

A Short Guide to: The New Public Contracts Regulations 2015

From a Contracting Authority's Perspective

This short guide provides an overview of the new Public Contracts Regulations 2015. As readers will be aware, these Regulations implement the new EU Public Sector Procurement Directive 2014/24/EU. The new Regulations essentially "copy out" the Articles of the EU Directive, a different approach to that adopted by the UK when it transposed the last (2004) EU Public Sector Procurement Directive. The Regulations make plain that expressions used in the 2015 Regulations will, for the most part, have the same meaning as they bear in the new Directive. So readers are well advised to have the new Directive, as well as the Regulations close to hand.

As with the predecessor 2006 Public Contracts Regulations which they replace, the 2015 Regulations will take some time to bed in. Interpretation of key provision is likely to evolve over time, not least in light of the various guidance notes which the Cabinet Office intends to publish and no doubt, in due course, case law from the Courts.

Timing

26 February 2015: this is the date the new 2015 Regulations enter into force in England, Wales and Northern Ireland. Scotland has recently commenced its own consultation process and will implement separately later this year. It is interesting to note that the decision to implement in England, Wales and Northern Ireland has been taken over a year in advance of the EU's deadline for implementation of the new EU Public Sector Procurement Directive 2014/24/EU. The Regulations apply to all new tender processes started on or after that date, "started" meaning the despatch of a new contract notice or publication of an equivalent advert in cases where publication of a contract notice is not mandatory (Regulation 118).

It is possible (depending on authority preference) that elements of the new Regulations may start to appear in tender processes started prior to 26 February 2015. For example, an authority may choose to publish contract notices concerning above threshold contract opportunities on Contracts Finder once they have been published in the EU's Official Journal (Regulation 106).

The majority of the provisions in the 2015 Regulations will apply from 26 February 2015 but with some key exceptions (Regulation 1). This includes the requirement to ensure that tender processes are run on a fully electronic basis which will apply to all contracting authorities only from 18 October 2018.

When do you need to go to market?

Clarification on when the new regulations apply: the scope of application of the new 2015 Regulations will be broadly familiar to contracting authorities working with the Public Contracts Regulations 2006. The new Regulations will continue to apply where a contracting authority seeks offers in respect of a public works, services or supplies contract with a value in excess of the applicable financial threshold (Regulations 3 and 5). Thresholds are largely unchanged as they must remain aligned with the thresholds set out in the World Trade Organisation's Government Procurement Agreement (Regulation 5).

Higher financial threshold and special "light touch" regime for health sector: the new 2015 Regulations do away with the Part A/ Part B services distinction and introduce a new "light touch" regime (Regulations 74-76). This new regime applies to the procurement of health, social and other services that fall within the CPV codes listed in Schedule 3 of the 2015 Regulations where the contract value is above a higher financial threshold of Euro 750,000. All other services that fall outside of the "light touch" regime will be subject to the 2015 Regulations in full. Authorities are advised to consult the CPV codes in order to determine whether a service requirement previously classified as "Part B" falls inside or outside of the new "light touch regime".

Close review of the 2015 Regulations confirms that the regime applicable to the procurement of such contracts is indeed light touch. Limited obligations apply to the award of these contracts, including:

- a contract notice must be published or a prior information notice used as a call for competition (the circumstances for doing so are prescribed)
- the award procedure must comply with principles of equal treatment and transparency
- the contract must be awarded in line with the advertised procedure
- time limits must be reasonable and proportionate.

In an update to the draft 2015 Regulations on which the Cabinet Office consulted in autumn last year, the new Regulations specify limited circumstances in which an authority may depart from the procedure it has previously outlined to bidders. However, there is an obligation on authorities to inform bidders of this variance. The Cabinet Office indicated in its consultation response document that it sees this update as enabling flexibility in exceptional circumstances, e.g. the extension of time limits where new information has come to light following publication of the contract notice. Arguably, this only reflects what an authority is permitted to do in practice already (e.g. to publish updates to already published contract notices) and is justified under the general EU Treaty Principles.

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Commissioners procuring services subject to the NHS (Procurement, Patient Choice and Competition) (No 2) Regulations 2013 will have until 18 April 2016 to adjust to the new "light touch regime" and the Cabinet Office will explain in due course what that entails. Negotiations between the Cabinet Office and Department of Health are ongoing and press this month accusing the UK Government of forcing NHS privatisation through this new regime underlines the need for the extended implementation period.

Exclusions from the regulations:

In addition to a number of the general exclusions (Regulation 10) that continue to apply, a number of additional exclusions have been introduced in the 2015 Regulations:

(1) Exemptions for public to public arrangements: the new Regulations confirm (and expand on) two exemptions for cooperation between entities within the public sector confirming the position previously established under EU case law (Regulation 12). The Regulations will not apply to:

- **"in-house awards"** (so-called "Teckal" arrangements) where a contracting authority awards a contract to an entity which it controls where (i) the authority exercises over that entity a control similar to that which it exercises over its own departments, (ii) the entity carries out more than 80% of its activities with the controlling authority, and (iii) there is no private sector capital participation in the controlled entity. This exemption is typically relied on by local authorities who set up wholly owned subsidiaries.
- **"inter-authority co-operation"** ("Hamburg Waste" arrangements) where (i) two or more contracting authorities come together to cooperate to deliver a public service they are charged with delivering with a view to achieving objectives they have in common, (ii) the co-operation is implemented in a manner governed solely by considerations relating to the public interest, and (iii) the participating authorities perform less than 20% of the activities covered by the co-operation on the open market.

There are detailed provisions in the 2015 Regulations regarding the operation of these exemptions, e.g. how to calculate whether the level of activities of the controlled entity is in excess of the 80% threshold.

(2) The "mutuals carve out": the UK pushed for and succeeded in securing a right to hold competitions limited to mutual-type organisations in certain circumstances as follows:

- this exemption is available for the award of certain types of services contracts only, including administrative services in relation to education, healthcare and housing, health and social work services, and library and other cultural services
- it can only relate to the award of contracts for not more than three years

- the mutual-type organisations must meet four key criteria: the organisation's objective must be the pursuit of a public service mission linked to the same type of services contracts described above; any reinvestment of profits must be to further the organisation's public service mission and any distribution of profits based on participatory considerations; the organisation must be employee-owned or require active employee participation; and the organisation must not have been awarded a contract under this "carve out" within the last three years.

Welcomed by many, there are some limitations to the operation of this "carve out". The "carve out" is a right to limit competition to mutual-type organisations that meet the criteria noted above, not a right to make a direct award. It will also be interesting to see how useful this "carve out" is in practice given that the types of organisations it was hoped that it would benefit (such as charities or registered providers) may not satisfy the four key criteria highlighted above in order to qualify as a relevant organisation to which this "carve out" applies.

What is your choice of procedure?

For public contracts an authority's choice of award procedure is essentially the same under the 2015 Regulations: open procedure; restricted procedure; competitive dialogue; and competitive procedure with negotiation (the "re-branded" negotiated procedure with prior advertisement). There are however a number of important changes even to these familiar procedures, including (Regulations 26-30):

- **accelerated forms of the open procedure and competitive procedure with negotiation** will be available in addition to the accelerated form of the restricted procedure which was already available under the 2006 Regulations. In all cases an authority may rely on this expedited procedure only in situations of urgency that it can duly substantiate
- **minimum time limits are generally shorter** across all of the procedures, e.g. for open procedures the authority could potentially limit the period for tender returns to 30 days (compared to the minimum 40 days under the 2006 Regulations)
- the **grounds for use of the competitive dialogue or competitive procedure with negotiation have been aligned** and, arguably, widened. For most complex projects, authorities should therefore have a choice between these two procedures and may be able to justify use of one or other procedure on the basis that design or innovative solutions are involved or the contract cannot be awarded without prior negotiation due to complexities related to, for example, the financial structure or nature of the project.

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- **calls for competition using prior information notices (rather than contract notices)** will be possible for local authorities and other non-Central Government entities adopting restricted procedures or competitive procedures with negotiation
- confirmation that **negotiations are not mandatory under the competitive procedure** with negotiation provided this possibility is highlighted from the outset
- **more flexibilities post-tender under the competitive dialogue** have been introduced. An authority may clarify, specify and "optimise" (as opposed to "fine-tune") final tenders. Negotiations with the preferred bidder are also now allowed within certain parameters. To us, these changes appear to extend what is permissible post-tender under the competitive dialogue.

It will be interesting to see how, if at all, Cabinet Office guidance adapts to the new procedures and any preferences it seeks to impose on authorities' choice of procedure, particularly in view of the level pegging seemingly granted to both the competitive dialogue and the competitive procedure with negotiation under the new rules.

The biggest change of all to the procedures is of course the invention of the "**innovation partnerships**" procedure. This is intended as a new procedure that sits alongside the other procedures set out above. Innovation partnerships are geared at enabling both the development and subsequent purchase from the same supplier(s) of an "innovative" work, service or product. The idea seems to be that high level project proposals are submitted during the competitive tender process and the solutions developed post-appointment (contrast the competitive dialogue where dialogue is required to continue until the authority identifies the solution that best meets its needs). There is also scope to appoint more than one innovation partner but for partners' contracts to be terminated as the development progresses post-appointment. For many, this procedure raises more questions than it answers and there are a number of restrictions that apply, including to the form the innovation partnership contract must take that might put some authorities off. That said, as a concept the innovation partnership seems potentially to represent a great door opening opportunity for suppliers and a new avenue for authorities to explore who are interested in working with the private sector to commercialise new products and services. In getting to grips with the new innovation partnership procedure, authorities should also be alert to the potential State aid and competition issues that may arise, for example due to the joint public/private sector working and investment.

What changes can you expect to EU notices?

The standard form EU notices for publication in the Official Journal of the European Union are in the process of being updated, e.g. contract notice, prior information notice, etc. We do not believe that they are ready for the UK or any other Member State that may be implementing as early as this (Member States have until 18 April 2016 for this). As the Cabinet Office indicated in its

consultation response document earlier this month it is working with the EU's e-Senders branch to ensure that the new notices are available as soon as possible or, perhaps more likely, guidance on how to adapt the "old" versions to ensure they are consistent. Guidance from the Cabinet Office is therefore expected on this point in the near future.

There will be a series of new EU notices too to reflect new provisions in Directive 2014/24/EU, e.g. a notice of modification of a contract during its term (distinct from a VEAT notice), a contract notice relating to the "light touch regime" contracts. These are also awaited alongside the updated standard form notices mentioned above.

What changes do you need to make to your tender documents?

Pre-qualification stage:

Not an immediate change but one to be aware of. The "core PQQ" adopted at central Government level and used by others too will be replaced by the **European Single Procurement Document**, essentially a bidder's passport to getting shortlisted on public contracts in the EU. This document will demonstrate a bidder's financial and economic standing, technical capacity and ability, and previous experience. A draft of this new document is under discussion by the Member States and as yet no final draft has been agreed. Authorities should be aware that its pre-qualification processes will need to be adapted in due course to reflect this new document.

In the meantime, authorities should ensure that any pre-qualification documents issued in relation to tender processes started on or after 26 February 2015 reflect:

- the updated list of mandatory and discretionary exclusion grounds relating to amongst other things, child trafficking offences and non-payment of taxes (mandatory exclusion) and conflicts of interest (discretionary exclusion)
- the new self-cleaning mechanism under which bidders may demonstrate why, despite falling within an exclusion ground, they ought not to be prevented from bidding for a contract
- the new condition that the minimum annual turnover may not in general exceed two times the estimated contract value
- the new parameters on use of ratios to assess a bidder's financial strength.

Tender stage:

- All tender documents must refer to contracts being awarded on the basis of the "most economically advantageous tender" ("MEAT") (Regulation 67). Lowest price can no longer be a headline award criterion. However, the wording of the Regulations seems to permit an authority to determine the MEAT on the basis of price or cost alone, i.e. without conducting any qualitative tender evaluation of factors such as the quality of the bid or its technical merit. As such, it still appears possible to award contracts on the basis of lowest price alone, albeit an authority will have to express its approach to evaluation slightly differently.

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- An authority's choice of award criteria may include staff "qualification" and "experience" where the staff assigned to deliver the contract may have a significant impact on level of performance. This effectively implements previous EU case law in this area (*Case T-477/10, European Dynamics*).
- Cost may be assessed on the basis of life-cycle cost, taking into account factors such as the energy or maintenance costs related to a tendered product. If this approach is taken, authorities must ensure they comply with the parameters on life-cycle costing set out in Regulation 68.

Contract operation

There are two key areas where the Public Contracts Regulations 2015 introduce provisions that are geared at regulating contractual issues. This is in addition to requirements relating to the operation of innovation partnerships as mentioned above:

- **Contract modifications:** the new Regulations confirm the circumstances in which contracts may be varied without necessitating a new procurement process (Regulation 72). These circumstances include:
 - low value/below threshold changes;
 - changes (regardless of their monetary value) that have already been provided for in the initial procurement documents in "clear, precise and unequivocal" review clauses provided that (i) such clauses state the scope/nature of the possible changes and the conditions under which they may be used and (ii) the changes do not alter the overall nature of the contract;
 - changes that are not "substantial", this being defined with reference to the familiar "materiality" tests established in the 2008 EU *Presstext* judgment.

The most noteworthy development in this area is the ability to allow a new supplier to step into the shoes of the originally appointed supplier, in whole or in part, following corporate restructuring such as a takeover or insolvency, provided certain conditions are satisfied.

- **Contract termination:** tied to the above development, the 2015 Regulations introduce the right for an authority to terminate a public contract in three scenarios, one of which includes "substantial" modifications as defined in Regulation 72. Importantly, if these scenarios are not enshrined in the contract terms, they will be deemed to apply by virtue of this new regulation, subject to reasonable notice being given (Regulation 73). It is also open to authorities to define relevant terms and conditions to aid in the operation of these new termination rights. The Cabinet Office has indicated that it will provide model contract clauses and guidance to assist authorities with these new termination rights. Authorities would be well-advised to clarify for suppliers how these new termination rights may operate, for example, whether the right to terminate in the event of a "substantial" modification will be limited in time.

New reporting and retention requirements

Reporting and recording obligations are more extensive for authorities under the 2015 Regulations (Regulations 83 and 84). Authorities should ensure their internal systems are updated to reflect these new requirements, including:

- a requirement to retain all concluded contracts where the contract value exceeds €1 million (supplies or services) or €10 million (works) at least for the duration of the contract, and to grant access to these contracts if requested subject to EU or national rules on access to documents and data protection. Whilst many authorities will be familiar with the need to publish contracts in line with the Government's Transparency Agenda and to make contracts available pursuant to the Freedom of Information Act, this creates a new basis for suppliers to request sight of contract documents
- a requirement to collate a report on every contract, framework agreement or dynamic purchasing system to which the 2015 Regulations apply in their entirety. This report should be held on file but may be requested in whole or in part by the European Commission and/or the Cabinet Office. The Regulations list the information that must be contained in this report, such as the contract value, the names of bidders rejected at the pre-qualification stage and the reasons for their rejection and any conflicts of interest identified and how they were addressed. It would be prudent for authorities to prepare a template report that they can use for all fully regulated contracts and framework agreements. It is also relevant to note that the Cabinet Office has reserved itself a right to request information beyond the scope of that listed in the Regulations in order to enable it to respond to Commission requests.

Additional UK-specific reporting and publication requirements arise under the Lord Young reforms which are summarised below. These requirements include an obligation on authorities to publish on the internet at the end of every financial year statistics on how far they have complied with the new obligation to pay contractors within 30 days of a valid and undisputed invoice being raised.

Have the remedies available to unsuccessful suppliers changed?

In short, the answer is no. The 2015 Regulations do not affect the rules in relation to the operation of the standstill period or the remedies available to unsuccessful suppliers for breaches of the Regulations (Regulations 85-104). These standstill/remedies rules apply to contracts and framework agreements fully regulated by the 2015 Regulations, including contracts subject to the "light touch regime". These rules do not extend however to any failure to comply with the new provisions in Part 4 of the Regulations which implement UK specific policy (the Lord Young reforms). Such failure could potentially still be subject to judicial review.

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What are the Lord Young reforms?

Some provisions in the new 2015 Regulations go further than the EU Public Sector Procurement Directive, implementing specific SME-friendly recommendations from Lord Young, the Enterprise Advisor to the Prime Minister (Regulations 105-114). These provisions introduce rules that must be followed by authorities when awarding below threshold contracts but contracts that are still above minimum thresholds of £10,000 (central Government) or £25,000 (sub-central Government authorities or NHS Trusts). These Lord Young reforms do not extend though to contracts also subject to the NHS 2013 Regulations. These requirements can be summarised as follows:

Above-threshold contracts

- to publish any contract notice sent to the EU's Publications Office for publication within 24 hours of when the authority is entitled to publish the notice at a national level
- to comply with Cabinet Office guidance on qualitative selection at the pre-qualification stage of the tender process, including avoiding burdensome and disproportionate questions
- to publish certain contract award information on Contracts Finder within a reasonable time (note this obligation extends to the award of call-off contracts under framework agreements).

Below-threshold contracts

- to publish information on the contract opportunity on Contracts Finder within 24 hours of the time it first advertises the opportunity in any other way
- not to include a pre-qualification stage if procuring a contract below €134,000 (central Government contracts) or €207,000 (sub-central Government contracts)
- to publish information on contract award within a reasonable time on Contracts Finder
- a requirement to include in every public contract (whether or not subject to the 2015 Regulations) provisions stipulating that the authority will pay the contractor no later than 30 days from the date on which the invoice is "valid and undisputed" (a concept to be elaborated upon by the Cabinet Office in guidance in due course)
- a requirement to "have regard" to any guidance published by the Cabinet Office in relation to these new requirements.

Food for thought

This short guide hopefully serves to highlight the main changes authorities need to be aware of as of 26 February 2015 when approaching the market with public contracts. There are a whole host of other changes that authorities may be interested in, many of which might appear to be smaller changes but which could have potentially bigger repercussions. These "smaller changes" include rules in relation to the opening of tenders under the open procedure, confirmation of the ability for authorities to operate two alternative methods of contract award under multi-supplier framework agreements within certain parameters and a specific prohibition on designing a procurement with the intention of excluding or narrowing competition.

We are already working with a wide range of contracting authorities to help them adjust to the new 2015 Regulations. We are also running a series of seminars on the changes under the 2015 Regulations in London, Birmingham and Belfast. If we can be of assistance, please do not hesitate to contact our Public Procurement Team.

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