

MacRoberts Public Sector & Government Group

Directive 2009/81 - the New EU Defence & Security Directive

Shortly, by 20 August 2011, Directive 2009/81 needs to be transposed into national law by EU member states and, when implemented, is expected to herald major reform in the way in which works, supply and service contracts (including contracts for military or security purposes containing classified information) are publicly procured in the field of defence and security.

Historically, procurements in these sectors have been largely exempt from the EU market. Relying widely upon Article 296 of the EC Treaty, which permits member states to derogate from the Treaty rules on public procurement (including in relation to the fundamental need for transparency) if deemed necessary to protect essential interests of their security, member states have routinely excluded competitive procurement for the majority of defence and security works, goods and services, often irrespective of the actual sensitivity of the procurement.

Now with the aim of opening up the European defence and security market - therefore creating "new" public contract opportunities cross border - the Directive sets out procurement rules and processes to be followed and also the consequences for breaching the new rules.

More specifically, the Ministry of Defence has been tasked with the Directives implementation in the UK and intends to do so by the Defence and Security Public Contracts Regulations 2011 ("the Regulations") which will come into law on 21 August. From that date, the Regulations will govern defence and sensitive security procurements above a specified financial threshold by contracting authorities and entitles throughout Scotland, England, Wales and Northern Ireland.

The key elements of the Regulations are as follows:

- I. The open procedure is not available. Instead, the Regulations allow use of the restricted or a more streamlined negotiated procedure. Competitive dialogue may also be available in limited circumstances.
- II. Recognising the sensitive and often complex nature of defence and security contracts, the Regulations contain specific provisions to allow procurers to protect sensitive information and their security of supply. For instance, the Regulations allow a procurer to ask for certain information in order to assess the capability of not only contractors but also sub-contractors to meet security of supply requirements.
- III. The Regulations include specific provisions relating to sub-contracting, including the ability for procurers to compel successful contractors to award all or part of its proposed sub-contracts to third parties through OJEU competition at an EU level.
- IV. The Treaty exemption still applies and may therefore be relied upon, although it is thought use of the exemption is likely to be more carefully scrutinised. Certain contracts are also automatically exempt from the regime including some research and development services and cooperative programmes between EU member states based on research and development for a new product.
- V. A remedies regime very similar to that contained in the Public Contracts Regulations 2006 which apply in England and Wales ("PCR 2006") applies meaning (a) potentially any procurement decision may be subject to legal challenge, (b) a standstill period should be complied with, and (c) the courts have the power to declare a contract ineffective if certain procedural rules are not adhered to (such as the standstill rules).

In many respects the Regulations reflect existing rules and practices for non-sensitive and non-defence procurements contained in PCR 2006, the Public Contracts (Scotland) Regulations 2006 ("PCSR 2006") and the respective utility regulations. But it is also vital to recognise the Regulations do have its own quirks and will undoubtedly have a legal, operational and commercial impact on many client's current practices and procedures. It is also important to appreciate that not only clients in the 'military' or defence sector (in its strictest sense) will be affected.

Our Public Procurement Experience

In this regard, MacRoberts LLP has many years of specialist experience of advising contracting authorities in relation to Scottish, UK and EU public procurement law issues. Our procurement team regularly advises public, private and utilities sectors on public procurements, ranging from the

MacRoberts LLP

Capella, 60 York Street, Glasgow G2 8JX Tel: +44 (0) 141 303 1100
Excel House, 30 Semple Street, Edinburgh EH3 8BL Tel: +44 (0)131 229 5046

procurement of large infrastructure works, down to smaller procurements, as well as competitive dialogue and particular issues arising at every stage of a procurement process, including compliance advice under PCR 2006, PCSR 2006, Utilities Regulations and on all matters relating to defence procurement. This includes most recently advising a major utility provider on the question of whether or not the requirements of the New Defence Directive apply to certain of its activities.

We are also in the enviable position of being regularly called upon to advise both the public sector and bidders in relation to EU public procurement grievances and remedies. For example, we have assisted authorities in responding to bidder letters of complaint and approaching potential 'hostile' bidder debriefings. We lead discussions for aggrieved bidders with the contracting authority concerned, and advise regularly when aggrieved contractors seek remedies in the Scottish and UK courts - in particular in relation to advising on the prospects for successful action (or defence) with regard to concerns of non-compliance with the EU public procurement regime.

We also provide procurement training to clients, which can provide major benefits in terms of effective competitive tendering, and the management and in the outcomes of procurement competitions. Recent training events include - 'Attacking New Markets: A Guide to the New Defence Regime.'

In terms of personnel, our team of three lawyers dedicated to and specialising in public procurement law is led by Duncan Osler who is one of only three people Accredited by the Law Society of Scotland as a Specialist in Public Procurement Law. Duncan is also an active member of the Procurement Lawyers Association which publishes papers on public procurement law matters. As such, Duncan contributes to best practice policy development both as a speaker at conferences, seminars and through published articles. Other key team members are Robin Fallas (Senior Solicitor) and Kimberley Russell (Solicitor), who both have many years of extensive experience in advising on all aspects of procurement compliance and procurement disputes.

In addition, as a multi-service Firm, we have a strong philosophy within MacRoberts that wherever you touch down in the Firm, the commitment to the success of our clients, and the standard and quality of service, should be outstanding. It is a philosophy reflected in our One Firm vision:

MacRoberts values the delivery of the highest quality of service to all of our clients, above all else. We expect that every partner and employee, as individuals, show outstanding personal commitment in achieving that goal, recognising that the financial success of the Firm and our personal professional development and success are based on the success of our clients. Everything that we do is therefore driven by the following objectives:

First - the success of our clients

Second - the financial success of the Firm

Third - our own personal satisfaction and development

This vision drives our business plans and underpins all of our operational and financial objectives and strategies. It is a lasting statement of what we are about and how we go about our business. It is the essence of the Firm.

Together with the breadth and depth of our specialist team and public procurement experience, this vision ideally places us to assist you and your clients in relation to all public procurement matters - including, but not limited to, the implications of the new defence regime.

For any information in relation to MacRoberts LLP and/or how we can assist further, please contact:

Duncan Osler, Partner

**MacRoberts LLP
Excel House, 30 Semple Street
Edinburgh EH3 8BL**

**duncan.osler@macroberts.com
T: 0131 248 2115**