



First for Public Law

The 2015 Procurement Regulations : One Year on

Introduction

It has now been a year since the introduction of the 2015 Public Contract Regulations (the Regulations), which implements the new EU Directive on public procurement and replaces the previous public sector procurement regime as set out in the 2006 Public Contract Regulations. In this article we provide a summary of some of the key changes that were made as well as cases and updates since the 2015 Regulations came into force.

A Summary of Key Changes

The 2015 Regulations brought in a number of key changes, including:-

Removal of the Part “A” and “B” services distinction and introduction of the light touch regime – Regulation 74 - 77. The Regulations provide that all procurements are fully regulated unless expressly excluded. To replace Part “B” of the previous regulations, a new light touch regime now applies to certain social, health, education, legal and other services (a more restricted list than Part B), provided that these services have a value equal to or greater than EUR 750,000. Where the light touch regime applies, an authority must publish an OJEU notice or PIN, comply with the principles of transparency and equal treatment, and publish a contract award notice.

Lord Young’s requirements and contract finder – Regulations 105 – 114. These requirements did not come from the EU Directive and have, for political reasons, been implemented in the UK only. The below threshold requirements provide that no PQQ stage is required for procurements below a certain value (£116,676 for central government authorities and £172,514 for sub central government authorities), that authorities must advertise contract opportunities of certain values (£10,000 or more and central authority or £25,000 or more and sub central authority), and that contracting authorities must publish certain information contract awards within a reasonable time and comply with Cabinet Office guidance. These requirements aim to promote access to public contract opportunities for SME businesses and reduce administrative burdens.



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Preliminary market consultations – Regulation 41. The Regulations provide express permission for contracting authorities to conduct market consultation before commencing a procurement by speaking to market participants and experts. Such a process enables the Authority to gather information and advice, which can be used in the planning and conduct of procurement. Authorities must be careful not to offend treaty principles and to ensure issue fairness and transparency of the process is maintained, as there is a risk of being unduly influenced by the information obtained by suppliers. Authorities should ensure they have a plan to capture and document market feedback and any information shared.

Requirement to have documents ready for publication – Regulation 22 and 53. As part of a push towards greater transparency and to encourage better organisation before procurements go live, the Regulations require that the procurement documents are ready and available electronically from the date of publication of the OJEU or invitation to confirm interest or following PIN. This allows the potential market to see the full breadth of the procurement and its scope. Contracting authorities must therefore front load preparation and identify all documents as part of their initial procurement strategy.

Amendments to procedure – Regulations 26 to 32. The Regulations have increased the choice of procedures available through changes to the Competitive Dialogue Procedure, revisions to the Competitive Negotiated Procedure and the introduction a new procedure, the Innovation Partnership. These changes were introduced to bring greater flexibility and innovation. Contracting authorities should now be considering the procedures as part of their procurement strategy. A PPN was issued in July 2015 and provides a procurement route decision tree setting out new procurement routes under these Regulations.

Timescales - Regulations 28, 29 and 47. Changes to the timescale requirements mean that contracting authorities must set reasonable timescales, which are appropriate to the specific nature of the procurement process, and these should be kept under review. For example, the minimum timescales have been reduced and there is a requirement to amend the timescales if significant changes are made to procurement documents or if the information requested has not been provided.

Clarification on modification rules – Regulation 72. The Regulations provide the parameters within which changes can be made to contracts without needing to retender. Any substantial changes will require a new tender exercise. Authorities should use these provisions to plan from the outset and ensure contracts enable changes to be made in the future. In some circumstances, where there is a substantial modification to the contract, authorities have a right to terminate under Regulation 73.

Updated mandatory and discretionary exclusion grounds – Regulation 57. The Regulations include a number of additional exclusions, relating to e.g. child trafficking offences, non-payment of expenses and conflicts of interest.

Award Criteria Selection and rating – Regulation 67. Authorities must now award to the most economically advantageous tender; price is included in the criteria for evaluating this. A cost effectiveness approach is to be taken; this may be on the basis of price or cost and may include the best price quality ratio. There is also greater clarity that social as well as environmental factors can be assessed.

Improved access for SMEs through division into lots – Regulation 46. If an authority chooses not to divide the tender into lots, it must provide an explanation for this. Authorities may share out lots and must set out details of objective criteria for determining which lots are awarded. This can be seen as a drive to encourage smaller suppliers and therefore will need to be considered by authorities at the outset. The management of multiple contracts following an award could be cumbersome and providing objective criteria may be difficult in practice.

Codification of Teckal and Hamburg principles – Regulation 12. The Regulations now incorporate and clarify the rulings of Teckal (which provides the Regulations that will apply for contracts awarded by authorities to legal persons under their control, also known as the in house exceptions) and Hamburg (which sets out when a contract between two authorities will be exempt).

Guidance from the Courts

Although the 2015 Regulations have only been in force since 26 February 2015, there have already been a number of key cases which provide useful guidance on the application and scope of the Regulations.

Lightways (Contractors) Ltd v Inverclyde Council [2015] CSOH 169. This Scottish case is the first ineffective declaration case and provides a warning that authorities must strictly comply with the Regulations. The Authority had illegally directly awarded a new contract by entering into a call off contract without advertisement with an operator who was not part of the original framework agreement. The Court found that a declaration of ineffectiveness was an appropriate remedy. The Authority has been granted leave to appeal the order of ineffectiveness.

Edenred (UK Group) Ltd v HM Treasury [2015] UKSC 45. This case held that the new Regulation on modification applied even though original procurement was under the old regulations. This judgement provides helpful guidance on the application of Regulation 72. It is possible to vary or modify an existing contract and it is possible to provide for this in the initial procurement documents although it would require close scrutiny of the OJEU notice, procurement documents and subsequent contract.

Woods Building Services v Milton Keynes Council [No.1] [No. 2 Remedy] [2015] EWHC 2172 (TCC) This case concerned an authority's manifest errors in assessing and evaluating each tender's submissions as well as its breaches of the treaty principles of equality and transparency. It was found that the Authority had therefore wrongly rejected

the Claimant's tender. The Court set aside the original decision, substituted its own view and created a formal record to show court adjusted scores, made a declaration that Claimant's tender was the most economically advantageous and held that damages would be an adequate remedy.

Geodesign Barriers Ltd v The Environment Agency [2015] EWHC 1121 (TCC).

Following the Claimant's complaint about a flawed evaluation process and an unsatisfactory post-tender debrief, the Court ordered that the Authority disclosed documentation which revealed how it had evaluated the competing bids and expressed concern about the lack of readily available evaluation documentation. The case reinforces the importance of ensuring an authority has clear and contemporaneous records of how the Authority arrived at its decisions in the tender. By keeping good records and documentation, especially when evaluating bids, an authority will be placed in a much stronger position when an award decision is challenged.

Fox Building & Engineering Ltd v The Dept of Finance and Personnel [2015] NIQB.

This is another case concerning disclosure. Following a challenge that the Authority's procurement process lacked fairness and transparency, a confidentiality ring was agreed with a restriction permitting a record of the nominal bidding to be disclosed and an automatic suspension was put in place. This was later lifted after an application of the American Cyanamid principles which determined that there was a public interest in awarding the contracts and damages would be an adequate remedy.

Sally Ballan v Information Commissioner August [2015]. This case held that confidentiality in bids from a long concluded procurement process should be maintained. The protection of commercial interests exception under FOIA included the commercial interests of the contracting authority itself.

Counted 4 Community Interest Company v Sunderland City Council [2015] EWHC 3898 (TCC).

The Claimant was the incumbent provider of the substance-misuse services but was unsuccessful in the procurement process carried out in 2015. The Court, for the first time, looked at the new Light Touch Regime for health and social services and Regulation 24 which requires an authority to take active measures to nullify any conflict of interest. The Claimant sought a declaration that the Authority acted unlawfully and that a new contract should be awarded to it and/or damages. This case has not yet gone to full trial.

Other Updates

Mystery Shopper Service. The Small Business, Enterprise and Employment Act 2015 came into force on 26 Mar 2015 and created a statutory basis for the Mystery Shopper Service. Section 39 gives the Secretary of State power to introduce regulations to impose duties on authorities around streamlining and efficiency in public procurement and creating a level playing field for SMEs. Section 40 provides a statutory basis for the

Secretary of State's power to investigate the way a contracting authority conducts its procurement functions. This is intended to remove barriers for SMEs and improve authorities' procurement practises.

Increasing Transparency. In July 2015 a PPN was issued setting out guidance around transparency principles and requirements.

New thresholds. The new thresholds came in force from 1 Jan 2016 and are slightly lower than those currently in place. They apply to all new procurements (from 1 January 2016).

New European Single Procurement Document. Regulation 59 was brought into force on 26 January 2016 and introduces the new European Single Procurement Document. This is hoped to simplify the tender process and reduce the administrative burden, thereby encouraging SMEs to participate in public tenders. The online only requirement has been delayed until 18 October 2018.

Conclusion

The main objective of the revised Procurement Regulations was to simplify the rules and procedures and introduce greater flexibility.

Whilst there has been some significant case law on Regulation 72, only a limited number of cases have reached the courts. There are initial indications that unsuccessful bidders are prepared to submit challenges but these are often resolved out of court. It is important that authorities keep detailed audit trails to increase their chances of successfully defending the challenges that are pursued.

It is also evident that more consideration is required for the application and scope of Lord Young's reforms. A number of grey areas have been identified, such as the question of which principles and regulations apply to sub-threshold procurements.

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