

DISCUSSION

Who's Who Legal brings together two leading experts to discuss issues facing government contract lawyers and their clients in the industry today.



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What impact has the performance of the domestic economy in your jurisdiction had on the workflow of government contracts in recent years?

EH: The pressure on public finances as a result of the credit crunch, and the subsequent downturn in the economy, lead to the need to, first, drive efficiencies in the way public services are delivered and second, to achieve revenue generation out of public assets. This has led to an increased demand for innovative models to share costs, deliver services in a more efficient way and attain investment to deliver capital programmes. We have noted public/private joint ventures become far more prevalent in procurement as a wide range of public sector bodies seek to attract the capital and expertise of the private sector in transforming and generating revenue out of public assets.

PC: Ireland suffered a serious economic crisis for a number of years after 2008, but has since recovered well and for the past four years has been the fastest-growing economy in the EU. There is no doubt that during the crisis public finances were constrained and, as a result, government spending decreased and this had a direct

impact on the size and volume of public contracts that were tendered.

Since the economy has turned around, there has been a significant increase in the number of national frameworks and major contracts that have been procured or put out to tendered.

The Office of Government Procurement (OGP) commenced operations in 2014 and has the responsibility for national procurement policy and procedures. Since 2014, the OGP has put in place 1,446 contracts/mini competitions representing an estimated framework/contract value of €13.8 billion and an estimated annual spend of €3.7 billion. A number of large PPP projects have also been successfully procured in the health and accommodation sectors. Transport bodies (port, rail, road, air) are all very active currently, as are many third-level education institutions. The construction industry in particular is benefitting from the upsurge in activity.

Have there been any major legislative or policy changes in your jurisdiction recently? If so, how have they impacted your practice?

EH: The most recent legislative change to have had an effect was the introduction

of the Concession Contracts Regulations 2016 as, prior to this, there was a divergence of practice in relation to the award of concession contracts. While the approach of many UK authorities was to advertise concession contracts opportunities in any event, we have seen an increase in the awareness of public bodies of the mandatory obligation to compete. Case law has shaped the conduct of procurement, in particular the need to maintain an audit trail by way of comprehensiveness notes of the evaluation and moderation process, and the rigour of the application of the award criteria and evaluation methodology.

PC: Save for the introduction of national legislation to implement the Concessions Directive 2014/23/EU, there have been no major legislative or policy changes in the procurement area during the past year. GDPR (introduced in May 2018) has given rise to particular data protection issues which now need to be considered in the tendering context.

Procurement litigation continues to ensure that the law evolves on a regular basis and this has implications for practitioners.

Some recent decisions of the courts could have a significant influence on the

application of the remedies regime. For example, the Irish Court of Appeal has determined that damages can only be awarded when a breach of procurement law is “sufficiently serious”. This clarification of the law has implications for the manner in which applications for injunctive relief (automatic suspension) are dealt with. In other litigation, the very constitutionality of aspects of the remedies regime has been tested. All of these developments now colour the legal advice that bidders and awarding authorities receive when matters become contentious.

The National Development Plan (NDP) 2018–2027, introduced in February 2018, sets out the government’s policy vision for the country’s development priorities. The NDP anticipates €116 billion of expenditure on infrastructure in an effort to address shortcomings in Irish infrastructure as well as future challenges. The NDP also makes clear that PPP will continue to feature for appropriate public capital investment projects and not all projects will be exchequer funded.

How active is the litigation market at the moment? To what extent have disputes become more complex?

EH: We have seen continued increases in the volume of procurement cases we handle on a year-on-year basis for the past eight years. We now handle approximately 30–35 procurement challenges each year. The introduction of a court fee of £10,000 for damages claims above £200,000 has been reported to have deterred some claimants from issuing proceedings.

Disputes have become more complex as a result of the court’s willingness to scrutinise the evaluation and moderation procedure in detail. Credible witness evidence and cross-examination by reference to the contemporaneous documents has become an essential part of any robust defence. In addition, there are significant strategic decisions for the parties relating to remedies: will the court maintain the automatic suspension or lift it? Is the breach sufficiently

serious to entitle the claimant to an award in damages?

PC: The litigation market is very active. As the number, size and value of contracts have increased in recent years, so too has the number of court challenges by unsuccessful bidders. A number of major infrastructure projects have been held up by litigation.

Court proceedings are often complex and can be drawn out, particularly where discovery is extensive or appeals are lodged; however where the contract award process is suspended by legal challenge, the courts can fast-track the litigation in order to obtain resolution as early as possible.

It is important to emphasise that many procurement challenges do not result in litigation; disputes are often resolved in other ways. Many authorities, when challenged, will terminate the procurement process rather than get drawn into a potentially lengthy legal process.

What impact has use of technology had on the procurement process?

EH: UK contracting authorities were early adopters of e-procurement products and we have found major projects procurements have been conducted through online portals for many years in respect of exchanging documents and clarification communications. We have seen an increase in the use of dynamic purchasing systems and e-auctions, which rely heavily on procurement platforms. Quite rightly the mainstay of complex procurements remains the face-to-face negotiation between authorities and bidders on commercial and technical solutions.

PC: Many authorities have moved to receiving electronic submissions from bidders and now conduct all of their procurement activities electronically. By October 2018, it will become mandatory to do this. Tenders are generally advertised on a central portal (etenders.ie) and clarifications/submissions are published through it.

Evaluation teams often work solely with online submissions and do not print hard copies. Individual evaluators often complete online evaluation forms and the outcomes of moderation meetings are recorded electronically. Documentation in electronic form may be required to be produced for court proceedings if necessary.

In general, technology has sped up the procurement process and reduced the burden on bidders who previously may have had to produce and return voluminous hard copy materials. In general. These advances are considered to have assisted SMEs that have less resources to devote to public tendering.

How has pressure on fees impacted the legal market this space?

EH: There has been consistent demand for more complex work where authorities do not have specialisms in-house, and in order to achieve the efficiencies and revenue generation referred to in my first question. More routine work is likelier to be kept in-house. There is more pressure to ensure participation in legal-service frameworks which are often mandated for use. Clients need to see advice that is commercially aligned with the organisation and capable of achieving objectives, and continue to be prepared to pay higher rates for this complex problem-solving end of the spectrum.

PC: There is always pressure on legal fees, particularly when the clients are in the public sector. However, procurement work can be complex and a number of the larger law firms offer specialist procurement teams who can advise quite efficiently.

Much procurement work is carried out without the involvement of lawyers. The majority of documentation has become largely standardised, however, external legal expertise is often sought to assist with the development of selection and award criteria, draft contracts, assist with negotiations, advise on issues that arise during evaluation and advise on debriefing and when disputes arise.