of particular interest in for nuclear purchasers and suppliers (see 'Innovation Partnership' below).

Under the UCR the procedures that are available differ slightly to the PCR – although they will be more aligned to those under the PCR upon the introduction of the new Utilities Contracts Regulations 2016 (“**UCR 2016**”) which will come into force next year.

It is up to the contracting authority or utility to decide which procedure will most effectively deliver its requirements. Each procedure is designed to cater for contracts of varying complexity, timescales and interaction with bidders.

The Procedures – an Overview

Procedure name	Suitable for	Negotiation/ discussion with bidders?	Key Features
Open procedure	Simple, commoditised purchases. e.g. off-the shelf safety equipment where there is little differentiation of products within the market.	No	No restrictions on use. No separate pre-qualification process. No flexibility to negotiate changes to a tender. If a high number of bids are received, all must be evaluated, which may be time consuming and costly. Available under PCR/UCR. Will be available under UCR 2016.
Restricted procedure	Simple, commoditised purchases (to a lesser extent than the open procedure). e.g. site security services where bidders may provide the specification in a number of ways.	No	Like the open procedure, but includes pre-qualification/shortlisting (see 3.3 below) process that may reduce the number of bidders invited to tender. Minimum of five suppliers must be invited (unless there are fewer suitable candidates). Available under PCR/UCR. Will be available under UCR 2016.
Competitive dialogue	Complex contracts where discussion with bidders is necessary to refine solutions.	Yes – during dialogue only	Includes a pre-qualification process. May take place in successive stages, where a bidder submits successive tenders, which are evaluated. Potential for down-selection at such stages. Available under PCR and will be available under UCR 2016. Not available under UCR (where a negotiated procedure is used for more complex requirements).
Negotiated procedure	For complex requirements under the UCR where the open or restricted procedures are not suitable.	Yes	Not available under PCR – UCR only. Utility has broad discretion to determine the structure of the procedure.

The Procedures – an Overview

Procedure name	Suitable for	Negotiation/ discussion with bidders?	Key Features
			Bidders negotiate with the utility and submit 'best and final offers' which are then evaluated to identify the preferred supplier.
Competitive procedure with negotiation	Complex contracts where negotiation with bidders is necessary to refine solutions and financial/commercial terms. In practice, similar to competitive dialogue.	Yes	Similar to the competitive dialogue procedure. Available under PCR. Not available under the UCR or UCR 2016.
Innovation partnership	Research and development projects where the authority wishes to establish a long term partnership for the development and subsequent purchase of an innovative product or service.	Yes	The authority can set up a partnership with one or more partners. Milestone targets will be established that allow for down-selection of bidders. Available under PCR and the UCR 2016. Not available under UCR.

The innovation partnership is an entirely new procedure. It is designed to facilitate the research and development of new products and services which are not already available on the market - and subsequent prototyping, testing and delivery of those products or services. It may well be that in an industry as technologically advanced as the nuclear industry, that the Innovation Partnership will be well-suited to assist purchasers to develop, test and ultimately procure state-of-the-art goods and services to address changing needs.

Can I talk with potential bidders before a procurement process begins? What do I need to consider?

Purchasers need to be aware of what is available in the market so that they can shape their requirement (i.e. the specification) for issue with tender documents. However, purchasers have historically been reluctant to engage with suppliers before a competition starts, for fear of being perceived as giving certain suppliers an unfair advantage, or head start, on other bidders – in breach of EU procurement law.

However, there is a new drive for authorities to proactively engage with suppliers, supported by the new Regulations and centrally from the Cabinet Office. The new Regulations expressly state that authorities may seek or accept advice from independent experts, other authorities or market

participants and use that advice in the planning and conduct of the procurement process so long as there is no distortion of fair competition.

In particular, one can see how this may be of use in designing a specification (taking care not to replicate a particular provider's solution), or deciding which aspects of service delivery or the commercial/financial terms might require particular focus during a competitive dialogue or negotiated procedure.

To ensure that there is no distortion in competition, if a supplier was consulted during pre-market engagement and intends to bid, the authority must make sure that the information shared is communicated to all parties interested in tendering and sufficient time is given to other parties to consider this information before they must submit a tender.

Clearly, the task of levelling the playing field is not always straightforward and one that should be carefully considered on a case-by-case basis.

Done in the right way, pre-market engagement can help save time and cost by improving an authority's knowledge in terms of the availability of goods and services and the commercial terms that are acceptable in the market, each of which will be core elements of an authority's preparation for the procurement.

Overview of a Procurement Process



Issuing tender documents

Once the authority or utility knows what it needs to buy, it must generally issue a notice in the Official Journal of the European Union (known as OJEU) setting out the key features of the procurement process. Tender documents must be ready for issue at the same time as a notice is published.

Once a bidder has submitted a tender, an implied contract is created between the contracting authority and the purchaser, whereby the tenderer has a right for its tender to be considered by the authority and also in accordance with the terms of the tender documents.

To the extent that the purchaser wants the ability to either amend or cancel the procurement process once tender documents are issued, it should include an express right to do so in the documents and communicate any amendment to cancellation to bidders.

Key Tip:

As well as taking into account the requirements of the PCR and UCR - whether you are purchasing or bidding, there are other legal considerations to take into account that are not EU procurement law matters, as such.

For example, both purchasers and bidders will have obligations of confidentiality to one another in respect of the information that they exchange with one another during a procurement process - information that is highly valuable in a competitive bidding environment. Both parties should carefully consider how to manage information security on an ongoing basis.

Both parties should also make sure that they do not make any incorrect representations that the other party relies upon - as this may give rise to misrepresentation claim. Again, ensuring clear and accurate communications is vital at all times. In the nuclear industry, where contracts can be worth many millions of pounds, the potential losses that may be suffered by a party relying on inaccurate information are significant.

Pre-qualification

Pre-qualification is often the first point in a procurement process where an evaluation and down-selection of bidding candidates is made. Under the PCR and commonly the UCR, it is the point at which a purchaser will assess the capability of the bidder to deliver

the requirement (rather than the credibility of the bidder's solution - which will come later). It is designed to sift out those suppliers that do not have the technical capability or economic and financial standing to perform the particular requirement.

A purchaser must clearly set out the basis upon which such selection is to be made and then conduct its assessment accordingly.

Award

The award stage consists of an assessment of the bidder's proposed solution, having already established that it is capable of delivering the requirement.

Under the PCR and UCR, purchasers must establish clear award criteria, in the tender documents, to decide which tender will deliver the "most economically advantageous tender" in terms of the quality and price of the proposal. Consequently it is crucial that purchasers evaluate the tenders in accordance with the criteria. It is also important to retain records detailing the reasons why tenders were evaluated in the way that they were to demonstrate that the decision is robust (if, for example, it is challenged).

Key Tip:

As a purchaser, a significant part of your preparation time for a procurement process should go into defining the specification - i.e. what it is you are buying.

It is also vitally important, however, to consider what is really important to you in terms of the quality of the product or service and the price that you pay, as this will form the basis of your evaluation criteria and the weightings that you allocate to those criteria.

From a bidder's perspective, the evaluation criteria and weightings, read alongside the specification, are the best indication you have of what it takes to win the competition. For example, you know that if price is weighted at 70% of the evaluation, the purchaser is looking for a low cost solution. If that is the case, it may not be suitable to offer your most innovative product or service, as this may be beyond the purchaser's budget. Instead, consider how you can provide the specified product or service for the lowest cost that you can.

Standstill

Once the evaluation has taken place and any internal governance requirements are satisfied, the purchaser is required under the PCR and UCR to issue decision letters (often referred to as standstill letters or Alcatel letters) to all bidders – successful and unsuccessful.

The letters must include details of the bidder's score and (in the case of the unsuccessful bidders) identify the winning bidder and the scores awarded to it, together with a narrative on the comparative advantages and disadvantages of the winning bid.

These letters trigger what is known as the standstill period – a mandatory period, which must be no less than 10 days long from the issue of the letters. This allows unsuccessful bidders to consider whether or not the procurement process has been carried out in a legally compliant manner and, potentially, to challenge.

The purchaser may not sign the contract until the standstill period has elapsed.

Procurement challenges

In both nuclear and other industries there has been a steady increase in procurement challenges under the PCR and UCR over the past five years.

For an authority or a utility, the consequences of such a procurement challenge can be severe if the challenge is successful.

A procurement challenge may be brought by a supplier in the form of a formal legal claim, issued in the High Court. To do so successfully, the supplier will have to demonstrate that it has suffered a loss as a result of a breach of procurement law by the purchaser.

The immediate effect of issuing a claim, if before contract signature, is an **automatic suspension of the procurement process**. This prevents a purchaser from signing the contract. This can only be lifted by an application to the court by the purchaser.

If a claim is ultimately successful then the remedies that a court may award include:

- **Damages:** to compensate the claimant for its loss. This is the most common remedy applied for and awarded by the courts. Damages can take into account bid costs and also the bidder's lost profit (or a proportion of it) as a result of not being awarded the contract. This can potentially be very significant.

- **Ineffectiveness:** the court may cancel all prospective obligations under a contract. However, to date in the UK, the court has not exercised its right to declare a contract ineffective.
- **Fines:** If an ineffectiveness order is made a court must also apply fines, which are unlimited. These are designed to dissuade purchasers from breaching procurement law in the future.

As well as the adverse impact of these remedies, there are a number of other impacts on an authority of a procurement challenge, including the adverse PR that the challenge may attract; the diversion of resources away from day-to-day functions to deal with the challenge; and the operational difficulties faced if the supplies or services cannot start on time.

Key Tip:

A procurement challenge must be brought within 30 days of the date a challenger, such as an unsuccessful bidder, knew or ought reasonably to have known of the basic grounds for a challenge.

If you are a bidder considering a challenge, you must not wait longer than the 30 days to bring your challenge (although the court does have a discretion to extend the time limits, it is very rare that it does).

In fact, if you are considering a challenge, you will need to act well in advance of the 30 day limit, so that you can take appropriate advice to decide if challenging is the best course of action, as well as allow time for any internal governance requirements and preparation of the necessary court documents.

Contact

If you would like to talk about any of the matters raised in this article, or more generally about any procurement law related matters, please contact Patrick Parkin, whose contact details are below.



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