

Brabners
we make the difference

Public Procurement Law Supporting Contracting Authorities and Utilities



Public Procurement Law

Understanding when public procurement law applies is critical for contracting authorities to ensure that you operate compliant procurement processes. Whether central government, a local authority, a registered provider of social housing or other government body or utility, such as an airport or port, if you want to purchase or procure works, goods or services over a certain value then public procurement law will apply.

Until the new Procurement Bill comes into effect in late 2023 the law is contained in three sets of regulations; The Public Contracts Regulations 2015; The Concession Contracts Regulations 2016; and The Utilities Contracts Regulations 2016.

These laws regulate how and when an entity governed by public procurement law procures a contract, including rules around pre-market engagement and the minimum requirements that must be complied with when competitively tendering the contract. You must also observe public procurement law throughout the life of a contract. For example, there are limits on making changes to a contract during its term, and of course, at the end of the contract, the cycle begins again and a new contract must be procured.

Failure to comply with public procurement law is a failure of a contracting authority's duty to bidders and to other potential economic operators that may have an interest in the contract and there are a range of remedies available to private sector suppliers in the event of such failure.

The commercial challenges

Over the course of time, public procurement law has generally become tighter and more difficult to step outside of. This can be frustrating if you wish to take advantage of commercial opportunities that are presented to you, but you can't due to the requirements of the Regulations. For example, Councils or registered providers of social housing frequently wish to accept a "package deal" offered by developers.

Whilst the ultimate intention of public procurement law is to foster competition and encourage better value for money, there is an internal time and monetary cost to ensuring compliance with the Regulations, with many breaches being inadvertent breaches of the complex rules, which at times can seem bureaucratic.

While there are exemptions in the Regulations, there are rules around how those exemptions apply which must be rigorously adhered to and they are quite fact specific. If organisations, or the specific contract in question, are not exempt from the Regulations, understanding how best to navigate public procurement law can help you to still achieve your goals.



How we can help

Our procurement experts can assist by providing commercial solutions to your public procurement law issues.

We advise on:

- Whether the contracting entity is considered to be a contracting authority or a utility for the purposes of public procurement law (which is not always obvious);
- Whether the nature of the deal would be considered to be a supply, services or works contract under public procurement law;
- Whether the overall value, which is calculated in accordance with certain rules within the Regulations, would be sufficient for the public procurement law to apply;
- Whether there are any practical measures which could be taken to keep a contract outside of the ambit of public procurement law



Is an exemption available?

There are a number of exemptions available within the Regulations but they are not necessarily easy to apply. They are tightly drawn and must be considered carefully on the facts of every proposed contract.

To understand if an exemption applies, you will need support with:

- Assessing whether one of the limited list of exemptions could be relied upon, such as in relation to the purchase of land, an emergency or technical matters.
- Assessing whether one of the public sector exemptions are available, for example the in-house (or 'Teckal') exemption. For utilities, there are also the provisions regarding "affiliated undertakings".
- Assessing whether the proposed deal could benefit from the "exclusive rights exemption", which allows contracting authorities and utilities to negotiate with one party to protect the exclusive rights held by the other party. These can include intellectual property rights and, in very restrictive circumstances, land rights. This is subject to multiple criteria and is tightly drawn.

We can undertake a review of each of these options and advise on the practical steps you would need to take to rely on each exemption. This may include the issue of appropriate notices in the UK Find a Tender Service (FTS) to mitigate risk.

Considering a proposed commercial deal

If there is a particular deal you wish to progress, there are a number of practical issues that we look at to help you mitigate risk to your organisation.

We can:

- Provide examples of where other projects successfully took measures to avoid or mitigate risks and can suggest contractual measures as well as procedural and legal steps that can be taken.
- Advise on the merits of different Find a Tender Service Notices and the risks and rewards of their use to manage risk.
- Advise on the benefit of pursuing a fully compliant route versus the use of an exemption, based on the facts of the proposed deal.
- Advise on the protections afforded by public procurement law in order to de-risk the contract.
- Advise on the risk of a challenge if you choose to rely on an exemption where it is unclear if the exemption fully applies.
- Advise on what the risks of a challenge would be and its outcomes so that you can enter a particular contract fully aware of the risks and benefits to your organisation.

Whatever route you choose to take, our procurement team can support you in the process, including drafting of all notices, tender documents and contractual documents.



If It Goes Wrong or a Challenge Comes Your Way

Even after following a fully compliant procurement procedure, you may find yourself receiving a challenge from an unhappy bidder at the end of the process. In such circumstances, we can provide you with the critical support you need to protect your process and contract, including:

- Assessing the merits of the claim.
- Robustly defending the claim on your behalf.
- Suggesting mitigation measures (if possible), including without prejudice discussions.

- Advising on lessons learnt in order to help improve processes to manage or mitigate the risk of such challenge arising in the future.

In some cases, expert Counsel advice is required and we have strong partnerships with leading procurement Counsel in order to seek advice to better help you determine the best course of action when pursuing any potentially contentious routes and to defend any claim you may receive.

For more information or for an initial discussion regarding any of the matters outlined above, please contact one of our team.