

# THE UK PUBLIC CONTRACTS REGULATIONS 2015 HAVE ARRIVED



**On 5 February 2015, the UK Government published the Public Contracts Regulations 2015 (SI 2015/102) (the Regulations). The Regulations will enter into force on 26 February 2015 and will only apply to contract award procedures commenced on or after 26 February 2015.**

Last month the UK Cabinet Office published its responses to the consultation on the Regulations, explaining the Government's approach to drafting the Regulations. The Regulations transpose the new Public Contracts Directive (Directive 2014/24 on public procurement and repealing Directive 2004/18) into English law.

The Public Contracts Directive is one of three European public procurement Directives adopted in February 2014. These entered into force on 17 April 2014. These (together "the new Directives") are:

- Directive 2014/23 on the award of concession contracts (the Concessions Directive).
- The Public Contracts Directive.
- Directive 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17 (the Utilities Directive).

The new Directives contain many analogous provisions. For example, amongst others, the articles on life cycle costing and abnormally low tenders, the use of "e-Certis"<sup>1</sup> and the European Single Procurement Document<sup>2</sup>, and the emphasis throughout the new Directives on consideration for the environment and the encouragement of small and medium enterprises (SMEs) (see our Briefing of March 2012: <http://www.hfw.com/Tender-Rules> for an overview of the new Directives, and our Construction Bulletin of June 2014: <http://www.hfw.com/Construction-Bulletin-June-2014> for a discussion of the implications for contract variations).

1 An information system which helps bidders to identify the different certificates and attestations frequently requested in procurement procedures across the EEA.

2 A self-declaratory document which acts as preliminary evidence of a supplier's compliance with the pre-selection criteria – only a winning bidder will have to provide full documentation



When the European Union legislative bodies consulted on the new Directives in draft, a large part of the discussion focused on the various elements of the Public Contracts Directive, since the other two draft Directives contained many analogous provisions (particularly the Utilities Directive). The parts of the other two draft Directives which were specific to those Directives were discussed separately.

Similarly, the UK focused initially on transposing the Public Contracts Directive. The UK Cabinet Office launched a consultation on the draft Regulations on 19 September 2014 and published its responses on 30 January 2015. Since there is little scope in the Public Contracts Directive for Member States to exercise their discretion, the UK consultation focused on the areas where the UK was required to make policy choices.

Now that the Regulations which transpose the Public Contracts Directive into UK law have been discussed, approved and adopted, it should be relatively speedy to consult on Regulations to transpose the other two Directives along the same lines. The UK's approach to implementing EU Directives as literally as possible, and to avoid gold plating, means that Regulations transposing the New Concessions Directive and the New Utilities Directive are likely to contain few surprises. The UK has until 18 April 2016 to transpose all of the new Directives into UK law. In 2014 the UK announced its intention to transpose the Directives ahead of schedule. It has just over a year to do this, and a general election to contend with in the meantime, with all the disruption that this entails.

## Key changes brought about by the Public Contracts Directive (the Directive) and transposed into the Regulations

### E-Procurement

Most tender processes must eventually be conducted using electronic communications and a number of electronic resources aimed at improving access to contracts, and increasing transparency and efficiency.

- All procurement documentation must be available via the internet from the date of publication of the contract notice (with some exceptions).
- There is some scope for Member States to make policy decisions in the transposition of the electronic requirements. The UK has chosen:
  - To postpone mandatory use of electronic communication and the requirement on contracting authorities to use "e-Certis" until 18 October 2018.
  - Not to set centrally the level of security in e-communications, but instead to leave this to each contracting authority within a centrally-set "framework" as set out within the Regulations, including the levels of risk requiring the use of advanced electronic signatures.
  - Not to mandate the use of electronic catalogues or the use of "building information electronic modelling" for works contracts.

### Procedures

- Creation of the "innovation partnerships" procedure to encourage suppliers to develop works, supplies or services not currently available on the market through long-term partnerships. Contracts can be awarded to one or more suppliers using the competitive procedure with negotiation. The procurement can be structured in phases of research and development, at which an authority can reserve the right to terminate the process or reduce the number of partners, without re-starting the tender process.
- A clearer and more user friendly "competitive procedure with negotiation" will replace the existing "negotiated procedure".
- The "competitive dialogue" procedure has been simplified and now allows negotiation with the preferred bidder, provided that changes are not material.
- The justifications for choosing procedures with negotiation have been broadened considerably, and apply equally to competitive dialogue and the competitive procedure with negotiation.
- New standard forms for authorities to use in the tender process should be produced by the European Commission shortly before the April 2016 transposition deadline.
- Shorter minimum time limits for responses to adverts/tenders, depending on the complexity of the contract and the time required for bidders to respond. In all cases, a notice of contract award must be sent to OJEU within 30 days



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of conclusion of the framework or contract. In some procedures it is possible for authorities to reduce the minimum time limits where a suitable Prior Information Notice has been published. It is possible to accelerate time limits where the requirement is "urgent".

- Additional flexibility for sub-central authorities in certain procedures.

### Preliminary market consultation

- Although the previous rules did not prevent this, the new rules explicitly permit contracting authorities to discuss requirements with suppliers and expert bodies before a procurement procedure is started.
- Care must be taken, however, to preserve transparency and equal treatment throughout the tender process. The UK will issue guidelines on this, rather than write the obligation into the Regulations.

### Frameworks

- There are minor changes to the rules on frameworks:
  - The rules make it explicit that only authorities clearly identified in the OJEU notice may use a framework to award contracts.
  - When a framework agreement is concluded with more than one economic operator, and a framework gives an authority a choice between applying the terms of the framework or re-opening competition within the framework, the choice must be made by applying objective criteria set out in the procurement documents.
  - The Regulations make it clear that authorities are legally responsible for applying the rules set by a Central Purchasing Body when using their frameworks to award contracts.

### Dynamic Purchasing Systems

- New provisions on Dynamic Purchasing Systems (the DPS) change the way that they are established and used:
  - The current four year time limit is removed.
  - Now once a DPS is established the contracting authority must allow a supplier to apply to join it at any time, until the system is terminated.
  - To award a contract the authority must seek tenders from all suppliers admitted to the DPS.
  - Notices for each contract awarded under the DPS must be sent to OJEU within 30 days, with the option to group these in quarterly batches.

### Exclusions

- In addition to existing exclusions, there are new rules on the exclusion of economic operators from public procurement for various types of behaviour, including where there are "significant or persistent" deficiencies in performance of a previous contract.
- The UK chose not to make exclusions mandatory where it is not required by the Directive, and to give contracting authorities as much discretion as possible.
- Accordingly, the offences in UK national law which attract mandatory exclusion of an economic operator from a tender process have been listed (as in the 2006 Regulations), whereas the Regulations do not elaborate on the requirement to avoid conflict





of interest and to maintain fair competition. These principles will be addressed in guidance instead.

### Contract modification/termination

- The Regulations clarify that a contract or framework may be changed only if a change is not “substantial” such that it would constitute a new award.
- Small variations to a project will not trigger a new procurement process. This includes variations with a cumulative value of up to 15% of the contract value. In addition, variations which are not “substantial” are allowed. A variation can be challenged only if it is substantial and the 15% ceiling has been reached.
- Major changes are permitted even if they are both “substantial” and cumulatively worth over 15% of the contract value if the additional works are necessary but a change of contractor is not possible for economic or technical reasons.
- Major changes will also be permitted where the modification could not be foreseen, does not alter the nature of the contract and amounts to less than 50% of the contract value.

### Tender award criteria

- Award criteria must be “linked to the subject matter” of a contract.
- There is a new emphasis on assessment of the tenders using the Most Economically Advantageous Tender (MEAT) criterion.
- The UK had the option to remove ‘lowest price’ as a criterion within

the MEAT criterion, but it chose not to do this. Instead, guidance will emphasise the importance of a holistic decision and will stress the importance of the proposed quality of services where this is a particularly important factor in the contract, for example in healthcare or social work.

- An assessment of cost can now be made using a “life cycle” approach, looking at the cost during the whole life of the contract and works in question.
- The new rules contain tougher provisions on abnormally low tenders. Contracting authorities are now required to seek explanations where a bid appears to be abnormally low, and must reject the tender if the low price is the result of a breach of specified social and environmental law.

### Subcontractors

- The UK Cabinet Office chose not to impose new obligations on subcontractors, or on main contractors in relation to their subcontractors, although the Directive allows Member States to mandate various obligations.
- For example, the UK chose not to make it compulsory for contracting authorities to ask bidders to indicate in their proposals any share of the contract they may intend to subcontract to third parties and to provide the details of any subcontractors, or to make the main contractor directly obliged to provide information about its subcontractors and supply chain.
- The UK chose not to provide that subcontractors should

receive direct payments without it being necessary for them to request it. However, alternative measures are included separately in the Regulations to ensure that payments are provided in a timely manner, and which do not increase the burden on contracting authorities.

- The UK decided that authorities will retain discretion on what to do in the event that a subcontractor does not comply with environmental, labour or social law. The contracting authority “may” verify whether one of the conditions of compulsory exclusion applies to a subcontractor. Where this is found to be the case, the authority should require that the subcontractor be excluded.

### SME encouragement

- The Directive gave Member States the option to require contracting authorities to divide contracts into lots under certain conditions, and/or to require them to provide a justification for a decision not to divide contracts into lots.
- The UK, according to its usual approach, decided to preserve as much flexibility as possible. Accordingly:
  - Public authorities are not required to break down contracts into lots.
  - Authorities may accept bids for “combined lots”.
  - However, contracting authorities must provide reasons if they decide not to break down contracts into lots, and there will be guidance on what these reasons might be.



- The UK Regulations also implement some key UK reforms suggested by Lord Young in his report 'Growing Your Business' published in May 2013. The reforms include abolishing Pre-Qualification Questionnaires (PQQs) for contracts below the EU threshold.

#### Exemptions from the regime

- Exemptions for “public to public” contracts have been clarified (codifying European case law).
- Exemptions for certain contracts with defence/security implications.

In short, the Directive has been transposed into the Regulations in accordance with the UK's usual approach. Contracting authorities in the UK will have the maximum flexibility allowed by the Directive. It is hoped that the new procedures and principles will assist the European Union's aims to streamline and modernise public procurement and to make contracts accessible to a wider pool of contractors across Europe. Businesses should consider what changes and operations they may need to put in place to benefit most from the new Regulations.

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