



# Procurement Update.

Spring 2016

## Introduction

There have been some important updates in procurement law since we published our Spring Procurement Update. This update brings you a summary of the latest changes to procurement legislation.

## Utilities Contracts Regulations

The UK Government laid the new Utilities Contracts Regulations 2016 (derived from Directive 2014/25/EU) (UCR 2016) before Parliament on 17 March 2016. The new rules for utilities contracts will apply to procurement exercises commenced on or after 18 April 2016. Procedures advertised before 18 April 2016 will still be governed by the Utilities Contracts Regulations 2006 (UCR 2006).

We summarise the main changes below:

- The UCR 2016 clarify that an entity will not be considered a utility where the “special and exclusive rights” on which it operates have been granted following an advertised competition based on objective criteria (Regulation 5);
- The competitive dialogue procedure will now be available to utilities (Regulation 48), as will the new innovation partnership procedure (Regulation 49);
- The duration of framework agreements awarded under the UCR 2016 has been limited to a maximum of eight years, except in exceptional cases (Regulation 51(3));
- Preliminary market consultation will be expressly permitted, provided it does not distort competition or violate the principles of transparency and non-discrimination (Regulation 58);
- Regulation 84 imposes a positive obligation on utilities to seek an explanation on the price or costs proposed in the tender where a tender appears to be abnormally low;
- The rules on contract modification will also apply to contracts awarded by utilities (Regulation 88). Regulation 88 also clarifies that, from 18 April 2016, these provisions will also apply to contracts awarded under the UCR 2006;
- A new “light-touch” regime for health, social and other services (Regulation 90 and Schedule 2) has been introduced which removes the previous distinction between Part A and Part B services;
- The UCR 2016 will apply to supplies and services contracts above £328,352 and works contracts above £4,104,394.

## Concession Contracts Regulations

The Concession Contracts Regulations 2016 (derived from Directive 2014/23/EU) (CCR 2016) were also laid before Parliament on 17 March 2016 and will apply to new procurement exercises commenced on or after 18 April 2016. The CCR 2016 will apply to works or services concession contracts awarded by a utility with a value above £4,104,394. The value of a concession contract is an estimate of the total turnover of the supplier generated over the course of the contract, net of VAT, representing the consideration for the works or services.

A contract will be covered by the CCR 2016 where the consideration given to the contractor is that the contractor is permitted to

exploit the works/services that are the subject of the contract (together with payment, if desired) and the award of the contract transfers the operating risk to the concessionaire.

There are a number of exclusions from the regime including concessions awarded by a utility to an “affiliated undertaking” and concessions awarded by a utility where the activity is already directly exposed to competition.

Concession contracts must be limited in length. Where a concession is to be longer than 5 years, the maximum duration of the concession contract shall not exceed the time that a supplier could reasonably be expected to recoup the investments made in operating the works or services, together with a return on invested capital.

The CCR 2016 do not impose prescribed procurement procedures, however there are certain procedural requirements that must be met e.g. in relation to the use of award criteria, mandatory and discretionary exclusions and compliance with the principles of equal treatment, non-discrimination and proportionality.

## The Public Procurement (Amendments, Repeals and Revocations) Regulations 2016

The first amendments have been made to the Public Contracts Regulations 2015 (PCR 2015), which came into force on 26 February 2015. Some of the amendments contained within the Public Procurement (Amendments, Repeals and Revocations) Regulations 2016 are to reflect the updated position following the introduction of the UCR 2016 and CCR 2016. There are also a number of other interesting amendments, in particular in relation to modification of contracts during their term.

We summarise the key amendments, which also come into force from 18 April 2016, below:

- The definition of “public contract” in Regulation 2 of the PCR 2015 has been amended to exclude concession contracts;
- Regulation 4, in relation to mixed procurements, has been amended to include reference to both concession contracts and contracts subject to the UCR 2016. Where a contract is part public contract and part concession contract, the contract shall be awarded in accordance with the PCR 2015 where the value of the public element of the contract is estimated to be equal to or above the relevant EU threshold. A contract involving both public and utility elements will be awarded in accordance with Regulation 6 (mixed procurement involving the same activity) and Regulation 7 (procurement covering several activities) of the UCR 2016;
- Regulation 7 (Utilities) has been substituted to make reference to the UCR 2016;
- The mandatory grounds for exclusion of economic operators set out in Regulation 57 have been amended to include an offence under section 2 or section 4 of the Modern Slavery Act 2015;
- Regulation 72(1)(b), the exemption for contract modification where additional works/services/supplies can be procured from the incumbent contractor without a new procurement process, has been amended to make both justificatory limbs a requirement for the exemption to be met (i.e. where a change of contractor (i) cannot be made for economic/technical reasons; and (ii) would cause significant inconvenience or duplication of costs). The previous drafting required only one justification before the exemption could be used. This amended drafting is in line with the position set out in Directive 2014/24/EU from which the PCR 2015 are derived;
- Regulation 118(5) has been amended to clarify that Regulation 72 (modification of contracts during their term) and Regulation 73(3) (implied power to terminate contracts in certain defined circumstances) apply to contracts awarded under the Public Contracts Regulations 2006. This is a welcome clarification of the position as suggested by case law in *Edenred*<sup>1</sup> and CCS Guidance on Amendments to Contracts during their Term.

If you have any comments or queries in relation to this update, or indeed any aspect of procurement law, please do not hesitate to get in touch with one of our team.



Declan Magee  
Partner  
+44 (0)28 9034 8827  
declan.magee@carson-mcdowell.com



Dorit McCann  
Partner  
+44 (0)28 9034 8816  
dorit.mccann@carson-mcdowell.com



Niamh McGuckin  
Solicitor  
+44 (0)28 9034 8817  
niamh.mcguckin@carson-mcdowell.com



<sup>1</sup> R (Edenred (UK Group) Limited) v HM Treasury and others [2014] EWHC 3555