Public Procurement World - United Kingdom

2. Application of the Statutory Procurement Laws

| Contents |
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| To generate table of contents, right-click here and select **Update Field.** |

# a. Which public agencies are covered by the laws?

A broad range of UK public entities are covered by the definition of "contracting authority" under the EU Procurement Directives and in the UK Regulations. In the PCR 2015, the term "contracting authority" includes central government authorities such as the Cabinet Office, the House of Commons and government departments such as the Department for Health.

# b. Which private entities are covered by the laws?

In accordance with the EU Procurement Directives, private entities are covered by the UK Regulations in limited circumstances only.

The UCR 2016, in implementing the Utilities Sector Directive, applies to private entities operating on the basis of a special or exclusive right granted by a competent public authority undertaking certain specified actions. Such a private entity must be operating in a utility sector subject to the UCR 2016 and be awarding a contract in relation to a utilities activity falling within the UCR 2016.

# c. Are co-operations between contracting authorities exempted from public procurement law? If so, what are the conditions for the exemption?

The PCR 2015 do not apply to a contract concluded between two or more contracting authorities where all of the following conditions are satisfied:

the contract implements or establishes a co-operation between the relevant contracting authorities so as to ensure that public services they have to perform are delivered with a view to achieving objectives they have in common;

the implementation of that co-operation is governed exclusively by considerations relating to the public interest; and

the relevant contracting authorities perform on the open market less than 20% of the activities relating to the co-operation.

Additionally, the PCR 2015:

do not apply to public service contracts awarded to another contracting authority by a contracting authority based on an exclusive right which the former enjoys pursuant to: (a) published law; (b) regulation; or (c) administrative provision which is compatible with the Treaty on the Functioning of the European Union (the "TFEU"); and

may not apply where the contracting authority exercises control or joint control together with another contracting authority over the entity concerned (see further in section 7a below).

# d. Which types of contracts are covered?

There is no deviation by the UK from the EU Procurement Directives on this point. In brief, the UK Regulations apply to public works contracts, services contracts and supply contracts.

The new UK Regulations introduced the 'light touch' regime, which governs the award of contracts for social and other specific services listed in Schedule 3 of the PCR 2015 and Schedule 2 of the UCR 2016, for example religious services, where the value of the contract is over a certain threshold value (€750,000 ( £589,148). Contracting authorities and utilities intending to award a contract under the 'light touch' regime should:

advertise their intention to award a contract that falls within the list of specific services and above the applicable threshold;

run a competitive award process in accordance with the terms of the call for competition in the advertisement;

ensure that the procedures applied to the award of the contract comply with the principles of transparency and equal treatment of economic operators;

ensure that all time limits are proportionate and reasonable; and

publish a contract award notice.

Certain provisions of the PCR 2015 are applicable to contracts which are greater than £10,000 in value (in respect of central government contracts) or £25,000 (in respect of non-central government and NHS Trust contracts), but below the general threshold (referred to above). These provisions, known as the "Lord Young reforms" were intended to support growth and transparency and maximise opportunities for small and medium enterprises.

Aside from the Lord Young reforms, the PCR 2015 applies to contracts above the threshold value specified in Article 4 of the Public Sector Directive (in Euros) and expressed in pounds sterling in the Official Journal. Likewise, the UCR 2016 applies to contracts above the threshold value specified in Article 15 of the Utilities Sector Directive.

# e. How are changes to an existing contract dealt with? Do changes require a new procurement procedure?

Contract variations are governed by Regulation 72 of the PCR 2015. Modifications to an existing contract are permissible under the UK Regulations, in the following circumstances, where:

they have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses which state the scope and nature of possible modifications and the applicable conditions and do not provide for modifications that would alter the overall nature of the contract (or framework agreement);

the modifications are for additional works, services or supplies by the original contractor, which have become necessary, were not included in the initial procurement and where a change of contractor cannot be made for economic or technical reasons or would cause significant inconvenience of substantial duplication of costs. The PCR 2015 contain the additional requirement that any increase in price must not exceed 50% of the value of the original contract;

the modification does not exceed 50% of the value of the original contract (or framework agreement), is required because of circumstances which a diligent contracting authority could not have foreseen, and (in the case of the PCR 2015) any increase in price does not exceed 50% of the value of the original contract (or framework agreement);

a new contractor replaces the original contractor as a result of, for example, a corporate restructuring or merger, that new contractor fulfils the selection criteria used in the original procurement of the contract, and this change does not entail any other substantial modifications to the contract;

the modification is not 'substantial', meaning it does not meet any of the following conditions: (a) the modification renders the contract or the framework agreement materially different in character from the one initially concluded; (b) the modification introduces conditions which, had they been part of the initial procurement procedure, would have— (i) allowed for the admission of other candidates than those initially selected, (ii) allowed for the acceptance of a tender other than that originally accepted, or (iii) attracted additional participants in the procurement procedure; (c) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement; (d) the modification extends the scope of the contract or framework agreement considerably; (e) a new contractor replaces the one to which the contracting authority had initially awarded the contract in cases other than those provided for elsewhere in the PCR 2015 (i.e. corporate restructuring, merger etc.); and

the modification does not alter the overall nature of the contract or framework agreement and its value is below threshold and below 10% of the initial contract value for service and supply contracts and 15% of the initial contract value for works contracts.

Any modifications which do not fall into one of the above exemptions require a new procurement procedure. Contracting authorities are required to publicise permissible modifications (which fall into categories (ii) and (iii) above.

# f. What is the applicable regime for framework agreements?

The main provisions on framework agreements are set out in Regulation 33 of the PCR 2015. Under the PCR 2015, the duration of a framework agreement cannot exceed 4 years (8 years under the UCR 2016), except for exceptional cases duly justified, in particular by the subject-matter of the framework. Only those contracting authorities which are clearly identified in the call for competition or the invitation to confirm interest may use a framework agreement. Contracts entered into pursuant to a framework agreement are not permitted to entail substantial modifications to the terms set out in the relevant framework agreement.

# g. What is the applicable regime for public-private partnerships (PPPs)?

PPPs are governed by the PCR 2015 and contracting authorities are required to use the competitive dialogue procedure to procure most PPP projects (see the answer to question 3a below for more detail about this procedure).

# h. How are concessions dealt with?

The award of concession contracts is governed by the CCR 2016. Similar to the UK Regulations, the CCR 2016 applies to concession contracts with a value which is equal to or higher than the threshold specified in the Concession Contracts Directive. Contracting authorities and utilities are required to act in a transparent and proportionate manner and treat economic operators equally and without discrimination.

Contracting authorities and utilities must award concession contracts based on objective criteria which comply with the principles outlined above and which ensure that tenders are assessed in conditions of effective competition in order to identify an overall economic advantage for the contracting authority/utility.

# i. Are there anti-avoidance rules (including laws on bid rigging)?

The UK rules directly reflect the EU position and therefore contain certain rules in relation to aggregation. The EU (and UK) rules require the value of purchases under individual contracts to be added together for the purpose of ascertaining the relevant threshold. This is an anti-avoidance measure, the aim of which is to deter the contracting authorities/utilities from deliberately dividing up contracts (which fulfil the same or a similar purpose) to bring them below the relevant thresholds.

Bid rigging is proscribed as a matter of competition law rather than procurement law. EU competition laws apply where trade between member states is affected. Otherwise, the Competition Act 1998 is the relevant law but it largely mirrors EU competition law. There may also be criminal liability pursuant to the Enterprise Act 2002.

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