



PROJECTS AND CONSTRUCTION

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# Procurement Law Update

by **Seanna Mulrean, Jamie Ritchie**

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8th August 2017 | by Seanna Mulrean, Jamie Ritchie

There have been a number of significant developments for public procurement in Ireland this year. Firstly in May, Ireland implemented the Concessions Directive. In July new guidelines and template tender documents aimed at improving how public contracts are procured and ensuring compliance with the public procurement rules were published by the Office of Government Procurement. We summarise below the key aspects of each of these developments.

## Concession Contracts

On 23 May 2017 the Concessions Directive was finally implemented by the Minister for Public Expenditure and Reform. The European Union (Award of Concession Contracts) Regulations 2017 (the “**Regulations**”) are retrospective in effect so that the new regime is deemed to have taken effect from April 2016 (when the Directive should have been implemented).

### What is a Concession Contract?

Under the Regulations a Concession Contract is a contract for a pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust either the provision and management of services (or execution of works) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services or works that are the subject of the contract or in that right, together with payment. Examples might include a contract to run a café in a hospital or a contract for the operation and maintenance of a road or rail network.

### What are the key features of the Regulations?

- The Regulations only apply to contracts which have a value equal to or greater than €5,225,000;
- The Regulations apply to both contracting authorities and utilities;
- Publication of a concession notice in the Official Journal of the European Union is mandatory;
- The duration of a concession must be limited. While the Regulations provide that the duration must not be unduly lengthy with a view to preventing market closure and restriction of competition they do not prescribe a maximum duration;
- There are no standard mandatory award procedures but certain general guarantees are provided for and are aimed at ensuring transparency and equal treatment.

### What will these changes will mean for Tenderers

Whereas previously concession contracts have often been awarded without a formal procurement process, tenderers will find that concessions meeting the threshold will now be tendered through a formal procedure in accordance with the rules set out in the Public Sector Directive (2014/24/EU) and the Utilities Directive (2014/25/EU) as applicable.

Tenderers engaging in tender processes for concession contracts should ensure that they are fully informed as to how such processes are to be conducted both from a practical and legal perspective.

## **New Public Procurement Guidelines**

On 11 July 2017, Minister Patrick O'Donovan TD commenced a series of speaking engagements at a regional level to promote the new [Public Procurement Guidelines for Goods and Services](#).

The guidelines take account of the new procurement Directives which came into force in April 2016 and are designed to inform public sector buyers and suppliers on the impact of the new Directives.

In summary, the new guidelines include:

- Model letters for use in relation to below or above threshold contracts;
- Checklists for procurement and contract files to promote compliance for the individual contracting authorities and to ensure uniformity of approach. The checklist provides a 23 point sequence for contracting authorities to follow;
- A restatement of ongoing desirable outcomes such as, discouraging turnover requirements in excess of twice that of the contract value, increased use of consortia bidding, proportionate capacity criterion and improved market analysis for tenderers;
- Provisions for an onus on each contracting authority to ensure officials are fully trained to ensure compliance with key public procurement policies; and
- An acknowledgement that Ireland will also be required to report back to the European Commission every 3 years on SME participation levels.

*LK Shields regularly advises clients in relation to both contentious and non-contentious procurement matters. Please contact [Seanna Mulrean](#) or [Jamie Ritchie](#) of our Projects and Construction team for further information.*

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