

## **Item 3. b – Milestone Reports**

### **Public Contracts Regulations 2015 – Key Changes**

#### **Introduction of the Public Contracts Regulations 2015.**

Public Contract Regulations 2015 represent the biggest review of European procurement law for some time. The purpose of the report is to confirm the way in which these changes will be identified and publicised across the three STaR councils.

Further it will highlight some of the key changes being introduced by the new Public Contracts Regulations 2015 (“PCR 2015”) when compared to the existing regime set out in the Public Contracts Regulations 2006 (as amended) (“PCR 2006”).

Provisions are included which expressly state that a procurement should not be designed with the intention of excluding it from the scope of PCR 2015 or of artificially narrowing competition. In addition to complying with existing duties of transparency, equal treatment and non-discrimination, PCR 2015 has clarified that this also requires contracting authorities to act in a proportionate manner.

#### **Key Dates**

PCR 2015 largely came into force on **26 February 2015**. The new rules will only apply to new procurement processes beginning or taking place after this date

There are some key exceptions to the commencement date, including the following:

- **1 April 2015** – obligations on the use of Contracts Finder are deferred until this date save for contracting authorities which perform their functions on behalf of the Crown.
- **18 April 2016** – any procurement for health care services for the purposes of the NHS within the meaning and scope of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 started before this date is not covered by PCR 2015.

#### **Programme of Training / Awareness Raising**

The STaR Procurement Team have been fully engaged in all documentation / guidance information regarding the implementation of PCR 2015. The Trafford Legal team are also providing specific training which identify key changes and provide the procurement team with an opportunity to address queries / agree policy regarding implementation.

Further, Oldham Council have organised provision of free training from their external legal provider and a number of the STaR Procurement staff and Trafford Legal will attend this briefing.

In parallel, STaR will provide awareness raising and training to clients of STaR. The intention is for STaR to take these proposals to the Senior Leadership and Corporate Management Teams for each of the Councils to agree how the information will be disseminated.

It is proposed that the training will be delivered via a number of workshop / training events giving participants an interactive opportunity to engage with the STaR procurement and legal teams. A number of workshops will be offered to staff in each of the three Councils to ensure that there is sufficient access for all staff requiring training. The training will be provided through April and May 2015.

In order to ensure most effective use of time for STaR officers and participants, the content of the sessions will provide an opportunity to address other contemporary issues as well as PCR 2015. Changes to CPRs and Social Value considerations will constitute part of the training package demonstrating how each of the requirements are compatible and complementary in practice.

In addition to the above STaR will be engaging with other AGMA procurement teams to develop a suite of e learning packages to develop procurement competencies. This work has already started regarding social value considerations and we will continue to create and build a suite of packages focussing priorities on key issues.

## **Key Changes Particularly Relevant to STaR**

### **General Overview**

New provisions are included relating to the award of contracts between entities in the public sector. These include provisions to codify and clarify the “Teckal” exemption which allows the award of contracts between contracting authorities and controlled entities provided the following conditions are met: (i) the contracting authority exercises control over the entity similar to that which it exercises over its own departments; (ii) more than 80% of activities of the entity relate to the performance of tasks entrusted to it by the authority; and (iii) there is no direct private capital participation in the entity (with the exception of non-controlling and non-blocking forms of private capital participation required by national law in conformity with the EU Treaties).

PCR 2015 also provide for contracts to be exempt where contracting authorities jointly control an entity based on similar tests to the above and for “Reverse Teckal” where the controlled entity (if a contracting authority itself) can award a contract to its controlling contracting authority.

The thresholds are reviewed every two years by the Commission. As we are part way through the cycle, the main thresholds for works, services and goods contracts remain the same until 31/12/15. A new threshold for service contracts which are subject to the “light touch” regime is introduced:

	<b>Threshold</b>
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Works	£4,322,012
Goods/Services	£172,514
Light Touch Services	£625,050

### **Conflict of interest provisions.**

Possible conflicts are stated to include staff members with financial, economic or other personal interest which might be perceived to compromise their impartiality or independence. Conflicts may also arise with incumbent suppliers. The obligations require a contracting authority to take appropriate measures to effectively prevent, identify and remedy conflicts of interest. In circumstances where measures cannot be taken to remedy conflicts, a contracting authority may have discretion to exclude the relevant bidder.

### **Electronic Requirements**

Subject to certain limited exceptions, all communication and information exchange must be carried out by electronic means.

### **Access to Information and documentation Requirements**

PCR 2015 require that all contracting authorities offer unrestricted and direct access (free of charge) to all procurement documents from the date of publication of the contract notice in OJEU and that the contract notice must include a reference to the internet address where the documents can be accessed. Oral communication can be used provided that its content is documented to a “sufficient degree”. However, oral communication cannot be used in relation to essential elements (defined as including the procurement documents, the request to participate, etc) of the procurement procedure. Oral communications with tenderers which could have a substantial impact on the content and assessment of tenders is also required to be documented by appropriate means which may include audio records.

### **Procedures**

The open and restricted procedures remain a free choice for contracting authorities to select. The competitive procedure with negotiation (an updated version of the negotiated procedure) and competitive dialogue procedure remain available only in specific circumstances but these have been merged and widened and therefore should be easier to justify.

In addition, contracting authorities will be able to utilise the new innovation partnership procedure as set out below.

### **Innovation Partnership Procedure**

This is a new route adopted by the EC for public procurement which is aimed at increasing innovation. The economic operators taking part are known as partners. The basic features of the innovation partnership procedure include:

- the contracting authority will seek offers for one or more partners to assist in the development of an innovative product, service or works not yet on the market, and the subsequent purchase of the innovative solution without the

need for a separate procurement procedure for the purchase, provided the final purchase corresponds to pre-agreed levels of performance and maximum costs;

- the procurement can be run with one or several partners carrying out separate R&D activities;
- • the partnership procurement shall set intermediate targets to be attained by the partners taking part and provide for payment in appropriate instalments;
- termination after each phase (in full or per partner) can be reserved upfront;
- the procurement can be carried out in successive stages provided this is indicated upfront;
- the initial and each subsequent tender is to be negotiated but the final tender must not be negotiated; and
- the minimum requirements and the award criteria must not be negotiated.

### **Dynamic Purchasing Systems** (Regulation 34)

Dynamic Purchasing Systems (“DPS”) are retained in PCR 2015. These systems are essentially open frameworks and provide for an electronic process for commonly used supplies, services or works. Contracting authorities must allow all economic operators the ability to participate during the validity of the DPS. They are not often used as, once the system is set up, PCR 2006 currently requires a further notice to be placed in OJEU in order to tender under the system. This requirement to publish a further OJEU notice is not required under PCR 2015 and the UK Government hopes more use will be made of DPS under PCR 2015.

- The 4 year maximum duration contained in PCR 2006 has been deleted, albeit contracting authorities are required to indicate the period of validity of the system in the call for competition.

### **Modification of contracts** (Regulation 72)

Modifications to existing contracts are permitted without commencing a new procurement in the following circumstances:

- Where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options.
- For additional works, services, or supplies by the original contractor, irrespective of their value that have become necessary and were not included in the initial procurement where a change of contractor cannot be made for economic or technical reasons; or would cause significant inconvenience or substantial duplication of costs for the contracting authority.

However, any increase in price cannot exceed 50% of the value of the original contract.

- Where all of the following conditions are fulfilled:
  - the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;
  - the modification does not alter the overall nature of the contract; and
  - any increase in price is not higher than 50% of the value of the original

### **Light Touch Regime** (Regulations 74/76)

Under PCR 2006, service contracts were divided into Part A (which were subject to the detailed regulatory regime) and Part B (which were only subject to limited obligations under that legislation). EU Treaty principles, including sufficient advertising and fair and transparent process, also applied to Part B services where there was cross-border interest.

Under PCR 2015, Part B services have been replaced by a specific list of social and other services which are subject to the “light touch” provisions.

“Light touch” means that a contract notice or PIN used as a call for competition must be published in the Official Journal in the usual way and a contract award notice published once a contract has been awarded. The procedure can be determined by the contracting authority but must comply with principles of equal treatment and transparency and provide reasonable and proportionate timescales. PCR 2015 specifically says that a contracting authority may use or adapt procedures available for fully regulated procurements.

### **Reserved contracts for certain services** (Regulation 77)

For certain specific health, social and cultural services to which the light touch regime applies, PCR 2015 allows contracting authorities to reserve the award of contracts for those services to certain types of organisations as part of its call for competition. The organisations entitled to bid must meet the following conditions: (i) the organisation’s objective is the pursuit of a public service mission linked to the delivery of the services; (ii) profits are reinvested with a view to achieving the organisation’s objectives; (iii) the structure of management/ownership of the organisation performing the contract are based on employee ownership or participatory principles; and (iv) the organisation has not been awarded a contract for those services in the past 3 years.

If a contracting authority decides to reserve these contracts to such organisations, the maximum duration of a contract which can be awarded is 3 years.

### **Publication on Contracts Finder and Lord Young requirements** (Regulations 106, 108, 110-113)

PCR 2015 introduce a number of additional requirements governing the purchasing activities of contracting authorities. These came into force on 26 February 2015.

The requirements include:

- Where a contracting authority sends a contract notice to the Official Journal, it must also publish the information on Contracts Finder within 24 hours of when it is entitled to publish at national level. The same applies in respect of contract award notices although this is not required within 24 hours;
- Having regard to guidance in relation to pre-qualification which may include a standard form. Guidance will also indicate what is considered to be a reporting deviation from the guidance, requiring an authority to notify the Cabinet Office;
- Prohibiting the use of pre-qualification questionnaires for below EU threshold contracts (although the services thresholds are used for works or “light touch” regime contracts in this context given that the works and “light touch” thresholds are quite high);
- A requirement that 30 day payment terms (for undisputed invoices) to be included in public contracts and passed down the supply chain, and a requirement to report on late payment of invoices. If express provisions are not included, PCR 2015 imply specific terms into contracts. Guidance may be issued setting out model contract clauses.

### **Frameworks** (Regulations 33)

The key principles relating to framework agreements under PCR 2015 are largely the same as those set out in PCR 2006 although there is additional clarification in places to further emphasise the need for transparency.

PCR 2015 introduce a new concept of a “hybrid” call off process which provides for part direct award, part mini competition. For frameworks incorporating this approach to call off's, a contracting authority is required to set out in the procurement documents how the choice will be made (on objective criteria) between a direct award and a mini competition and specify which terms may be subject to reopening of competition. PCR 2015 also indicate that this approach could be lot specific, ie it does not have to apply across all lots within a framework.

### **Central Purchasing Bodies** (Regulation 37)

Contracting authorities may acquire supplies or services, or both, from a central purchasing body in respect of activities conducted on a permanent basis in one of the following forms: (a) the acquisition of supplies or services, or both, intended for contracting authorities; (b) the award of public contracts or the conclusion of

framework agreements for works, supplies or services intended for contracting authorities. A contracting authority will remain responsible for compliance with PCR 2015 in certain circumstances, eg in running a call off under a framework established by a central purchasing body.

### **Joint procurements** (Regulation 38)

PCR 2015 introduce new provisions to clarify procurements being carried out jointly and means contracting authorities may be responsible for complying with PCR 2015 even if they are not conducting the tender process themselves. Clarity of each contracting authority's responsibilities is therefore needed at the outset:

- Entirely joint procurement means joint responsibility for fulfilling obligations even if one contracting authority manages the procurement process on behalf of another contracting authority.
- However, where discrete parts of the procurement process are not carried out jointly each party has sole responsibility for fulfilling obligations under PCR 2015 for their relevant part although they will still have joint responsibility for parts carried out jointly.

### **Pre-procurement market engagement** (Regulations 40 and 41)

PCR 2015 permit soft market testing provided this does not distort competition and is transparent and non-discriminatory. The UK Government actively encourages the use of soft market testing to deliver more effective and efficient procurement processes.

Where organisations have been involved at pre-procurement stage (whether in soft market testing or otherwise, eg incumbents), a contracting authority must ensure that there is a level playing field when the tender process starts such as providing information which has been made available at pre-procurement stage.

Bidders may be excluded from the procurement in circumstances where their prior involvement would distort competition (and there are no other means of ensuring equal treatment which can be applied).

### **Variants** (Regulation 45)

Contracting authorities may now require as well as permit bidders to submit variants (and must set out the minimum requirements they must meet).

Contracting authorities may specify that a variant can only be submitted if a standard bid is submitted or can allow just variants but this must be clear in the procurement documents.

PCR 2015 confirms that contracting authorities must ensure that the award criteria can be applied to both non-variant and variant tenders by means of ensuring equal treatment which can be applied).

### **Lots** (Regulation 46)

PCR 2015 introduces a change in emphasis in relation to lots to encourage SMEs.

As before, contracting authorities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots.

Contracting authorities may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or (if a PIN is used as a call for competition) in the invitation to confirm interest. Authorities must set out how this will work in practice including the objective criteria which will determine which lots will be awarded where the application of the award criteria results in one tenderer being awarded more than one lot.

The UK has not mandated the use of lots, as permitted under the Public Contracts Directive but if contracting authorities decide not to divide an opportunity into separate lots, it must include the reasons for this in the Regulation 84 report.

### **Prior Information Notices** (Regulation 48)

There is no longer a mandatory requirement for a contracting authority to publish a PIN above a certain threshold.

### **Notices** (Regulations 48 to 52)

Contract award notice timescales have been reduced to 30 days from 48 days.

### **Bidder feedback** (Regulation 55)

PCR 2015 continue to require contracting authorities to inform each candidate and tenderer (as soon as possible) of decisions reached concerning the conclusion of a framework agreement, the award of a contract or admittance to a dynamic purchasing system.

An economic operator's right to request information remains (and a response must be provided quickly and no later than 15 days of a request) and the majority of this information would be provided in any event in the standstill letter. The new provisions also include a new right to request details of the conduct and progress of negotiations and dialogue with bidders which is in addition to information made available in the standstill letter.

### **Electronic Auctions/catalogues** (Regulations 36 and 36)



The use of e-auctions has been retained under PCR 2015, albeit some changes have been introduced to improve transparency.

### **Eligibility and Selection** (Regulation 56 to 64)

PCR 2015 recognise “compliance checks” requiring contracting authorities to verify that bids submitted comply with the rules and requirements applicable to the tender as well as checking whether grounds for exclusion apply and selection criteria is satisfied.

A contracting authority is also now expressly entitled to clarify errors, missing or incomplete bids but we would urge caution here as PCR 2015 require that any such request is made in full compliance with the principles of equal treatment and transparency.

PCR 2015 also confirm that checking a tenderer remains “eligible to tender” is an ongoing obligation, ie contracting authorities must continue to verify that there are no exclusion grounds or changes in circumstances which would mean an operator fails to meet selection criteria.

A number of changes are included in relation to the mandatory and discretionary grounds for exclusion including additional discretionary grounds where conflicts cannot be remedied or where persistent poor performance has led to contract termination or similar sanctions. Bidders are allowed to provide evidence to demonstrate reliability despite the existence of grounds for exclusion. PCR 2015 also provide a duration for the exclusion – 3 years from the date of conviction for mandatory grounds and 5 years from the date of the event for discretionary grounds.

PCR 2015 also contains a number of changes to the selection criteria, including:

- minimum annual turnover: (i) no more than 2 x estimated contract value, unless justified; (ii) applies per lot but can be combined if awarded more than one lot (note there are specific rules for frameworks and DPS).
- technical experience: new supply chain management and tracking systems that the operator will apply when performing the contract.
- education and qualifications if not to be used as award criteria.
- a requirement to accept the European Single Procurement Document (ESPD) which is a self declaration, as preliminary evidence that there are no grounds for exclusion and that the selection criteria is satisfied. An authority can ask for supporting documents referred to in the ESPD at any time and must require the winner to provide up to date information to confirm this.
- requirements on having recourse to e-Certis.
- relying on other entities – contracting authorities may require joint liability (if an economic operator is relying on other entities for educational/professional purposes, that entity must be performing the relevant parts, must be checked for eligibility and there may be requirement to replace them in certain circumstances).

## **Evaluation** (Regulations 67 and 68)

Contracting authorities are required to base the award of public contracts on the most economically advantageous tender assessed from the point of view of the contracting authority. This may be on the basis of price or cost and may include the “best price-quality ratio”.

Life-cycle costing is also permitted and rules are set out on how to work out life-cycle costing etc in Regulation 68. The approach must be disclosed to bidders.

Award criteria must still be linked to the subject matter of the contract but may also include “organisation, qualification and experience of staff assigned to performing the contract” where the quality of the staff assigned can have a significant impact on the level of performance of the contract. Care must be taken not to duplicate any “staff” related assessment undertaken at pre-qualification stage.

## **Abnormally Low Tenders** (Regulation 69)

A contracting authority is now obliged to seek reasons from bidders to explain prices and costs which appear to be abnormally low in relation to the works, supplies or services. Under PCR 2006, a contracting authority was only obliged to investigate if it was considering excluding a tenderer.

## **Termination** (Regulation 73)

Contracting authorities shall ensure that every public contract which they award contains provisions enabling the contracting authority to terminate the contract where (i) the contract has been subject to a substantial modification which would have required a new procurement procedure; (ii) the contractor has, at the time of contract award, been in one of the situations referred to in certain of the mandatory grounds for exclusion; or (iii) the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and the Public Contracts Directive (that has been declared by the Court of Justice of the European Union in a procedure under Article 258 of TFEU). Contracting authorities will need to consider how to capture this right to terminate, how this is treated (eg what kind of default this will be) and the consequences of exiting the contract including any compensation payable. The Cabinet Office will be issuing model clauses and guidance on this.

To the extent that a public contract does not contain provisions enabling the contracting authority to terminate the contract on any of the grounds mentioned above, such a termination term shall be implied into the contract.

## **Individual Reports** (Regulation 84)

Contracting authorities are required to create and keep a written report on each contract, framework agreement and dynamic purchasing system entered into under PCR 2015.

The information recorded must include information relating to the following (amongst other):

- the qualification and selection of tenderers and the award;
- where applicable, why electronic procurement is not used;
- the use of the negotiated procedure without a call for competition;
- how conflicts of interest have been managed; and
- the non-application of the regulations in certain circumstances.

In addition to the above, there is a general obligation on contracting authorities to document the progress of all procurement procedures including ensuring sufficient information is kept to justify decisions such as communications with economic operators and internal deliberations, preparation of procurement documents, any dialogue and negotiation, selection and award. Documentation must be kept for three years from the award of the contract.

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