

Key Aspects of the Public Contracts Regulations 2015 from a Local Authority's Perspective

The Public Contracts Regulations 2015 (PCR 2015) came into force on 26 February 2015 and applies to local authorities seeking offers in relation to:

- A proposed public supply contract
- A proposed public works contract
- A proposed public services contract
- A proposed contract for the provision of certain health, educational or cultural services (in which event the “light- touch” regime will apply and the procurement will be subject to lesser procedural requirements)
- A proposed framework agreement or dynamic purchasing system, where the subject matter involves any of the above.

What has changed?

Services, supplies and works contracts are no longer classified as Part A or Part B. The PCR 2015 **will not apply** if the proposed contract, framework agreement or dynamic purchasing system:

- Falls within one of the express exclusions or
- Has an estimated value which (net of VAT) is below the relevant threshold of:
 - ◊ £172,514 for supplies and services contracts
 - ◊ £4 322 012 for work contracts
 - ◊ £625,050 for light touch regime services contract.

The types of excluded contracts are:

1. Contracts that are expressly excluded. For example, contracts for the acquisition of land and rights over land, contracts for legal services connected with litigation or the exercise of official authority, loan contracts, employment contracts, political campaign services contracts, service concessions contracts, certain research and development services contracts etc. (Please note that this is not an exhaustive list.)
2. Contracts between local authorities and entities controlled by them. The “in-house” test is satisfied where:
 - i. The local authority exercises control over the entity similar to that which it exercises over its own departments. This means it exercises a decisive influence over their strategic objectives and significant decisions.
 - ii. More than 80% of their activities are in the performance of tasks that the local authority entrusts to them.

- iii. There is no direct private capital participation.

This in-house test can be met in circumstances where the requisite control is exercised jointly by a number of public bodies provided they each have representatives on the decision-making body of the provider and are able to jointly exert decisive influence over the strategic objectives and significant decisions of the provider.

3. Contracts between co-operating authorities.

The test here is:

- i. The subject matter relates to public service co-operation towards common objectives.
- ii. The agreement is governed only by considerations relating to the public interest.
- iii. The participating contracting authorities perform on the open market less than 20% of the activities concerned by the co-operation.

Pre-market engagement

The new regulations allow engagement in market consultations prior to a procurement process as long as appropriate steps are taken to ensure that competition is not distorted by the subsequent participation of economic operators involved in the market engagement.

Advertising

The PCR 2015 sets out minimum requirements in respect of communication (including electronics). They also include some formal procurement procedures based solely on electronic means.

Choice of Procedure

The competitive dialogue and competitive procedure with negotiation may be used in much broader circumstances than before and the regulations introduces the innovation partnerships procedure for bespoke products or services.

(Please note that Government guidance states that where possible the open or restricted procedure should still be used).

Running the Procedure – Selection

New grounds for mandatory exclusion for violations of environmental, social and labour laws and extension of grounds for discretionary exclusion for significant or persistent deficiencies in past contract performance which have led to early termination etc. However, a candidate should not be excluded if it can provide sufficient evidence to demonstrate that it has made right any wrongdoing.

Evaluation

1. Any yearly turnover requirement on potential bidders should not exceed twice the estimated contract value.
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2. A new requirement to demonstrate technical ability.
3. All contracts must be awarded on the basis of the most economically advantageous tender which include a best price-quality ratio approach.

4. Life cycle costing provisions allow authorities to take account of environmental and social issues and costs in the broadest sense

Reporting

For each award, local authorities must produce a written report for delivery to the Commission, or Cabinet Office if requested, to include the key information on the process followed and reasons for decisions taken. Documents must be kept for at least 3 years.

Operating the Contract

New contract terms required by PCR 2015 include:

- i. Payment of undisputed invoices within 30 days and for contractors to carry this obligation down the supply chain.
- ii. Termination provision to allow contracts to be terminated where the contract has been substantially varied (other than as permitted), or if the contractor should have been excluded from bidding for the contract or if the contract should not have been awarded due to a serious breach of community law.

A proposed extension, renewal or amendment to an existing contract may be considered equivalent to a new contract if it constitutes a material change. Material changes are those which demonstrate the intention of the parties to renegotiate the essential terms.

Lots

Contracting authorities are encouraged to open up procurement participating to small and medium sized enterprises by dividing large contracts into separate lots where possible. The regulations give local authorities the discretion to award contracts in the form of separate lots and the ability to decide the size and subject matter of those lots.

Mutuals

Contracts of up to 3 years covered by the light touch regime may be reserved for not for profit organisations with a public service mission and where management is based on employee participation.

Note to conclude

Even if the PCR 2015 do not apply, or only apply to a limited extent, consider the extent to which the general EU principles of fairness, transparency and equal treatment applicable to public procurement might impose minimum requirements.

***If you have any queries relating to this update or wish to seek advice,
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