

Brabners
we make the difference



Public Procurement Law
Supporting the
Private Sector

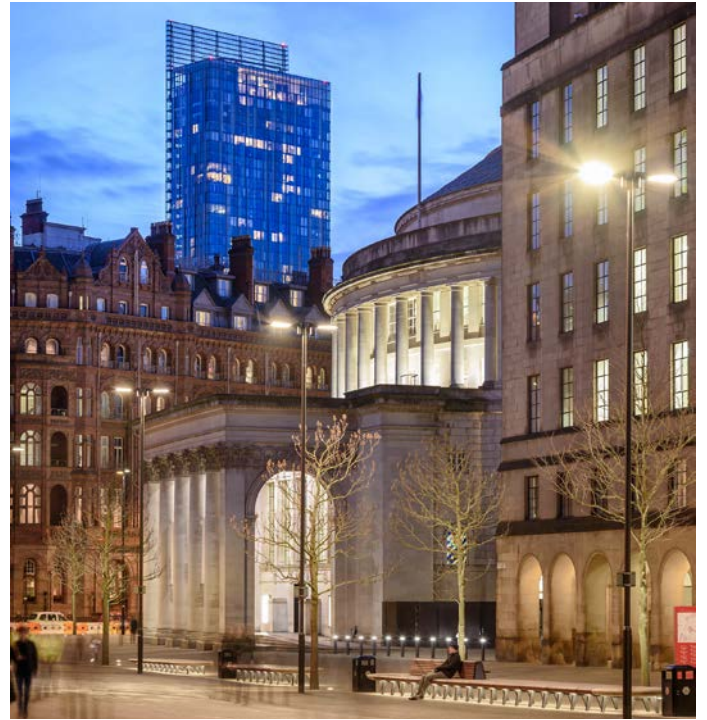
What is Procurement Law?

When contracting authorities, such as central government, local authorities, registered providers of social housing and other government bodies or utilities, such as airports or ports, require 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 through a competitive tender, the minimum requirements that must be complied with and how that competitive tender must be carried out.

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



Key points to be aware of when tendering

There are a number of points that any private sector suppliers should be aware of when considering entering into or bidding for a contract with an organisation that is governed by public procurement law, such as:

- Is the organisation a contracting authority?
- If it is a contracting authority, is the contract in question being procured in accordance with public procurement law? If it is not, is the contract subject to an exemption or are the Regulations being circumvented?
- Contracting authorities must treat bidders fairly and equally and must comply with the principles of transparency and proportionality when setting out their requirements and in the evaluation of tenders.
- There are minimum requirements that must be complied with in their notification to you when you have not been successful in your bid.

- There are limits on the changes that can be made to a contract once it has been awarded.
- While there are exceptions to the Regulations, there are rules around how those exceptions apply, which must be rigorously adhered to and they are quite fact specific.

Subject to limited exceptions, the time limit for bringing a claim is 30 days from the date when you first knew or ought to have known of the grounds for bringing the claim. Therefore, if a cause of challenge arises, you must not wait until the end of the tender process before bringing a claim.

If you are considering a procurement challenge, we can act quickly to assist you in providing further details, information and advice on any and all of the above. We can also advise on the terms and conditions of contract that are provided to you by the contracting authority as part of the bidding process.

Can I approach the contracting authority or utility with an opportunity?

You might like to approach a contracting authority or utility with a proposed “package deal”. What we mean here is an opportunity to undertake a contract that you have pulled together and think may be attractive to the organisation bound by public procurement law. We often, but not exclusively, see this in relation to development deals where the developer has pulled together land, a potential contractor and possibly an outline of planning permission.

On the face of it, public procurement law does not permit the contracting authority or utility to proceed with such an opportunity as the contract, if above the minimum threshold in value, should be tendered in line with the procurement regulations. However, we can advise on potential exemptions or exclusions from the relevant Regulations that may apply in such circumstances. We can also discuss alternative options for complying with the Regulations and/or mitigation strategies to minimise the risk faced by the contracting authority.



How do I protect my rights?

A big concern for private sector suppliers is when you consider that you have been unfairly treated in what is supposed to be an objective and fair tendering procedure undertaken by a contracting authority or utility. To help you understand your position, we can work with you through the challenge process:

1. Firstly, we would consider the information provided to you as an unsuccessful bidder and review it in the context of the original tender documents.
2. Then we would advise whether we consider there has been a breach of the duties placed on the contracting authority or utility in respect of your treatment in the process, or if there may have been a manifest error in the evaluation of the tender.
3. We would then assist in preparing a formal response to the contracting authority or the utility setting out the basis of your claim.
4. We can then either escalate the legal process and/or investigate alternative approaches that may be more suitable in the circumstances for yielding the result

you seek, namely either damages in recompense for the loss of the opportunity and the time incurred in preparing the bid or reversing the process to give you another chance of winning the contract and performing the work.

We would keep you up to date with changes and updates in law and Government procurement policies and guidance to assist in ensuring you can assert your rights.

In this process, you will benefit from our combined expertise on the commercial contracts aspects of the tender process, the public procurement law aspects and any litigation needs that arise as part of bringing a procurement challenge. In some cases, expert Counsel advice is also required, and we have strong partnerships with leading procurement Counsel in order to seek advice to better help you assess your rights and any claim you may have.

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