All change?
Procurement update
April 2016
Forthcoming changes

Welcome to our procurement update for April 2016.

Given the degree of change the procurement sector is experiencing at the moment, both in terms of the ‘bedding in’ of the Public Procurement Rules and the forthcoming changes in the utilities and concessions sector, this update focuses on our experience and analysis of the recent key procurement developments. We also consider what impact Brexit may have in this arena.

We trust that you will find this brief paper useful. If you have any queries, or would like to discuss further any of the issues raised, please speak to your usual Pinsent Masons contact or one of our team below, who will be happy to assist.

Our team

We are the largest dedicated team of procurement lawyers operating in the UK today. We are market-leading, by virtue of our experience, expertise and strong commercial streak. We offer services across the full spectrum of procurement work, from structuring and delivering multi-billion pound procurements, to acting as your ‘trusted advisor’ on discrete procurement issues.

We are frequently instructed by central government, utility companies and universities, among our other clients. We work closely with our clients on the practical application of the procurement rules, and are adept at scanning the horizon for issues that can be ‘nipped in the bud’ before they become problems. We also support clients who are being challenged under the procurement rules as well as those who wish to challenge a procurement decision.

We are ranked Band 1 by Chambers 2016 and have been described as “solution-focused” and “experts at what they do.”

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BREXIT: a change to procurement regulations?

Kerry Teahan looks at the unlikely changes to public procurement regulations in the short to medium term in the aftermath of the UK’s referendum on EU membership, regardless of the result.

Within the UK, the EU procurement regime is now well established as the framework within which utilities and public bodies must conduct their purchasing. Whilst initially perceived as unwieldy and restrictive, such purchasers are now well versed in the need to navigate the procurement pitfalls and increasingly look to the regime to maximise competition, achieve value for money and, particularly in light of the reforms introduced by the new EU procurement directives, seek to achieve social benefit and innovation in their purchases.

With the Brexit referendum looming on 23 June then, the question for many, whether those who embrace the regime, or those who might see an EU exit as a welcome escape from the perceived complexity and onerous restrictions of regulated procurement, is what impact the UK’s withdrawal from the EU might have on procurement regulation?

Although there are a large number of unknowns that could shape what the answer is, a change of tack on procurement policy is unlikely to be pursued by policymakers in the UK in the immediate months and years after any ‘out’ vote.

Whilst the Treaty on the Functioning of the European Union and directives from which the procurement rules in the UK derive would cease to have effect, an ‘out’ vote would have no immediate impact on the validity of UK procurement laws. In England, Wales and Northern Ireland the main rules are the Public Contracts Regulations 2015 and the Utilities Contracts Regulations 2016 and the Concessions Contracts Regulations 2016. Although still rooted in EU law, different rules apply in Scotland.
Until repealed or reformed, this legislation will continue to regulate purchasing. Moreover, in the aftermath of an ‘out’ decision, reform of procurement law seems unlikely to be top of the Government’s ‘to do’ list. There was no single consolidated set of public procurement rules in place in the UK before the first tranche of EU legislation was implemented, but there was nevertheless a pre-existing regulated procurement regime. This included compulsory tendering for local authorities, for example. Like the EU system, these rules existed to achieve best value for money when expending public monies and to ensure accountability and freedom from bribery and corruption. It is highly likely therefore that, even if the existing regime were to be repealed, another very similar regime would take its place.

It is unlikely that the public sector, nor indeed those who supply to it, would embrace an unregulated approach to procurement.

Whilst at a practical level there may be a mixed appetite for procurement regulation, this has not been reflected in how EU law has been implemented in the UK. In fact, quite the contrary. The UK’s approach has been to go beyond the minimum requirements set by EU law. An example of this is the incorporation of the ‘Lord Young reforms’ in the Public Contracts Regulations and use of the Cabinet Office standardised pre-qualification questionnaires in England and Wales, and the steps being taken throughout the UK to encourage the use of social objectives in purchasing.

If the UK votes to leave the EU, the UK would still need to have some form of continued relationship with the EU and this might, in some scenarios, mean adopting EU procurement rules.

If the UK adopted a similar relationship with the EU to Norway and Iceland and became a member of the European Free Trade Association (EFTA) – the main benefit being so that it could gain access to EU free trade agreements – the UK, as an EFTA member, would still need to adopt the EU procurement rules. In that scenario, not only would the UK still be stuck with the current rules, as a non-EU member state, it would have no influence on their content.

Whilst there is uncertainty over what the consequences of an ‘out’ vote might be, from a procurement perspective at least, it seems highly unlikely that the procurement landscape will change quickly. **Like it or loathe it, for the foreseeable future at least, procurement regulation seems here to stay.**
The Public Contract Regulations 2015: one year on

The Public Contracts Regulations 2015 (‘PCR 2015’) came into force just over a year ago. We take a look below at some of the key changes we are seeing impact on the way authorities are procuring public contracts.

**New grounds for exclusion**

A bidder can be excluded where it “has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract...which lead to early termination, damages or comparable sanction.”

Poor performance is often an issue with which authorities wrestle. If an authority has been let down by a contractor in the past, it isn’t going to be keen to run the risk of awarding it another contract. So, allowing poor past performance as a ground for exclusion should be a welcome change. However, there is some uncertainty as to how far the exclusion can be applied, given that the PCR 2015 permit bidders to “self-cleanse” despite the existence of a ground for exclusion. If the bidder can provide the authority with “sufficient” evidence of the remedial measures it has taken to demonstrate its “reliability” and, if this evidence is considered “sufficient”, it will not be excluded from the tender process.

**Electronic availability of procurement documents**

“Contracting Authorities shall, by means of the internet, offer unrestricted and full direct access free of charge to the procurement documents from the date of the publication [of the OJEU notice].”

**Procurement documents**

“Procurement documents” are defined non-exhaustively as "any document produced or referred to by the Contracting Authority... including the Contract Notice, PIN, technical specification, descriptive document, conditions of contract...”. This wide description has caused some concern about what has to be made available “at day one”. Crown Commercial Service (CCS) Guidance states that authorities would be expected to provide only information that is reasonably available at the point at which notification to the market is made. We interpret this as a requirement to make available all documentation which describes the opportunity and how the process is going to operate as soon as possible to enable bidders to decide if the opportunity is for them but also to enable them right from the beginning of the procedure to start preparing their submission of tenders. This does not mean fully developed and detailed documents need to be made available from the outset, but has brought in a step change for authorities in terms of the level of preparation needed to start a tender process.

**Unrestricted and full direct access free of charge**

By October 2018 full electronic procurement will be mandatory for all procurement processes. The current requirement for the contracting authority to offer bidders unrestricted and full direct access free of charge to the procurement documents is the first step towards full electronic procurement and introduces a key change in how procurement documents must be shared. Authorities are faced with the difficulty of deciding what solution should be internally implemented to fulfil the relevant requirements. CCS Guidance has confirmed that there is no current plan to introduce a single central solution as, according to the Guidance, there is already a substantial and well-established use of e-procurement by public bodies.

Authorities must therefore decide what portal to implement, and where a portal is not implemented, authorities must instead provide bidders with an internet address to obtain information and access tender documents. The latter approach raises difficulties for authorities as it is not possible to track who has downloaded procurement documents. Given the move towards fully electronic procurement, we are already advising authorities on how they might secure use of a portal and the associated costs of this.
**Timescales**

Across the board, there have been reductions in the minimum timescales set for running the procedures. This enables procurements to be run more quickly, but in most cases by days rather than weeks and, in practice, we aren’t seeing this have a particularly significant impact. This may, in part, be due to the continuing requirement that authorities take account of the complexity of the contract and time required to compile tenders when setting time limits.

**New procedures**

There has not been as strong a shift by contracting authorities to using the Competitive Procedure with Negotiation (CPN) as was anticipated a year ago. In fact, the name of the procedure itself is somewhat misleading. The PCR 2015 confirm that negotiations are not mandatory, provided this possibility is highlighted from the outset and furthermore, with CPN, tenders can’t be negotiated after the final tender is submitted. In comparison we see the Competitive Dialogue (CD) procedure offering more opportunity for “negotiations” than CPN. CD permits: (a) negotiation with the preferred bidder after final tenders have been submitted, clarified, specified and optimised, provided that it does not have the effect of materially modifying essential aspects of the tender or the procurement or risk distorting competition or causing discrimination; and (b) there is some limited scope for negotiations with the preferred tenderer in competitive dialogue prior to entering into the contract.

The position in relation to the use of the ESPD currents differs across the UK: (1) In England and Wales, it is expected that the ESPD will be built into the CCS Standard PQQ; (2) in Scotland, the ESPD will replace the sPQQ and any other PQQs used by authorities, making the ESPD the only document that can be used for pre-qualification purposes in Scotland; and (3) in Northern Ireland, it is expected that authorities will be obliged to accept ESPDs alongside PQQs.

**Pre-qualification**

In England and Wales, contracting authorities are required to use the CCS Standard Pre-Qualification Questionnaire (PQQ) for above threshold procurements, which PQQ contains standard questions that cannot be changed without an explanation being provided. Authorities do still need to create their own evaluation and scoring methodology. It should be noted that there is however a prohibition on using a separate PQQ stage for below-threshold contracts, except in relation to the procurement of clinical health services. There is also a Standard PQQ used in Scotland (sPQQ). This sPQQ includes a standardised question set for use by all public sector buyers, and allows bidders to answer these questions once, and store those answers online. In contrast, in Northern Ireland, there is currently no mandated standardised PQQ.

There has been a real move recently towards standardising PQQs and the European Single Procurement Document (ESPD) is now in force in England, Wales and Northern Ireland. This will further standardise self-certification by bidders of compliance with minimum PQQ requirements. The ESPD is effectively a standard form for self-declaration of good standing that the bidder does not fall within any of the exclusionary grounds and has the necessary economic/financial standing and technical and professional ability. It is intended to reduce the administrative burden on bidders at an early stage by avoiding the need to submit additional evidence and documentation in support of statements made in the PQQ.

Permitted modifications

The PCR 2015 codified the extent to which a public contract can be modified without triggering a requirement to run a new procurement process. To clarify, this applies to modifications to all public contracts, even where the original contract has been entered into before the PCR 2015 Regulations came into force.

Since the introduction of the PCR 2015, we have received a lot of questions regarding what constitutes a “material” change; what are the circumstances in which contracts may be changed without necessitating a new procurement process; and what the overall effect of changes to a contract is when viewed cumulatively as "material".

Despite the level of queries we have received, we have not yet seen any modification notices published in the Official Journal of the European Union (OJEU) in the UK (a requirement under the PCR2015 for certain types of modifications to public contracts.)
The Public Contracts (Scotland) Regulations 2015

In Scotland, the 2014 EU procurement directives, including those on public, utilities and concession contracts procurement, will be implemented on 18 April 2016. The new Public Contracts (Scotland) Regulations 2015 largely reflect their counterpart in the rest of the UK; however notable differences include:

- a restriction on Scottish public bodies to award contracts on the basis of price/cost alone; and
- certain contracts will not be reserved for ‘mutual’ organisations as had been the case elsewhere in the UK.

The Scottish Government has also chosen 18 April 2016 as the date on which to bring into effect a raft of other changes to the public procurement landscape. These include the substantive provisions on the Procurement Reform (Scotland) Act 2014 (the ‘Act’) and the new Procurement (Scotland) Regulations 2016 (the ‘2016 Regulations’). The Act and the 2016 Regulations essentially extend the application of certain provisions contained in the EU mandated Regulations to contracts which are valued below the relevant EU thresholds. Services and supplies contracts valued over £50,000 and works contracts valued over £2,000,000 will be subject to the provisions of the Act and 2016 Regulations, meaning that in practice there should be greater competition and access, particularly for SMEs, for these lower value contracts. A specific remedies regime is introduced under the Act, and contractors will be able to hold public bodies to account for any breaches of those rules.
The Concessions Contracts Regulations 2016: changes at a glance

The Concessions Contracts Regulations 2016 (‘CCR 2016’) implement from 18 April 2016, in England, Wales and Northern Ireland, the Concessions Directive 2014/23/EU, which introduced a new regime for the regulation of works and services concessions awarded by contracting authorities and utilities throughout the EU. The CCR 2016 are not retrospective but substantial modifications to a concession contract, such as an extension of its duration, may render the contract a new concession and mean that the contracting authority/utility has to comply with the new rules. Similar provisions apply in Scotland through the Concessions Contracts (Scotland) Regulations 2016 which also come into effect on 18 April 2016.

### Issue | Key change
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**What is a works/services concession?** | A concession contract is a written contract under which the awarding body entrusts works/services to one or more contractors and the contractor, in exchange, receives the right to exploit the works or services as “payment.” For example, this might include private healthcare services delivered using a health authority’s premises/assets, transport services where revenues are retained by the contractor, or airport/port concessions operated for passengers’ benefit.

The contract must involve the transfer of operating risk to the concessionaire and a real exposure to the vagaries of the market i.e. the risk that the concessionaire might not recoup its investment.

**Who do the regulations apply to?** | The CCR 2016 apply (subject to some very limited exceptions) to contracting authorities and utilities granting works and services concessions where the value of the concession is €5,225,000 (£4,104,394) or more.

The value is calculated using the estimated total turnover (net of VAT) generated by the concessionaire over the duration of the contract. This is a fundamental (and very important distinction from the public contracts and utilities regulations). The amount paid by the party granting the concession (if anything) is not relevant in determining if the contract is caught. The estimate is determined at the moment at which the concession notice is sent (i.e. the opportunity is advertised, as discussed below). However, if the value of the concession at the time it is actually awarded is more than 20% higher than the original estimate, the higher estimate needs to be used. The value should be calculated using an objective method specified in the concession document that complies with the procurement rules on calculating contract value.

**Are there any exclusion?** | Exclusions include (non-exhaustively) concessions for: (i) the acquisition or rent of land; (ii) certain public electronic communication networks; and (iii) certain concessions in relation to public transport.

**How does the award process work?** | There is no prescribed process, but the party granting the concession must comply with the following:

- a Concession Notice must be published in the Official Journal of the European Union (OJEU) advertising the opportunity and a tender process run. This is a fundamental change in approach for service concessions, which were previously un regulated, unless deemed to potentially have “cross-border interest”;
- the principles of transparency, equal treatment, non-discrimination and proportionality;
- information must not be given to candidates in a way that gives them an advantage over others;
- action must be taken by the contracting authority to prevent fraud, favouritism, corruption and to deal with conflicts of interest arising during the concession award procedure;
- consideration should be given to the complexity of the concession when determining time limits for the receipt of applications/tenders;
- the restrictions on modifying concessions during their term (more on this below);
- issue standstill letters and observe a standstill period (10 days) before entering into the contract; and
- an award notice must be sent (within 48 days of the award) to the OJEU detailing the results award procedure.
### How long can concession contract last?

The CCR 2016 limit the potential duration of concessions. Where the contract will exceed five years, the contract must not exceed the time that the concessionaire could reasonably be expected to take to recoup its investment, together with a return on invested capital.

### Modification to contract terms

If there is a material change to the concession, then a new tender process may be required. Some changes are permissible, examples include:

- Where the change proposed was provided for in the concession contract; or
- Where change is needed to allow the concessionaire to supply necessary additional works/services and a change of concessionaire cannot be made due to economic or technical reasons and it would cause significant inconvenience/duplicate costs for the contracting authority. However, any increase in value shall not exceed 50% of the value of the original concession and, where several successive modifications are made, that limitation shall apply to the value of each modification.

### What is the selection and award criteria?

#### Selection criteria

Criteria should be set out in the OJ EU notice and be proportionate, non-discriminatory and fair. They must relate exclusively to the professional and technical ability, financial and economic standing of the concessionaire and be linked to the subject-matter of the contract. The selection criterion should also allow concessionaires to be able to rely on other entities (a requirement designed to help SMEs).

#### Award criteria

The award criterion should be assessed on objective requirements so as to identify an “overall economic advantage” for the party awarding the concession. Criteria must be disclosed in advance, listed in descending order of importance and cannot offer the party awarding the concession an unrestricted freedom of choice.

### Timescales

The minimum deadline for the receipt of applications is 30 days from the date of publication of the OJEU notice and, if the procedure is in stages, the minimum deadline for receipt of the initial tender is 22 days.

### Termination

Conditions are implied for the termination of a concession contract in addition to grounds agreed by the parties themselves:

1. A modification has taken place which would require a new concession award procedure;
2. The concessionaire should have been excluded due to a criminal conviction; or
3. The European Court of Justice finds that a member state has not met their obligations under the Treaties, by the fact that a contracting authority belonging to that member state has awarded the concession in question without complying with its obligations under the Treaties and the CCR 2016.
The Utilities Contracts Regulations 2016: changes at a glance


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| New procedures             | • (1) Competitive Dialogue - runs in successive stages, allowing a utility to down-select solutions, using established award criteria, to determine a preferred bidder. Following this selection, some limited negotiations permitted. This procedure is very flexible and can be useful where utilities are unable to define the solution they need or to access what solutions the market can offer.  
  • (2) Innovation Partnerships - allows utilities to partner with suppliers to develop works, supplies or services which are not available on the market. High level project proposals are submitted during the tender process and the solutions are developed after entering into the contract(s) with the successful tenderer(s). |
| Framework contracts        | • Now an eight-year limit on duration.  
  • There is now also further detail on use of frameworks, e.g. call-offs must be awarded using ‘objective rules and criteria.’ |
| Preliminary market         | • Utilities can conduct discussions with suppliers before procurement commences, to inform the market and gain advice from experts in relation to the planning of the procurement. This should help shorten timescales. Care will need to be taken to ensure such interaction does not distort competition/create conflicts of interest.  
  • New rules requiring utilities to take ‘appropriate measures’ to prevent, identify and remedy conflicts of interest. |
| engagement                 |                                                                                                                                                                                                              |
| Lots                       | • Utilities have discretion to divide a contract into lots as well as enabling them to award more than one lot for a contract to the same supplier/limit the number of suppliers appointed to a lot. |
| Selection criteria         | • The list of grounds has been extended to include: deficient past performance of contractual obligations; attempts to unduly influence the utility or seek confidential information; breach of environmental, social and labour law; conflict of interest; and being party to an anti-competitive agreement.  
  • Utilities which are also ‘contracting authorities’ are required to exclude candidates if they would be required to do so under the PCR 2015. The list of mandatory exclusion grounds includes slavery and trafficking offences, bribery and corruption offences, and non-payment of taxes. However, if a bidder is found to fall within any of these exclusion grounds, they can avail of a new self-cleaning mechanism which allows them to demonstrate why they ought not to be excluded from bidding for a contract.  
  • Utilities can apply exclusions after the selection stage if necessary evidence arises at any part of the procedure.  
  • In applying selection criteria relating to financial standing, utilities may not now apply a minimum annual turnover condition in excess of two times the estimated contract value unless the risks justify otherwise. |
| Award criteria             | • All awards must be based on the most economically advantageous tender (MEAT) only. Such criteria may include price, cost (including life-cycle cost), and the best price/quality ratio.  
  • Award criteria can now include social as well as environmental aspects. They can also include the organisation, qualification and experience of staff to perform the contract, where the quality of the assigned staff can have a significant impact on the level of performance of the contract. |
### Modification to contract terms
- Utilities can modify contracts without the need for re-procurement in the following specified circumstances:
  - where the changes are minor and explicitly provided for in the procurement documents;
  - where the minor changes are below the relevant thresholds and less than 10% (services/supplies) or 15% (works) of the initial contract value;
  - where the changes are not substantial;
  - where additional works/services/supplies have become necessary and a change of supplier would not be practicable, and would involve substantial inconvenience and duplication of resources; or
  - where the change is unforeseeable by a diligent utility.

### Retention of procurement documents
- Utilities must make the procurement documentation available online from the date of publication of the contract notice. It is not clear exactly what documentation must be made available at the date of publication; however, if we consider the guidance given by the Crown Commercial Service on the PCR 2015 in relation to this point, it will probably require all information that is “reasonably available” to be provided. Whilst it does not mean that fully developed and detailed documents need to be available from the outset, it has undoubtedly increased the level of preparation necessary on the part of an authority prior to the commencement of a tender process.
  - Utilities must also now retain an appropriate level of information on each contract and framework agreement covered by the regulations. They must retain concluded contracts greater than or equal to £1 million (services) or £10 million (works), information on every contract subject to the regulations, and to document every procurement process subject to the regulations. This information and documentation should be sufficient to justify decisions taken at all stages of procurement processes.

### Abnormally low tenders
- Utilities are now required to seek explanations from suppliers submitting tenders which appear abnormally low in relation to the requirements. Unfortunately there is not a definition of what an “abnormally low” tender is. Tenders must be rejected if it is established that the reason for the low cost is as a result of a breach of social or labour laws.

### Abolition of Part A/Part B distinction
- The old ‘Part A’ and ‘Part B’ services distinction has been abolished. Most of the former Part B services are now subject to the full regime.
  - Only social and health services will be subject to a new ‘light touch’ regime (similar to the previous part B requirements), for those contracts with a value exceeding €1,000,000 (£785,530). Contracts valued at less than this are assumed to have no cross-border interest.

### Shorter timeframes
- Open procedure: 52 days 35 days (receipt of tenders).
- All other procedures: 30 days for requests to participate (reduced from 37 days), with an absolute minimum of 15 days. The time limit for receipt of tenders can be agreed with tenderers.

### What is an ESPD?

The European Single Procurement Document (ESPD) is an EU-wide procurement document published by the European Commission which had to be implemented by all EU member states by 18 April 2016. It provides a standard form for self-declaration by bidders on certain issues at the pre-qualification stage of the procurement process and is intended to replace the certification certificates issued by contracting authorities.

The reasoning behind the creation of the ESPD is to reduce the administrative burden placed upon businesses (particularly SMEs), at the outset of the tender process. The ESPD enables bidders to electronically declare their eligibility without the burden of producing numerous certifications relevant to exclusion/selection criteria. Bidders will be able to re-use and edit existing ESPD documents when competing for multiple tenders.

The Crown Commercial Service (CCS) have not yet published guidance in relation to how the ESPD should be used in England and Wales nor have the Central Procurement Directorate published any guidance for Northern Ireland; however it appears that contracting authorities will be obliged to accept ESPDs alongside the PQQ. Conversely, in Scotland the position differs slightly. The ESPD will actually replace the standard Pre-Qualification Questionnaire (sPQQ) and any other PQQs used by Scottish contracting authorities, making the ESPD the only document that can be used for pre-qualification purposes in Scotland.