

# Guide to the New Public Contracts Regulations 2015

## 1. Introduction

Public procurement has been undergoing a process of reform. The final version of the Public Contracts Regulations 2015 (**Regulations**) was published on 5 February and the new Regulations will come into force on 26 February. This means that all procurements started (i.e. advertised) on or after that date will be subject to the new regime.

The Regulations implement Directive 2014/24 on public procurement. Further regulations relating to utilities and concessions, which will implement Directives 2014/25 and 2014/23 respectively, will have to be introduced in the UK prior to April 2016.

Authorities and economic operators need to be aware of the changes which will be introduced by the Regulations. This Guide is intended to give you a summary of the key changes contained in the new regime and to help authorities and economic operators plan for the new regime. We will also be running a breakfast briefing on the Regulations over the next few months.

The Regulations contain a number of significant changes and introduce many new concepts, such as life-cycle costing, into procurement law. At the same time, the Regulations codify existing case law and retain the same remedies regime.

The purpose behind the new directives is to clarify and simplify EU public procurement law, to provide more flexibility and to encourage SME participation in public procurement processes. Whether the new Regulations will achieve these aims remains to be seen. However, it is clear that the Regulations will lead to changes in the procurement processes and this could increase the number of procurement challenges over the next few years.

### Summary of the key elements of the Public Contracts Regulations 2015:

- Introduction of a new innovation partnership procedure to allow for the development of innovative solutions;
- Light touch regime for health, social, legal and other services with a higher threshold and limited procedural requirements;
- Shorter timescales to speed up straightforward award procedures;
- Possibility for sub-central authorities to use a PIN notice as a call for competition;
- Express permission to conduct market consultations;
- Encouragement to divide contracts into lots;
- Prohibition to set minimum annual turnover threshold higher than twice the annual contract value;
- Expanded list of mandatory and discretionary exclusion grounds including poor performance. The extended exclusion grounds are counterbalanced by the introduction of new self-cleaning provisions which allow operators to show that they have implemented remedial measures to demonstrate reliability despite the existence of an exclusion ground;
- Introduction of the European Single Procurement Document to allow operators to self-declare compliance with pre-qualification requirements in lieu of certificates;
- Award of all public contracts on the basis of MEAT and a new meaning of MEAT which encourages evaluation on the basis of the best quality/price ratio, including life-cycle costs;
- Permission to use experience as an award criterion;
- New rules on modification of contracts which allow for the change of an operator without a new procurement in case of a corporate restructuring or insolvency;
- New record keeping and reporting obligations.

## 2. Procedures (Regulations 26-32)

### Open and restricted procedures

The open and restricted procedures will remain largely the same with the exception of reduced time limits for responses (see below).

### Competitive procedure with negotiation

What was known as the negotiated procedure has become the competitive procedure with negotiation. The competitive procedure with negotiation is intended for use when the open or restricted procedures are unlikely to lead to a satisfactory outcome or the **competitive dialogue** (which is also retained) would be too protracted or over complicated for the subject matter. The grounds for using the competitive procedure with negotiation have been widened and are now broadly the same as those for the competitive dialogue (e.g. where the authority's needs "cannot be met without adaptation of readily available solutions" or where prior negotiations are necessary due to specific circumstances related to the nature, complexity or risk-profile of the contract). This may mean that, in practice, the competitive dialogue procedure is less commonly used or ceases to be used altogether.

### Negotiated procedure without prior publication

The negotiated procedure without prior publication will remain in use in certain prescribed circumstances which are similar to those under the current regime.

### Innovation partnership procedure

The Regulations introduce a new procedure, known as the innovation partnership procedure, which may be particularly useful for IT, R&D, health and new technologies. The new procedure is aimed at providing the necessary means and incentive for the market to engage in the development of innovative solutions. It applies where the authority identifies a need which cannot be met by what is already available on the market. The supplier essentially bids to enter into a partnership with the authority to develop a new product or service. The authority can choose one or more operators to become the authority's innovation partner(s) who will work with the authority to develop the product/service that best meets the authority's need.

A striking difference between this and existing procedures is that operators will be allowed to interact with the authority before contract award criteria and technical specifications are prescribed. The procedure can be structured in phases following the sequence of steps in the R&D process with options to terminate partnership/reduce partners at the end of each phase. The authority can then purchase the developed innovation at the end of the process provided it corresponds to agreed performance levels and costs.

### Simplified regime for sub-central authorities

The Regulations also provide for a simplified regime for sub-central authorities below central government level, e.g. local and regional authorities. This allows sub-central authorities to make a call for competition by means of a PIN notice where the restricted procedure or the competitive procedure with negotiation is used. (Regulation 26(9) and Regulation 48(5)).

The PIN must specify the object of the contract, indicate that a further contract notice will not be published for the award of the contract and must be sent for publication no less than 35 days or more than 12 months from the date the authority fixes for responses.

## 3. Light touch regime (Regulations 74-77)

The **distinction between Part A and Part B services has been abolished** and replaced with a more limited set of specialist services which will be subject to what is commonly being referred to as the "light touch regime". This will apply to services such as health and social services but also includes a list of other services contained in Schedule 3 to the Regulations (e.g. legal services). These services benefit from a higher threshold of €750,000 and will be subject to limited procedural requirements, notably the publication of contract and contract award notices and adherence to the principles of transparency and equal treatment.

#### 4. Time Limits

The minimum time limits which authorities must allow for operators to respond to notices or to submit tenders have been shortened to speed up straightforward award procedures.

For the **open procedure**, the minimum time limit for receipt of tenders has been reduced to 35 days (reduced to 30 days where electronic submission is provided for and 15 days where a PIN is published).

For the **restricted procedure**, the minimum time limit for requests to participate is now 30 days. The minimum time limit for receipt of tenders is also 30 days (reduced to 25 days where electronic submission is provided for and 10 days where a PIN is published).

#### 5. Contracts between entities in the public sector (Regulation 12)

Some of the most important procurement case law (notably the *Teckal* and *Hamburg Waste* cases) has been codified in the new Regulations with some modifications. As a result, the Regulations explicitly allow:

- for the **direct award of a contract to an entity over which the contracting authority exercises control** similar to the control it exercises over its own departments, where the controlled entity carries out more than 80% of its activities for the authority and where there is no direct private capital participation in the controlled entity;
- **co-operation between authorities** in the performance of a public contract where the co-operation is solely governed by public interest considerations and where the authorities perform less than 20% of the relevant activities on the open market.

#### 6. Preliminary market consultation (Regulation 40)

Before commencing a procurement process, contracting authorities are now expressly **permitted to engage with the market**. In particular, the Regulations refer to seeking advice from independent experts, authorities or market participants. This advice can then be used in the planning and conduct of the procurement process **provided that it does not have the effect of distorting competition or breaching the principles of transparency and equal treatment**.

#### 7. Encouragement of SME participation

Some of the more onerous requirements of the old regime have been removed or amended in order to encourage more SME participation. The most notable ones are:

- **shorter timescales** to cut procurement costs (see paragraph 4 above);
- an **encouragement to divide contracts into lots** and the obligation on authorities to provide an explanation when this is not done (Regulation 46);
- a requirement for authorities to set the **minimum annual turnover threshold** economic operators have to meet at no higher than twice the annual contract value (Regulation 58);
- the introduction of the **European Single Procurement Document** which allows economic operators to self-declare in order to demonstrate pre-qualification in lieu of certificates (Regulation 59). The European Single Procurement Document consists of a formal statement by an operator that the relevant ground for exclusion does not apply and/or that the selection criterion is fulfilled. This means that only the winning tenderer needs to submit the various certificates and documents, thus reducing red tape for economic operators significantly.

#### 8. New exclusion grounds including poor performance (Regulation 57)

##### New mandatory and discretionary exclusion grounds

The grounds for mandatory and discretionary exclusion have been expanded. New mandatory exclusion grounds include terrorist offences, child labour, human trafficking, failure to pay taxes and social security contributions. New grounds for discretionary exclusions include failure to comply with environmental/social/labour laws, undue influence on the authority's decision making process and bid rigging.

The discretionary grounds for excluding operators now also include **the ability to exclude on the basis of “significant or persistent deficiencies in the performance of a substantive requirement”** under a contract. Such deficiencies must have led to early termination of the contract, damages or other comparable sanctions. While this ground appears to give authorities a wide discretion to exclude operators on the basis of poor prior performance, it is important to read the extended exclusion grounds in light of the new self-cleaning provisions (see below). The intention behind the new provisions in the Regulations is to correct mistakes and not to punish operators for past mistakes.

### Self-cleaning

While the extended exclusion grounds give contracting authorities a wide discretion to exclude operators, **economic operators are permitted to “self-clean”** i.e. provide evidence of remedial measures the economic operator has taken which demonstrate the operator’s reliability despite the existence of a relevant ground for exclusion. If the contracting authority considers the evidence provided is sufficient, the economic operator shall not be excluded from the competition. Examples of self-cleaning measures include payment of compensation in respect of damages and taking action to prevent further offence or misconduct (e.g. implementation of a compliance programme). It is important to note that self-cleaning applies to both mandatory and discretionary exclusion grounds.

## 9. Award criteria (Regulations 67 and 68)

### Use of MEAT now compulsory

All public contracts must now be awarded on the basis of the most economically advantageous tender. The Regulations introduce a new meaning of MEAT which encourages evaluation of bids on the basis of the best quality/price ratio. However, the Regulations also appear to allow authorities to determine MEAT on the basis of price or cost alone.

### Life Cycle Costs

Authorities are also now able to base their award decisions on the life-cycle costs of the products, services or works to be purchased. This **covers all stages of the product/work/service** including raw material acquisition or generation of resources through to disposal, clearance and finalisation and can include external environmental costs. When using this approach, authorities must indicate in the tender documents the data required from operators and the method the authority will use to assess the life-cycle costs.

### Experience as an award criterion

Authorities are now expressly permitted to consider the **“organisation, qualifications and experience of the staff assigned to performing the contract”** at award stage where the quality of the staff assigned can have a significant impact on the level of performance of the contract. This is a change from the existing case law which only allows operators’ relevant experience to be taken into account at the selection stage. Permitted award criteria also expressly include social, environmental and innovative characteristics, e.g. the protection of workers and employment of long-term unemployed.

## 10. Abnormally low tenders (Regulation 69)

The new Regulations clarify existing case law on abnormally low tenders and now expressly **state a positive obligation on authorities to require operators to explain the price of a tender which appears to be abnormally low**, and to assess information provided by operators. The Regulations also introduce a requirement on authorities to reject a tender which is abnormally low because it does not comply with environmental, social or labour laws. Otherwise, the authority may only reject a tender where the evidence supplied does not satisfactorily account for the low level of price proposed or where it is abnormally low because the operator has obtained State aid and cannot prove that the aid is compatible with the internal market.

## 11. Subcontracting (Regulation 71)

The Regulations allow authorities to ask operators to **indicate the share of the contract to be subcontracted** and the identity of subcontractors. Authorities can also apply the exclusion grounds to subcontractors and require any subcontractor not meeting one of the exclusion grounds to be replaced.

## 12. Material variation (Regulation 72)

The law on material variation of a contract, based on the *Presstext* case, has also been codified in the new Regulations. However, the new Regulations go further than the case law. **The basic test is that a new procurement is required if a contract modification is substantial** (i.e. "materially different in character").

### When is a change substantial (and a new procurement required)?

A change is substantial if one or more of the following five conditions is met:

1. the modification renders the contract materially different in character from the one initially concluded;
2. it introduces conditions which would have allowed for the admission of other candidates or acceptance of another tender or would have attracted additional participants;
3. it changes the economic balance in favour of a particular contractor in a manner not provided for in the initial contract;
4. it extends the scope of the contract significantly;
5. a new contractor replaces the original one.

### When is a modification not substantial (i.e. no new procurement required)?

Modifications will not be substantial where the value of the modification does not exceed the relevant EU threshold and is below 10% of the initial contract value (15% for works), subject to the over-arching condition that the modification does not alter the overall nature of the contract.

### When are contract changes expressly allowed without a new procurement?

Flexibility is also introduced to allow modification of a contract (even if it is substantial) without a fresh procurement in certain defined circumstances:

- where the change is provided for in the initial procurement documents in a **clear, precise and unequivocal review clause**;
- where **additional requirements** not initially provided for are necessary and a change of contractor cannot be made for economic/technical reasons and would cause significant inconvenience or substantial duplication (but any increase in price must not exceed 50% of the original contract value). Note that an OJEU notice must still be published in such circumstances;
- where the change is needed due to **unforeseeable circumstances** not altering the overall nature of the contract (but any increase in price must not exceed 50% of the original contract value). Note that an OJEU notice must still be published in such circumstances;
- where a contractor changes as a result of (a) an unequivocal review clause; or (b) a **complete or partial succession of a contractor following a corporate restructuring** (e.g. take-over, merger, insolvency) and the new operator fulfils the original qualitative selection criteria.

The last bullet, which allows for a change of contractor without a new procurement process following a corporate restructuring or insolvency of the original contractor, may prove to be particularly useful to authorities.

## 13. E-procurement (Regulations 22 and 53)

The current regime encourages the use of electronic procurement, however the new Regulations make **electronic OJEU notification and electronic availability of procurement documents mandatory**. This requirement is deferred until April 2017 for central purchasing bodies and until April 2018 for all other authorities.

Regulation 53 requires authorities to offer unrestricted and full direct access to procurement documents from the date of publication of the OJEU notice (or the date on which an invitation to confirm interest is sent) except in certain limited circumstances.

## 14. Practical Tips

### Prepare documents early

The new regime requires all procurement documents to be available electronically from the date of the OJEU advertisement or the date on which an invitation to confirm interest is sent. For many contracting authorities, this means starting the preparation of tender documents at an earlier stage than is currently the case.

### Update tender and contract documents

Contracting authorities should ensure that their precedent documents are now revised in line with the new regime to avoid any delays in procurements planned from 26 February 2015. For example, authorities need to ensure that revised documents include the new grounds for exclusion, that selection criteria (e.g. on turnover requirements) remain compliant, timescales and terminology in tender documents are amended and that the new MEAT award criterion, including, where relevant, life-cycle costing is incorporated.

In addition, contract documents should be reviewed to incorporate, where appropriate, new termination provisions in line with Regulation 72 on modification of contracts and Regulation 73 on termination of contracts.

### Be aware of record keeping obligations (Regulation 84)

Finally, authorities should be aware of new record keeping and reporting obligations which require key decisions and steps to be recorded for each procurement.

## 15. Useful Sources

Directive 2014/24 on public procurement:

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN>

Directive 2014/25 on procurement by entities in the water, energy, transport and postal services sectors:

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0025&from=EN>

Directive 2014/23 on the award of concession contracts

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0023&from=EN>

Public Contracts Regulations 2015:

[http://www.legislation.gov.uk/uksi/2015/102/pdfs/uksi\\_20150102\\_en.pdf](http://www.legislation.gov.uk/uksi/2015/102/pdfs/uksi_20150102_en.pdf)

## Our Team

Our leading public procurement team is well versed in all aspects of the new regime and is ready to hit the ground running from 26 February. We would be happy to help you in updating your procurement manuals or precedent documents to reflect the changes in the new Regulations. We would also be happy to deliver bespoke training packages on the impact of the new Regulations for your day to day business.



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