Public Procurement: Contracts

Inside

Which contracts are covered?
Financial thresholds
How to value contracts
Aggregation of similar and recurrent contracts
Exemption for stand alone offices
How to approach procurement in practice
Introduction
In brief, the EU procurement regime, implemented in the UK by the Public Contracts Regulations 2006, applies to contracts for works, services and supplies over particular financial thresholds. If a contract is within its scope, it must be advertised within the EU’s Official Journal, the “OJ”.

This guide provides a brief explanation of how contracting authorities can determine which contracts are covered. For a general overview of the regime, see our separate guide entitled “Public Procurement: Overview”.

Which contracts are covered?

Works contracts
A works contract is a contract in writing for the carrying out of “works” or a “work” or a contract under which a third party (such as a developer) is engaged to procure the carrying out of a specified “work”. The expression “works” includes most aspects of construction including demolition, building and installation of plumbing, heating and electrical equipment. A “work” is an output based concept, a contract for something which itself has an economic and technical function, such as a block of flats.

Services contracts
A services contract is a contract in writing for the provision of services. The procurement regime distinguishes between two main categories of services: those covered by the full procurement regime and those subject only to technical harmonisation rules and reporting requirements.

Those subject to the full procurement regime (Part A Services) include contracts for maintenance of equipment, IT, accounting and auditing, architectural services, management consultancy, property management and building cleaning.

Service contracts outside the scope of the full regime (Part B Services) include legal services, employment agency services and a catch all category of “other services”.

Services are categorised by reference to a CPC (common product classification) or CPV (common procurement vocabulary) number. These help identify which contracts are covered and are needed when completing contract notice forms for the OJ. There is a full listing at www.simap.europa.eu

Service concession contracts are outside the scope of the procurement rules.

Supplies contracts
Supplies contracts are contracts for the purchase, hire or lease of goods including, if relevant, their installation.

Mixed contracts
A contracting authority may enter a contract for both services and supplies of goods or a contract both for services subject to the full procurement regime and for services outside that regime. If that happens, the correct categorisation depends on which element is worth more.

Where a contracting authority contracts for works and either services or supplies, the categorisation will depend on the dominant purpose of the contract.

An easy get out?
Contracts only fall within the scope of the procurement regime if they are in writing. Can you avoid the regime by contracting orally? In the case of a substantial contract, that would be impracticable or risky and a contracting authority would be acting irresponsibly.

Also, though the procurement regime applies to contracts above particular thresholds, the principles underlying the regime (non discrimination on grounds of nationality, equal treatment, and transparency) apply to all contracts let by public bodies. There has been a number of cases where procurement has been challenged on the basis of the general principles rather than the detailed rules.

In-house provision
In certain circumstances a contracting authority may be able to avoid the operation of the Regulations where the contract is with a subsidiary. Whether a contracting authority can benefit from this will depend on the particular circumstances including the control the contracting authority exercises over the subsidiary and whether the subsidiary also works with third parties. The application of the Regulations should be given careful consideration in each case.

Financial thresholds for coverage
Having decided whether a contract is a works, services or supplies contract, the next thing to consider is its value. As a general rule, the regime applies only to contracts above a particular value.

The current financial thresholds (net of VAT) are as follows:

These are due to change again on 1 January 2016.
How to value particular contracts

Valuation of contracts is generally determined by reference to the consideration or price that will be paid (ignoring any VAT payable). This may involve estimating the value.

Contracts for supplies or services with “options” for what is to be provided should be valued on the basis that the contracting authority pays the highest possible amount. Many schedules of rates and call off contracts will be above the threshold.

Service contracts and supply contracts for hire of equipment (e.g. photocopiers) are often for an indefinite period rather than a fixed term. Contracts such as these are valued over a 48 month period even if intended to last for only a couple of months. A short term consultancy contract for, say, £4,000 per month would fall within the regime if it was not clear how long it would last.

If contracts are mixed and so include, for example, goods and services, the value of both is taken into account.

Aggregating similar contracts

Contracts must not be sub divided to avoid the regime’s application by bringing them below the relevant financial threshold. This basic principle is bolstered by rules requiring the aggregation of similar contracts.

Works aggregation

Where you enter a number of different works contracts to carry out a “work” (see above), all the works contracts are aggregated. If a contracting authority builds a block of flats, all works contracts (e.g. demolition, site clearance, construction etc.) should be aggregated.

If the financial threshold is exceeded taking into account all works, all contracts are potentially covered by the regime - even those below the threshold. There is however an exemption for small contracts worth less than £833,400 (£1m). These are not covered as long as they do not exceed 20% of the aggregate value.

For example, if works contracts on a site will cost £5m in total, comprising one contract for £3.5m, two for £500,000, and two others for, respectively, £300,000 and £200,000, the works financial threshold is exceeded and, in principle, all should be advertised. However, of the five contracts, four are below the small contract exemption (£833,400) and would not be covered at all as long as they did not exceed 20% of the aggregate value (i.e. £1m). Since the contracts are worth a total of £1.5m, they do exceed 20% of the aggregate value and the contract authority can decide to which of these contracts the exemption should apply. For example, it might decide not to advertise the two contracts for £500,000 or one of those contracts and the two contracts for £300,000 and £200,000.

Supplies aggregation

Where you have a single requirement for services and enter a number of separate contracts to fulfil the requirement, the estimated value is the aggregate value of each contract. For example, if you require architects for a project on an estate but deliberately split the procurement into two lots to increase the chance of BME architects winning some of the work, the contracts must be aggregated in deciding whether the value threshold is reached. However, there is a small contract exemption which operates similarly to that applied to works. In principle, contracts below £66,672 (£80,000) are excluded as long as they are not more than 20% of the aggregate value of services. As with works, if there are a number of small value contracts, you may be able to pick and choose which to advertise and which not.

Aggregating recurrent contracts

As well as rules on aggregation of similar contracts, there are rules on regular or repeat contracts for the same type of services or supplies. These should be aggregated by taking into account the value of those contracts over a 12 month period. So, for example, if a contracting authority enters a number of stationery contracts or contracts for network support services over a period, they must be aggregated.

A contracting authority has a choice between looking at the value of contracts over a 12 month period historically (e.g. looking at the value of contracts in the most recent financial year and making appropriate adjustments for likely changes) or by looking forward and estimating the value for the following 12 months. However, it may not make its decision with the intention of avoiding the application of the Regulations.

Exemption for stand-alone offices

In what is said above, the assumption is made that a contracting authority should aggregate both similar and recurrent contracts across its entire organisation. There is however a limited exemption which may reduce the burden on larger contracting authorities if they have a number of separate stand alone offices (or “discrete operational units”, in the jargon) which carry out their procurement separately.
To come within the exemption, the office must:

- be procuring only for its own use;
- make its own decision on entering the contract; and
- take the decision independently of other parts of the contracting authority.

If those conditions are satisfied, the value of the office’s procurement can sometimes be assessed separately. Although from the governance point of view, you will not want to give separate offices an entirely free hand, that is not essential. You can give the defined delegated authority to the office to carry out the process on its own. Of course, procuring on a location by location basis may lose the advantage of economies of scale, so applying the rules across the organisation may be preferable. However, it will depend on the facts of each matter as to whether the exemption applies and specific advice should be sought.

How should you approach this in practice?

The approach that you take will probably depend on whether or not you are considering works contracts or supplies and services contracts. Works contracts need to be looked at on a project by project basis. Aggregation and, if relevant, the need to send PINs (prior information notices giving advance notice of procurement plans) to the OJ are done project by project. The benefit of a PIN lies in the possibility of shortening time limits for receipt of tenders.

More forward planning is needed for services and supplies contracts. You will need to decide not only which services and supplies contracts fall within the financial threshold and should be advertised, but also what PINs for services and supplies should be sent to the OJ. If a PIN is to be issued, before each financial year, you should identify:

- what services and contracts you expect to enter in the coming year;
- any supplies or services contracts which will, on their own, exceed the financial threshold;
- contracts for particular types of services or supplies which should be aggregated; and
- recurrent contracts for particular types of services or supplies which should then be valued over a 12 month period.

You should then work out which contracts (or groups of contracts) will need to be advertised, using the small contracts exemption where available. Due to the bureaucracy and time delay in advertising individual contracts, many contracting authorities set up frameworks to cover their services and works requirements. These frameworks allow individual contracts to be called off either without further competition or following a mini-competition, depending on the nature of the framework. The framework can cover other contracting authorities, so benefiting from economies of scale. Framework agreements and their use are covered in a separate guide.

Changes to the Procurement Regulations

New EU procurement directives came into force on 17 April 2014. The UK has until April 2016 to implement them into UK law but the UK government is aiming to implement the directives quickly so that the UK can benefit from the improved flexibility that they offer. It is anticipated that the UK Regulations could change towards the end of 2014. Keep an eye on our website for further details.

For further information on this subject please contact:

Clare Reddy
Partner
T + 44 (0) 20 7074 8095
clare.reddy@lewissilkin.com

Owen Williams
Managing Associate
T + 44 (0) 20 7074 8218
owen.williams@lewissilkin.com