

TECHNICAL & LEGAL

PUBLIC SECTOR RISK PRACTICE NOVEMBER 2015

Public Contracts Regulations – guidance note

The new regulations 2015 (PCR 2015) took effect in England and Wales on the 26th February this year. In this guidance note, we consider some of the key provisions of the new procurement regulations in more details.



IN-HOUSE CONTRACTS

Certain types of contracts are excluded from the scope of the PCR 2015. The list of excluded contracts is broadly similar to those under PCR 2006 although regulation 12 introduces a new exclusion for contracts awarded to in-house bodies and joint co-operation between contracting authorities. Regulation 12(2) also specifically permits an extension of the Teckal exemption to what might be termed “horizontal in-house

transactions” – in other words, a body controlled by a contracting authority can award a contract to another body controlled by the same contracting authority. In terms of insurance, this regulation is primarily significant to those organisations considering the establishment of mutual insurance companies. It needs to be borne in mind, however, that legal opinion remains divided as to whether the powers of well-being created under the Localism Act grant sub-central contracting authorities

i.e. local authorities, fire authorities and police forces, with sufficient authority to establish mutuals.

CONFLICTS OF INTEREST

Regulation 24 deals with potential conflicts of interest. It imposes a requirement on contracting authorities that they should take measures to prevent, identify and remedy such conflicts and ensure equal treatment and non-distortion of competition. Whilst

there is obviously a potential for conflict when employees of the contracting authority have a direct or indirect interest in economic operators, regulation 24(1) can also introduce difficulties if the broker appointed to manage the tender process has to evaluate quotations supplied from an underwriting agency managed and/or controlled by that broker.

USING PINS AS A CALL TO COMPETITION

The regulations introduce greater flexibility on advertising with regard to sub-central contracting authorities. Regulation 26(9) permits local authorities, fire authorities and police forces to use a Prior Information Notice ("PIN") as a call for competition in order to commence a procurement under either the 'Restricted' or the 'Competitive with Negotiation' procedures. The PIN must, however, comply with the content requirements set out at regulation 48(5).

CHOICE OF PROCEDURES

There are five standard procurement procedures under the new regulations. These are;

- Open (Regulation 27);
- Restricted (Regulation 28);
- Competitive with negotiation (Regulation 29);
- Competitive dialogue (Regulation 30); and
- Innovation partnership (Regulation 31).

Timescales for all the procedures have been shortened. Subject to agreement with all the bidders involved, sub-central contracting authorities using the 'restricted' or the 'competitive with negotiation' procedures are allowed to set their own time limit for receipt of bid –

the time limits for receipt of requests to participate is 30 days. In addition, reductions in time scale continue to be available in circumstances where;

- a PIN notice has been published within the past 12 months, but no less than 35 days from date of contract notice
- where tender responses are submitted electronically
- in urgent circumstances where adherence to the full timetable would be impractical.

Table 1 on page 5 details the time limits applicable under the various stages of the tender procedures.

FRAMEWORKS

There is little new law in relation to frameworks, save that regulation 33(5) confirms what guidance and case law have previously been required; i.e. only contracting authorities who are identified as customers in the call for competition are entitled to call off contracts from a framework agreement.

PRE-PROCUREMENT CONSULTATION

Regulation 40 allows contracting authorities to use advice gained as part of a pre-market consultations in the planning and conduct of the procurement, provided that this is not anti-competitive or a breach of transparency and non-discrimination principles. Regulation 41 states that if a supplier has had prior involvement in the preparation of the procurement, the contracting authority must ensure that the relevant information is disseminated amongst all bidders, in order to ensure a level playing field. Deadlines for the submission of tenders must also be adequate.

LOTS

Whilst regulation 46(2) is primarily intended to encourage smaller suppliers, contracting authorities should note that it places a requirement on them to provide an explanation if they decide not to divide a contract into separate lots. The regulation also makes it possible to reserve the right to combine lots, provided this is set out in the OJEU notice or invitation to confirm interest.

ELECTRONIC AVAILABILITY OF DOCUMENTS

Regulation 53 requires all contracting authorities to offer by means of the internet, full and unrestricted direct access to all the procurement documents from the date that a contract notice (or invitation to confirm interest following a PIN) is published in the Official Journal of the European Union (OJEU). The term "procurement documents" is a defined term in the regulations and includes, in addition to the call for competition itself, technical specifications, descriptive documents, pre-qualification questionnaires (PQQ), invitations to tender, and the terms and conditions of the contract.

MANDATORY AND DISCRETIONARY EXCLUSIONS

Contracting authorities will need to update mandatory exclusion criteria in order to reflect an updated list of offences, which are detailed in regulation 57(1). These include, for example, offences under the Counter Terrorism Act 2008, and the Serious Crime Act 2007. Where a supplier has failed to pay taxes or social security contributions and there has been a binding judgment or decision in the case, that supplier must be



excluded. Regulation 57 also includes new grounds for discretionary exclusion which contracting authorities will need to address.

EXPERIENCE AND COMPETENCY

Amongst other things, regulation 58 confirms that a contracting authority may require sufficient level of experience to perform the contract to 'an appropriate quality standard', and that they can ask for this to be demonstrated by references from previous contracts.

The regulations provide more clarity on the need for retender in the event of a breach of the long term agreement

Competency of the suppliers staff is mentioned at regulation 67(3)(b), which makes it possible to evaluate the experience of the staff assigned to performance of the contract, when staff quality is likely to have significant impact on performance levels. However, any evaluation of experience as an award criteria must be linked to the performance of the contract itself, otherwise, it will probably be more appropriate to evaluate general experience as part of the technical capability assessment at the PQQ stage.

MOST ECONOMICALLY ADVANTAGEOUS TENDER

Regulation 67 confirms that all contract awards must now be made to the "most economically advantageous tender", using a cost effectiveness approach such as life-cycle costing to assess this; this may include best 'price-quality ratio' – as assessed on the basis of award criteria.

SPECIAL PERFORMANCE

Regulation 70 includes an opportunity for contracting authorities to insert special performance conditions, provided these are included in the call for competition or procurement documents. Contracting authorities may wish to use this mechanism to further certain policy agendas, for example, to promote sustainability.

ABNORMALLY LOW TENDERS

Regulation 69 requires contracting authorities to demand an explanation where a tender appears to abnormally low, and states that bids may only be rejected where this explanation is unsatisfactory. If, however, the tender is low due to breaches of environmental, social or labour law, the contracting authority is obliged to reject the tender.

SPECIAL PERFORMANCE CONDITIONS

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MID-TERM CHANGES AND THE NEED TO RETENDER

Regulation 72 highlights the importance of drafting contract change provisions with an eye to the future. It states that a modification which is provided for in the original contract in “clear, precise and unequivocal” terms will not trigger a new procurement process. Consequently, a substantial modification that was not originally provided for in the contract will trigger a new procurement process.

In addition to where the modification was provided for in the original contract, there are four situations where the PCR 2015 do not require a further

procurement process to be run, as follows:

- where the change in value is relatively small - under 10% (services & supplies) or under 15% (works) and is also under the applicable EU financial threshold (this is cumulative where there is a series of changes) (Regulation 72(5)); or
- where there are unforeseen circumstances (provided the change does not alter the overall nature of contract and the price increase is not greater than 50%; note too that there is a requirement to publish an OJEU notice about the modification once it has taken place) (Regulation 72(1)(c)); or
- where additional works, services or supplies are necessary and a change in contractor cannot be made for economic or technical reasons e.g. interoperability with existing kit; or where to change suppliers would cause significant inconvenience or duplication of costs. To come within this category the price increase must not exceed 50% and there is a requirement to

publish an OJEU notice about the modification once it has taken place (Regulation 72(1)(b)); or

- there has been a replacement of the supplier following a corporate restructuring, insolvency or merger, and the new supplier still meets the original selection criteria. This exemption is only available where there is no other substantial modification to the contract (Regulation 72(1)(d)(ii)).

REMEDIES

There is little change from the position under the PCR 2006; however contracting authorities should note that the numbering of the regulations has changed and therefore that standstill letters will need updating when are used for a procurement regulated by the PCR 2015. The obligations around award decision notices are now at regulation 86, the obligation to hold a standstill period is at regulation 87, whilst regulations 88 to 104 deal with claims made before the courts.



The regulations provide more clarity on the need for retender in the event of a breach of the long term agreement

TABLE 1 – TIMESCALES UNDER THE NEW PROCUREMENT REGULATIONS

Type of Procedure	Standard timescales	Options for Sub-central contracting authorities i.e. local authorities, police forces, fire authorities	Tenders submitted electronically	Urgent Requirements where full time limit would be impractical	PIN published within last 12 months but no less than 35 days from despatch of contract notice
OPEN					
Despatch of contract notice to receipt of responses	35 days		5 day reduction	Period reduced to 15 days	Period reduced to 15 days
Standstill	10 days				
RESTRICTED					
Despatch of contract notice to receipt of responses	30 days			Period reduced to 15 days	
Introduction to Tender (ITT) of bids	30 days	May agree time-limit with tenderers – in absence of agreement minimum period is 10 days	5 day reduction	Period reduced to 10 days	Period reduced to 10 days
Standstill	10 days				
COMPETITIVE WITH NEGOTIATION					
Despatch of contract notice to expressions of interest	30 days			Period reduced to 15 days	
Introduction to Negotiation (ITN) to receipt of initial tenders	30 days	May agree time-limit with tenderers – in absence of agreement minimum period is 10 days	5 day reduction	Period reduced to 10 days	Period reduced to 10 days
Standstill	10 days				
COMPETITIVE DIALOGUE					
Despatch of contract notice to expressions of interest	30 days				
Standstill	10 days				
INNOVATION PARTNERSHIP					
Despatch of contract notice to expressions of interest	30 days				
Standstill	10 days				

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CONTRACTS FINDER

Regulations 106, 108, 109, 110, and 112 deal with the publication of contract opportunities on 'Contracts Finder'. 'Contracts Finder' is the central government online procurement service designed for businesses, especially SMEs.

Regulations 106 and 108 apply to contracts above the procurement threshold, whilst regulations 109, 110 and 112, relate to contracts with a value between GBP 25,000 and the threshold. In short, any contracts in either category that are advertised (the term 'advertised' includes the issue of an OJEU notice on TED) must also be published on 'Contracts Finder'.



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