

## Checklist for auditors on managing legal & contracting risks

We asked James Falle, Managing Associate for [Addleshaw Goddard LLP](#) for the top areas that he would like to see auditors consider when they review legal and contracting risks on major procurements. This is what he gave us:

1.	<p><b>Has the authority advertised ? If not why not?</b> Under the Public Contracts Regulations 2006, most contracts must be advertised by publishing a contract notice in the Official Journal of the European Union (OJEU). Sometimes it is not necessary to advertise in the OJEU, but any decision not to advertise requires careful analysis. Some form of advertisement and competition is usually required, even where an OJEU notice is not necessary.</p>
2.	<p><b>Has the authority stood still?</b> When the authority decides who it is awarding the contract to, it must send a detailed standstill notice to all unsuccessful bidders. It must then stand still for 10 or 15 calendar days before signing contracts. This standstill period allows unsuccessful tenderers to take action in the courts should they feel that they have sufficient grounds.</p>
3.	<p><b>For call offs from a framework, has the authority voluntarily stood still?</b> There is no obligation to run a standstill period for framework call-offs. However, if authorities do not stand still, there is a risk of the call-off being declared ineffective. Therefore, authorities would be wise to voluntarily stand still on most major call-offs.</p>
4.	<p><b>Has the authority provided appropriate information?</b> Reasons and evaluation scores (including against each sub-criterion) for the winner and unsuccessful bidder must now be stated in the standstill notice. Additionally, unsuccessful bidders may request a standard debrief. If the authority does not provide appropriate information in the standstill notice, the contract might be set aside by a declaration of ineffectiveness. Additionally, the 30 day limitation period for damages claims may not have started to run.</p>
5.	<p><b>Has anyone complained?</b> Authorities are seeing increasing claims and demands. If there is a known complaint then clearly the risk that the complainant will press on (e.g. by taking court proceedings or complaining to the EU Commission) exists and the merits of any claim must be carefully assessed.</p>
6.	<p><b>Has the authority published a contract award notice (CAN)?</b> The authority can reduce the ineffectiveness time limit by publishing a contract award notice in the OJEU after contract signature. This is particularly useful if the contract was never advertised because the authority believed that one of the exceptions applied such that it did not need to advertise, or if there have been changes to the authority's requirements during the award process.</p>
7.	<p><b>What contractual safeguards has the supplier requested / been given?</b> Has the supplier requested indemnities or onerous discharge terms in the event that there is a declaration of ineffectiveness / contract shortening or an "automatic injunction"? If so, what degree of risk has been transferred to the authority?</p>

8.	<p><b>Have the authority's requirements changed?</b>  Material changes to an existing contract could take it outside the original procurement e.g. contract extensions; scope creep. In this case, there is a risk that the entire contract may be declared ineffectiveness.</p>
9.	<p><b>Have there been changes to the supplier e.g. changes to membership of consortium?</b>  Changes to the membership of a consortium, changes to key sub-contractors or changes of control of the main supplier may also potentially constitute a material change. See 8 above.</p>
10.	<p><b>Has anyone meddled?</b>  Has anyone at the authority tried to influence the evaluation panel's decision? For example, if the Cabinet or Mayor has sought to change the panel's decision, this significantly increases the risk that the award decision will be susceptible to challenge.</p>

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