



LEASEGUARD

Review of the new
Procurement Directives
for NHS Trusts

Introduction

The new Procurement Directives, which have been in the pipeline for a number of years, will now be adopted by the EU. The UK has 24 months to implement the provisions, but has stated an intention to do this as early as summer 2014.

With this in mind, it is important that you are aware of the impact the new Directives will have on the way procurement is conducted, and think about what will need to be adapted to accommodate the new rules. This note explores what the new Directives will mean for NHS Trusts, and what will need to be considered and done to prepare and comply with the new provisions. Until the Directives are implemented in the UK, the current Public Contracts Regulations should continue to be observed.

The Directives are extremely long documents, providing lots of information. This note is intended to be a helpful overview of some of the more important changes that will affect the NHS. It does not cover everything and should not be a substitute for considering the relevant sections of the Directives to address particular issues. .

About Leaseguard

For more than 20 years, Leaseguard has been a leading provider of lease advisory, procurement and contract management solutions to NHS Trusts, helping them drive down costs, enhance control and improve compliance over a broad range of contracts, including maintenance, leasing, MES, consumables, estates and medical contracts.

To discuss any of the issues raised in this Technical Note please contact Carrie Rudge on 01865 340800. For more information on how we can assist Trusts with the procurement and on-going management of maintenance, leasing or MES contracts, please call Stuart Jefcoate on 01865 340800.

How this report is written

We have structured this report so that the key changes made by the Directives are listed on this page, and then we drill down into some of the detail. There is a glossary at the end providing some definitions of the key phrases in case you need them.

10 things you must know

- 1. Part A and Part B services will be abolished and a new 'light regime' introduced**
- 2. Trusts will have more scope for negotiation with suppliers**
- 3. A new Innovation Partnership Procedure will be introduced**
- 4. Time limits will be reduced**
- 5. Changes will be made to the selection criteria**
- 6. Changes will be made to the award stage**
- 7. End to end e-procurement will be introduced**
- 8. The circumstances and extent to which a contract can be amended following award is clarified**
- 9. There is a new Directive governing concessions contracts**
- 10. The UK has a number of policy decisions to make**

The new light regime – health, social and related services

To date, there has been a distinction between Part A and Part B services, with Part A services being fully subject to the Public Contracts Regulations and Part B services only attracting rules relating to specifications and Contract Award Notices. This was originally put in place because it was considered that Part B services would only have limited cross-border interest, so should not be subject to the full rules.

The EU has reviewed the relevance of this distinction and has concluded that there should no longer be a difference between Part A and Part B services. Instead, all above threshold contracts will be caught by the new Directive unless they fall into the new 'light regime'. The services subject to this light regime are listed in the Directive and include 'health, social and related services'. The procurement of these services will only need to follow the 'light regime' if the contract is in excess of 750,000 Euros.

Exactly what this light regime will look like is not yet clear. It has been left to member states to put in place rules governing award of these contracts. The only guidance the Directive provides is that these rules must include advertising at the start and end, and that quality, continuity, affordability and availability must be able to be taken into account. And we must not forget that the Treaty principles of proportionality, equal treatment and non-discrimination, transparency and mutual recognition will apply as they do for all procurements.

More scope for negotiation with suppliers

The EU has recognised that contracting authorities would benefit from being able to negotiate in wider circumstances than the current rules allow, to ensure a contract meets their requirements. To facilitate this, the Competitive Dialogue and Negotiated Procedure with Prior Publication of a Contract Notice, termed the 'Competitive Procedure with Negotiation', will be more widely available.

Both procedures will now be available in any of the following circumstances:-

- The Trust's requirements cannot be met without adaptation of readily available solutions.
- The Trust requires design and innovative solutions.
- Negotiation is needed due to the nature, complexity or legal and financial make-up or because of the risks attached to them.
- The technical specifications cannot be established with sufficient precision by the Trust with reference to a standard.
- In certain circumstances, when in response to an Open or Restricted Procedure, only irregular or unacceptable tenders are submitted.

The new Directive effectively means these procedures will be available for any procurement that is not 'off-the shelf' purchasing, which widens the scope of use significantly. In our opinion, this is particularly important when it comes to the Competitive Procedure with Negotiation because the Directive specifically says contracting authorities can award the contract without negotiation where they have reserved the possibility of doing so. We will explain.

The Directive says that the Competitive Procedure with Negotiation must start with a Contract Notice, providing a minimum of 30 days for requests to participate. Trusts can limit the number of suppliers to be invited to negotiate by setting minimum requirements, with at least 3 suppliers being taken through if possible. Shortlisted suppliers will be asked to submit an initial tender which will form the basis of negotiation.

Trusts can then negotiate with suppliers through a number of amended tenders until they have a set of final tender documents which meet their requirements. Negotiations can include quality, quantities, commercial clauses, social and environmental considerations. Negotiation is not permitted in relation to the selection criteria, award criteria and weightings which have been predetermined. Negotiations should be aimed at improving the tenders so as to allow Trusts to procure things perfectly adapted to their needs.

Following negotiations, the final tender will be issued. Suppliers must be told that it is the final tender, and a fixed amount of time should be set for return of responses.

But, and this is significant in our opinion, the Trust does not have to negotiate if it has reserved the right not to. So, a procurement could be run under the Competitive Procedure with Negotiation, allowing flexibility to negotiate if it became necessary, but if it did not, the winning bidder would be determined by the initial tender. This could be extremely useful, and result in the Competitive Procedure with Negotiation replacing the Restricted Procedure in many circumstances.

On a separate note, there are no significant changes to the Negotiated Procedure without Prior Publication of a Contract Notice, which is still only justifiable in extreme urgency brought about by unforeseeable events or where it is clear that advertising would not create more competition, for example due to artistic, exclusive rights or technical reasons.

And, there are no major changes to the Competitive Dialogue Procedure.

Innovation Partnership Procedure

This is an entirely new procedure introduced by the Directive, intended for use if a contracting authority wishes to commission the development of works, services or supplies and subsequent purchase if development is successful. The contracting authority must have identified the need for an innovative solution that cannot already be met by what is available on the market.

The procedure is kicked off by the publication of a Contract Notice and suppliers are invited to participate based on prescribed selection criteria. The contracting authority may limit the number of participating suppliers, but this must not be less than 3, if possible. Negotiation then takes place with selected suppliers until a final tender is issued.

The contracting authority will enter into an innovation partnership with the successful supplier or suppliers, with the contract providing for phases of development, and subsequent purchase of the works, services or supplies. The contract is likely to provide for termination at different stages if development does not meet previously agreed requirements.

Time limits

You will be pleased to hear that time limits have been shortened for the **Open Procedure** - the minimum time limit for the return of ITTs has been reduced to 30 days where tenders are submitted electronically.

Restricted Procedure – the minimum time limit for the return of ITTs has been reduced to 25 days where tenders are submitted electronically. The minimum time limit for expressions of interest and PQQs remains at 30 days.

As with the current rules, time limits can be reduced even further if certain circumstances apply, such as a PIN having been issued or in situations of urgency.

There are two things worthy of specific mention relating to reducing the timescales even further. First, the preamble to the Directive states that deadlines should be allowed to be shortened beyond minimum requirements for the 'where the deadlines would be impracticable because of a state of urgency' which should be duly substantiated by the contracting authority'. Significantly it states that this urgency need not be brought about by events unforeseeable and not attributable to the contracting authority.

Second, it is worth noting that there is increased flexibility for sub-central departments to reduce the timescales. Although this does NOT apply to Trusts, it is included here so that there is no confusion as to whether Trusts can take advantage of this. When using the sub-central departments can reduce the ITT stage of the to a timescale agreed with shortlisted suppliers, and if agreement cannot be reached, departments can set a minimum of 10 days; a significant departure from previous rules and those applying to central bodies.

Selection criteria

A number of additional requirements will be introduced at selection stage which will provide more protection for Trusts and make the process less onerous for suppliers.

To make things less onerous for suppliers, the minimum annual turnover suppliers can be required to have cannot be more than twice the contract value, if Trusts wish to use turnover to test financial capacity.

Self-certification

There will be an increased ability for suppliers to self-certify that they can meet and evidence minimum requirements, with only winning bidders being required to produce documentary evidence, and not even then if the documents are available on a free database accessible by the contracting authority. This could be problematic when using a two stage procurement process, such as the as it is possible that suppliers who cannot meet the selection criteria are invited to tender, to the exclusions of suppliers who can meet the criteria, thereby limiting competition.

To address this, the Directive includes an exception, allowing contracting authorities to request supporting documents if it is necessary to ensure 'the proper conduct of the procedure', for example when suppliers are shortlisted to be invited to tender in a Restricted Procedure. It is unclear in which other circumstances it would be permissible to request documentary evidence during the procurement process.

These self-certifications will be called European Single Procurement Documents and will comprise a formal statement confirming that the relevant grounds for exclusion do not apply, the selection criteria are fulfilled and the documentary evidence could be provided immediately if requested.

The EU Commission will provide a standard Single Procurement Document which contracting authorities must accept from suppliers.

Mandatory and Discretionary Exclusions

Trusts will be required to add new mandatory and discretionary exclusions to their tender documents. Of particular note are the addition of convictions for terrorism, human trafficking and child labour offences and non-payment of taxes and/or social security contributions to the mandatory list. There are limitations on these exclusions, specifically if to exclude a supplier would be disproportionate, payment of social security has been brought up to date, or it was more than x years ago. The number of years must be determined by member states, but should not be more than 5 years from conviction.

Significant deficiencies in the performance of a prior public contract has been added to the list of discretionary exclusions (unless member states makes this mandatory), if the deficiencies led to early contract termination, damages or comparable sanctions. If however the supplier is able to provide evidence that it has taken measures to 'demonstrate reliability' they should not be excluded from the process.

Changes to the award stage

The preamble to the Directive contains some general guidance on award criteria, for example confirmation that criteria should always include a price element.

All contracts will have to be awarded on the basis of the Most Economically Advantageous Tender, so Price Only will no longer be an overall criterion. But, the Directive does state that Most Economically Advantageous Tender can comprise of price only! It appears therefore that this is a change in terminology only.

Opening up business to SMEs has been high on the EU and UK agenda for some time now. To reflect this, contracting authorities will need to consider whether to divide every contract into lots. If a contract is not divided into lots, it will need to be justified in the Contract Notice or tender documents.

e-Procurement

The new Directive requires end to end e-procurement to be implemented within 30 months. There are some detailed rules surrounding this, but it primarily means that notices must be sent to OJEU electronically; bidders must be given electronic access to documents; they must be able to submit their tenders electronically; and communication must take place electronically.

These new rules will not result in a great deal of change for most of us in the UK as on the whole we already conduct end to end e-procurement. It has been introduced because rather surprisingly only 10% of procurements were carried out electronically across the whole of the EU in 2011.

There are specific requirements regarding the tender process and how it will be electronically executed, but if you are using tendering software these requirements should already be met:-

- The exact time of submission of requests to participate and tender documents must be identifiable.
- Trusts should not be able to access tender documents before the deadline expires.
- People must be authorised to set and change dates for opening tender documents.
- Only authorised people must be able to access tender documents.
- Bidders must be provided with unrestricted and direct access to the procurement documents from the date of the Contract Notice or confirmation of expression of interest.

e-Certis

e-Certis is an online database managed by the EU commission. Member states will be required to keep it up to date with details of the types of certificates that suppliers might need to provide during a procurement process in that member state. It will also contain details on where different types of information required during a procurement process might be found, for example on sid4gov.

e-Invoicing

All Trusts will be required to accept e-invoicing from suppliers, provided that the e-invoice conforms to a prescribed standard. The EU plans to draw up a standard for a model core electronic invoice.

Amending a contract

If circumstances change following award of contract, it is often difficult to determine what can be done. The new Directive very helpfully clarifies this and explicitly sets out the circumstances and extent to which a contract can be amended following award. And the new provisions are more lenient than may have been expected.

The Directive provides that contracts and framework agreements can be modified in any of the following circumstances:-

- a. Where changes have been provided for in the original tender documents.
- b. When additional works, services or supplies have become necessary that were not provided for in the original tender documents and where a change of contractor cannot be made for economic or technical reasons, and would cause significant inconvenience or substantial duplication of costs for the contracting authority. If this circumstance is relied upon, the increase in price cannot be higher than 50% of the value of the original contract.
- c. Where the need to change the contract has been brought about by circumstances which a diligent contracting authority could not foresee, the change does not alter the overall nature of the contract, and any increase in price is not more than 50% of the value of the original contract. There could be more than one change of this nature to a single contract.

If circumstances b or c are relied upon the contracting authority must publish an OJEU Notice.

- d. If the change brings about a new contractor due to a review clause included in the original tender or due to succession.
- e. Where modifications are not substantial. The Directive provides guidance on what would be considered substantial, for example if it would have resulted in different suppliers being selected, or winning the tender, or if the scope of the contract is extended significantly.
- f. The value of the modification is below the OJEU limit, and is below 10% of the initial contract value for services and supplies or below 15% of initial contract value for works. And the overall nature of the contract has not changed.

Framework Agreements

Frameworks are a very popular procurement method, and as such, the Directive only provides some clarifications, rather than any changes:-

- Contracting authorities that will be able to use the Framework must be identified when it is set up. They must be identified by name or some other means, such as a category within a geographical area. And be sure to include reference to successors.
- If it is a multi-supplier Framework, and there is the option to either direct select or carry out a mini-competition, there must be objective criteria in the Framework documents as to how this decision will be made.
- The recitals to the Directive confirm that contracts called off the Framework do not need to coincide with the duration of the Framework agreement, but may be shorter or longer.

It is still the responsibility of the authority using the Framework to ensure compliance with EU law. If there is a challenge made it will be against the Trust that is using the Framework, not the contracting authority that established it.

In-house award (Teckal) and inter authority cooperation (Hamburg)

Since the 2004 Directive there have been a number of things established by case law, two of which are rules concerning in house awards and inter authority cooperation. These rules have been included in the Directive, and Trusts only need take note of them if they are awarding a contract in-house or when there is inter authority cooperation.

Teckal

The Directive says that if contracting authorities award a contract to entities owned and controlled by them, they do not have to follow the procurement rules when awarding that contract, they can just direct award. Ownership and control are defined in the Directive as exercising 'a control which is similar to that which it exercises over its own departments' and 'more than 80% of activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority' and 'there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by applicable national legislative provisions...'

Hamburg

This allows contracting authorities to set up cooperation agreements between them without the need to follow the procurement rules. But, this may only be done if the cooperation relates to the aim of ensuring public services they have to perform are provided with a view to achieving objectives they have in common. The implementation of that cooperation must be governed solely by considerations relating to the public interest and, if any activities are performed on the open market they must constitute less than 20%.

Concessions Directive

This is a completely new Directive, governing the procurement of concessions contracts with an estimated value of more than 5 million euros. Prior to the new Directive, services concessions contracts were not regulated at all, while works concessions attracted some light regulation.

As concessions contracts are a very specific area, we will just outline the principles which will guide procurements in the future:-

- A Notice must be published in OJEU
- The mandatory and discretionary exclusions apply
- Selection criteria must be related and proportionate
- Award criteria must be objective and ensure equal treatment, non-discrimination and transparency
- Negotiation is allowed in relation to some aspects of the tender
- Minimum time limits apply

Other things to note

Dynamic purchasing

The rules will be relaxed, in particular the requirement to publish a Contract Award Notice after every call-off.

Mutuals and Social Enterprises

Contracts can be reserved to Mutual and Social Enterprises for a limited period.

Skills and experience

The Directive will allow contracting authorities to take into account skills and experience of individuals at award stage as long as it is directly relevant to the contract.

Social and environmental

Social aspects will be able to be taken into account. Trusts will be able to require specific certification and labels of social or environmental characteristics which previously has not been allowed.

Glossary

Award criteria – the criteria by which the winning suppliers will be determined.

Competitive Dialogue Procedure – procurement procedure available in prescribed circumstances during which the contracting authority can dialogue with shortlisted suppliers to determine a solution which meets their requirements, after which the contracting authority invites shortlisted suppliers to bid.

Competitive Procedure with Negotiation – procurement procedure available in prescribed circumstances during which the contracting authority can negotiate with suppliers to develop tender documents which meet requirements, after which the contracting authority invites shortlisted suppliers to bid.

Concessions contract – a grant of a right by a contracting authority to a supplier to provide services or works. The risk of carrying out the service or works must be transferred to the supplier.

Contract Award Notice – the Notice which must be published in the Official Journal of the European Union to confirm the details of the contract which has been awarded.

Contract Notice – the Notice which must be sent to the Official Journal of the European Union in advance of certain procedures advertising a contract upon which suppliers can bid.

Contracting authority – a public body, as listed in the Procurement Directives.

Discretionary exclusions – prescribed list of requirements. If suppliers do not meet these requirements, they may be excluded from the procurement process.

Framework Agreements – an arrangement whereby a contracting authority enters into an agreement with one or more suppliers, through which the contracting authority or others can purchase prescribed supplies, services or works.

Innovation Partnership Procedure – new procurement procedure available when a contracting authority requires an innovative solution which is not already available on the market.

Invitation to Tender (ITT) – the document sent to suppliers who wish to bid for a contract, setting out the conditions of tender, the award criteria, scoring methodologies and questions.

Mandatory exclusions – prescribed list of requirements. If suppliers do not meet these requirements, they will be excluded from the procurement process.

OJEU – Official Journal of the European Union

Open Procedure – one stage procurement procedure whereby all suppliers can submit a bid for the contract.

Pre-qualification questionnaire (PQQ) – the document sent to suppliers in two stage procedures, setting out the selection criteria which suppliers must meet in order to be invited to tender, as well as criteria and scoring methodologies to determine the suppliers to be invited to tender.

Prior Information Notice (PIN) – a notice sent to the Official Journal of the European Union by contracting authorities to advertise details of future contracts.

Restricted Procedure – two stage procurement procedure whereby all suppliers go through a selection stage during which they are shortlisted to be invited to tender.

Selection criteria – criteria that suppliers must meet in order for their bid to be considered, or criteria that determines which suppliers should be shortlisted.



LEASEGUARD

Head Office:

Leaseguard Group Limited
Overy Court, Dorchester on Thames,
Oxon, OX10 7JU
T. 01865 340800 F. 01865 341800
www.leaseguardgroup.co.uk

Operations Centre:

Leaseguard Group Limited
Little Baldon House
Nuneham Courtenay, Oxon, OX44 9PU
T. 01865 340819 F. 01865 340829
www.leaseguardgroup.co.uk