

The much awaited Public Contracts Regulations 2015 come into force on Thursday 26th February 2015. A copy can be found at:

<http://www.legislation.gov.uk/ukxi/2015/102/made>

Subject to points of detail set out below, any contract advertised on or after Thursday 26th will fall under the new rules. Procurement specialists have for some while been getting to grips with proposed changes but on an aide memoire basis what are the headline issues for those with more general local authority procurement interests?

nplaw's Public Law & Standards Team can advise on these changes and procurement law more generally as well as provide briefings and training.

Firstly the actual procedures are refreshed. For completeness sake, we now have:

Open procedure

Regulation 27

Restricted procedure

Regulation 28

Competitive procedure with negotiation

Regulation 29

Competitive dialogue procedure

Regulation 30

Innovation partnership

Regulation 31

Negotiated procedure without prior publication

Regulation 32

Looking at specific provisions (and the use of regulation numbers may well become widespread because the Regulations are written in line with the EU Directive):

Regulation 26(4): The new Regulations permit the use of the competitive dialogue and competitive procedure with negotiation in much broader circumstances than before. Government guidance however is that where possible the open or restricted procedures should still be used.

Regulation 76: Part A/B Distinction Rebranded & Renewed. Replacing the Parts A and B services distinction, there is a new "light touch" procurement regime for social and other specific services such as administrative, cultural, health and education. As was always the case, transparency principles, equal treatment, advertisement and publication of notices still apply and such services must be advertised on OJEU when they are valued at £625,050 or more.

Some changes have been made to previously excluded services and it is certainly worth checking the schedule for certainty's sake.

PQQ Cap: Pre-qualification stages are not permitted for contracts valued at less than £172,514 (so no restricted-type procedure can be used). This presents an issue of how to assess the tenderers' suitability. Authorities are also obliged to have regard to central government guidance on PQQs for above threshold contracts.

Regulation 12(1) Contracting with wholly owned companies: Teckal now codified.

A contract awarded by a contracting authority to another legal person will fall outside the scope of the directive where the following cumulative conditions are fulfilled:

- The contracting authority exercises a control over the legal person concerned which is similar to that which it exercises over its own departments;
- More than 80% of the activities of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;
- There is no direct private capital participation in the controlled legal person.

Contracting authorities may also award contracts without competition where they jointly exercise control with others so long as the rest of the test is duly satisfied.

As a point of interest, these 'Teckal' compliant entities are also expressly stated to be able to contract directly with their host authorities without competition.

Regulation 12(7) Working with Other Local Authorities: the "Hamburg" principle.

Contracts between authorities may be exempted from competition, provided the subject matter relates to public service cooperation towards common objectives. Standing Orders may merit a note on this though it should be applied with caution.

An agreement concluded between two or more contracting authorities shall not be deemed to be a public contract where all the following conditions are met:

- The agreement establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;
- The agreement is governed only by considerations relating to the public interest;
- The participating contracting authorities do not perform on the open market more than 20% in terms of turnover of the activities which are relevant in the context of the agreement.

Regulation 46: Promotes dividing procurements into "lots". Procuring bodies now must explain the main reason for deciding not to sub-divide contractual opportunities. In practical terms, this is an audit trail issue for a Council. If a procurement is being run with lots we can award a single contract to cover several lots, but only if it is clear in the procurement documents that the contracting authority reserves the possibility of awarding on this basis and indicates that the lots might be combined. Standing Orders may be used to provide guidance on authority's approach to "lotting".

Regulations 40/41: Soft Marketing. Now explicit that we can engage in market consultations with suppliers before a procurement commences, but that where this takes place there is an obligation to ensure that competition is not distorted by the subsequent participation of economic operators that were involved in the market engagement. Need to consider appropriate measures.

Regulation 47(3): Extending Deadlines. Authorities can agree deadlines for receipt of tenders with selected candidates under the restricted, competitive procedure with negotiation, and dynamic purchasing system procedures. Standing Orders may refer and give guidance.

Regulation 72: Altering Contracts. Case law already sets out the extent to which a public contract can be changed without incurring new procurement obligations. We will be required to include a condition in all contracts that allows us to terminate a contract if the contract has been subject to a substantial modification. Suggest Standing Orders provides guidance. Note the need to be "clear, precise and unequivocal"

Regulation 15: Evaluation - “Best price-quality ratio” and “life cycle-costing”. Life cycle costing provisions which allow authorities to take account of environmental issues, and cost in the broadest sense, provide clarity on a discretion which may be of use in some circumstances. It would be something to review on a case by case basis, particularly where evaluations on quality and price (most economically advantageous tender) may adequately deal with the point.

Selection phase changes: Standing Orders should provide guidance on changes including new mandatory exclusion grounds, for example for child labour and terrorism offences, the new requirement to accept the European Single Procurement Document (ESPD), a self-declaration that the supplier meets the selection criteria, and the requirement to use the e-Certis database to check suppliers’ credentials (mandatory from 18 October 2018).

Regulation 57: Taking a bidder’s past performance into account when assessing suitability. What approach will the authority take in assessing past performance? A bidder which might otherwise be excluded from taking part in a procurement due to a previous regulatory breach may present evidence that measures have been taken to demonstrate its reliability. Officers will need guidance on this “self-cleaning” provisions.

Regulation 73: Termination reserved. This would be implied into contracts but better to deal expressly. An authority is required to reserve a right to terminate where the:

- contract has been varied in breach of regulation 72 (see above);
- contractor should have been excluded from bidding for the contract under regulation 57 (1) to (3); or
- contract should not have been awarded due to a specified breach of community law.

Regulation 106: Obligation to advertise all contracts valued at £25,000 or more (net of VAT) on the Contracts Finder website. Lord Young’s ‘Growing Your Business’ recommended key reforms to open up all public sector procurement opportunities and streamline procurement to remove barriers to SMEs. Those including “lotting”, abolishing PQQs for contracts below threshold, 30 day payment terms passed down the supply chain and a requirement to report on late payment of invoices. Note the Lord Young Reforms largely come into effect on 26th February also and attention should be paid to low value contracts falling within their range.

Social, Environmental and Employment Laws: Guidance may be forthcoming but the Regulations do not impose obligations in respect of selection criteria relating to social, environmental and employment law compliance. Leverage in respect of these issues is to remain in the actual contracts being tendered.

Regulation 84: Reporting. For each award we must produce a written report for delivery to the Commission, or Cabinet Office if requested, to include all the key information on the process followed, reasons for decisions taken (including choice of procedure used) and why the successful tender was chosen. Further, documents produced relating to the progress of all procurement procedures must be kept for at least three years. To withstand audit reports need to be contemporaneous.

Regulation 53: E-docs. Authorities are to be required to make their tender documents available electronically. Standing Orders should reflect this.

Regulations 55 and 84: Record Keeping Obligations. Note among others the need to disclose information on “the conduct and progress of negotiations and dialogue with tenderers” as part of the debrief obligations.

Regulation 69: Abnormally Low Tenders. Authorities required to investigate tenders that appear abnormally low. Standing Orders should provide guidance on abnormally low tenders and reporting arrangements.

Regulation 77: Social Enterprises. Authorities given right to permit staff mutual type groups with a not for profit public service mission to participate in award procedures for certain services within the health, social and cultural sectors. Limitation in terms of how long such contracts can be and how regularly each group may hold them.

Sub-contracting: Arrangements be evaluated and reflected in the contract terms. The Regulations enable authorities to require tenderers to indicate their proposed sub-contracting arrangements, tenderers to rely on the capacity of other entities, for example, partners or sub-contractors; and authorities to require tenderers to replace sub-contractors to whom mandatory exclusion grounds apply.

Regulation 112: Payment terms. Authorities need to ensure their contracts require them to pay contractors within 30 days of an undisputed invoice, and for contractors to carry this obligation down the supply chain.

Concession Arrangements: Concessions arrangements are often high-value, complex and long-term contracts. A separate directive (Directive 2014/23 on the Award of Concession Contracts) relating to concessions allows for this need for flexibility and recognition of the differences between concessions and other contracts. Transitional arrangements should be monitored should you plan any significant service concession over the coming 14 months.

Please note:

- The Regulations will not apply to any contract award procedure commenced before 26th February 2015.
- Rules relating to e-communications largely only apply from 18 October 2018 (except in relation to dynamic purchasing systems and electronic catalogues and to reduce certain deadlines in open and restricted procedures).
- E-procurement by central purchasing bodies and the availability of the European Single Procurement Document in electronic form apply from 18 April 2017.
- e-Certis will only be used from 18 October 2018.
- Obligations relating to the use of Contracts Finder largely will apply from 1 April 2015.

Local authorities will be particularly focused on these changes of course. For maintained schools and academies some of the provisions of the new Regulations are excluded and NHS exclusions also apply. Advice in respect of specific circumstances can of course be given.

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