This short guide provides an overview of the new draft Utilities Contracts Regulations 2016 (the ‘Regulations’) which are due to come into force on 18 April 2016. It is not anticipated that the draft Regulations will substantially change in the final version. The Regulations implement the new EU Utilities Procurement Directive 2014/25/EU (the ‘Directive’).

The Regulations essentially ‘copy out’ the Articles of the Directive and make plain that expressions used in the Regulations will, for the most part, have the same meaning as they bear in the new Directive. So readers need to have the new Directive, as well as the Regulations, close to hand when considering the application of the Regulations to any new project/tender exercise.

As with the predecessor 2006 Utilities Contracts Regulations which they replace, we anticipate that the 2016 Regulations will take some time to bed in, particularly in respect of some of the new concepts and approaches discussed below. The interpretation of key provisions is likely to evolve over time, not least in light of the various guidance notes which the Cabinet Office intends to publish and no doubt, in due course, case law from the Courts. It should be noted however that many of the changes included within the draft Regulations can already be found in the Public Contracts Regulations 2015 which came into force on 26 February 2015.

**Which Utilities Contracts Regulations apply – 2016 or 2006?**

The 2016 Regulations will apply to all new tender processes started on or after 18 April 2016. These changes apply to England, Wales and Northern Ireland only. New Scottish Regulations are expected to be published this year.

You should therefore expect to be following the 2016 Regulations if:

- you are responding to a contract notice with a dispatch date of 18 April 2016 or later (see foot of the contract notice for this date)
- you are responding to any other form of advertisement published by a utility on or after 18 April 2016, e.g. an advertisement on the utility’s website or on Contracts Finder
- you have received a direct approach from a utility in respect of a proposed utilities contract on or after this date
- you make an unsolicited approach to a utility regarding a potential utilities contract on or after 18 April 2016.

Otherwise, you will still be operating in the familiar territory of the 2006 Regulations. This includes if you are bidding for call-off contracts under a framework agreement set up before 18 April 2016.

Based on our experience from the implementation of the 2006 Regulations, we would anticipate that some utilities may start to rely on flexibilities introduced in the 2016 Regulations even if running a tender process started before 18 April 2016. This may well be clearly indicated by the utility, but if you are in any doubt, we would recommend seeking clarification from the utility in question in order to ensure you are clear on the ground rules for the competition.

When do the rules apply to “utilities”? At a high level, the scope of the new 2016 Regulations remains the same as the 2006 Regulations. A utility is only obliged to go to market (by which we mean to publish a contract notice) if it is seeking offers in respect of a contract for works, supplies or services listed in the Regulations, the value of which is expected to be equal to or exceed the relevant financial threshold. Financial thresholds are slightly higher under the new Regulations. Certain general exemptions and exclusions from the application of the 2016 Regulations (eg. oil and gas exploration and exploitation, gas and electricity supply, certain public transport services, etc.) are also retained.

The 2016 Regulations contain a number of important changes and clarifications however and ‘codify’ certain key principles arising out of EU case law, all of which go to elaborating on the scope of the Regulations as readers know them. These include:

- **Which entities are ‘utilities’**: Unlike the 2006 Regulations, the 2016 Regulations will not have an indicative list of utilities that are subject to the Regulations. This is important for bidders as the application of the new Regulations will potentially be wider. Utilities will now have to consider whether they are subject to the new Regulations by reference to the guidance in Regulation 5. One of the bases under which entities could be caught by the Regulations is if they operate under ‘special or exclusive rights’. This will not apply, however, where those rights have been granted to them following an advertised competition procedure.
- **Framework agreements**: now limited to a maximum term of 8 years (this contrasts with the maximum term of 4 years for frameworks awarded under the Public Contracts Regulations 2015)
- The new ‘light touch’ regime: the Part A and B service regime has been replaced with the ‘light touch regime’ (see below). Note that this is subject to higher thresholds than the equivalent regime under the Public Contracts Regulations 2015
- **Keeping services ‘in-house’**: the Regulations confirm the ‘Teckal’ line of case law that a utility which is a ‘contracting authority’ can contract directly with another party, which to all intents and purposes operates like one of its ‘in-house departments’, without undertaking a procurement process. This is only the case however where:
  - the contracting authority exercises over that entity a degree of control similar to that which it exercises over its own departments
  - the entity carries out more than 80% of its activities with the controlling authority
  - there is no private sector capital participation in the controlled entity.
Contracting authorities can work together without prior competition: EU case law (the ‘Hamburg Waste’ decision) has established permissible ‘inter-authority co-operation’ which means that, in the right circumstances, a utility which is a ‘contracting authority’ can come together with another contracting authority without needing to first run a tender process. The following conditions must first be met:
- two or more contracting authorities come together to cooperate to deliver a public service they are charged with delivering with a view to achieving objectives they have in common
- the co-operation is implemented in a manner governed solely by considerations relating to the public interest
- the participating authorities perform less than 20% of the activities covered by the co-operation on the open market.

What is the new ‘light touch regime’ and what does it mean for you?
The ‘light touch regime’ is a new regime that will apply to the award of certain types of services contracts (generally for ‘services to the person’) where the value of those services equals or exceeds the financial threshold of €1,000,000 (approximately £785,530).

It takes over in part from where the Part B services regime left off. Under the 2016 Regulations the Part A/Part B services distinction has been removed.

If you provide any of the following services, you are likely to need to get to grips with the ‘light touch regime’ sooner rather than later: health, social and related services; benefit services; legal services; prison related services, security services and postal services.

The good news is that procurements for ‘light touch services’ are likely to be fairly flexible as the requirements associated with running a tender process for these services are minimal:
- a contract notice must be published or a periodic indicative notice, or notice on the existence of a qualification system, used as a call for competition (the circumstances for doing so are prescribed)
- the award procedure must comply with principles of equal treatment and transparency
- the contract must be awarded in line with the advertised procedure
- time limits must be reasonable and proportionate
- a contract award notice must be published.

Flexibility and limited regulation could potentially create uncertainty or lead to situations (as happened with Part B services procurements) where utilities base tender processes on more fully regulated procedures (eg. a restricted procedure). It will be interesting to see how this regime evolves in practice.

Are there opportunities for you to engage with a utility before they go to market?

Yes. The Regulations make clear that ‘preliminary market consultation’ is permitted. This is intended to cover situations where a utility seeks or accepts advice from independent experts, authorities or market participants. The Regulations do not prescribe the form any such consultation should take, eg. one on one meetings, supplier open days, etc. but it is clear that the output of any such consultation must not be used in such a way as to distort competition or to breach the principles of non-discrimination or transparency.

On that basis, suppliers may approach utilities with potential ideas, information and advice. However, caution must be exercised. The Regulations set out possible methods that a utility may follow depending on any concern it may have about ensuring a level playing field, eg. communicating information gleaned during the preliminary market consultation to other bidders or extending time limits to allow other bidders a reasonable timeframe to respond if they have not been involved in such early market consultation. The Regulations now signal the right of a utility to exclude a bidder if it believes there is no other way to ensure equal treatment of bidders, albeit a bidder has the right to try to prove why their prior involvement could not have had such a distortive effect on competition. This right is also reflected in the revised grounds for discretionary exclusion of a bidder (see further below).

Are there any changes to the usual tender procedures used by utilities?

Yes. These changes can be summarised as follows:
- accelerated form of the open procedure will be available in addition to the accelerated form of the negotiated procedure which was already available under the 2006 Regulations. A utility may rely on this expedited procedure only in situations of urgency that it can duly substantiate. It will have to give reasons for relying on this quicker procedure in the contract notice
- minimum time limits are generally shorter across all of the procedures. For example, under the open procedure the quickest you could invite tenders back following despatch of a contract notice was 52 days. That period is now 35 days under the 2016 Regulations. Under the restricted procedure the shortest possible timeframe (return of expressions of interest plus return of tenders) was 37 days. That period has been reduced to 30 days under the 2016 Regulations
- new competitive dialogue and innovation partnership procedures are being introduced for utilities procurement. Bidders may be familiar with competitive dialogue as it is already used for public contracts procurement. Given the freely available use of the negotiated procedure for Utilities procurements, it remains to be seen whether utilities will be keen to use competitive dialogue as an alternative. In competitive dialogue, bidders must first pre-qualify before being invited to enter into a dialogue with the utility in order to identify and develop a solution. This procedure is very flexible and the dialogue may be conducted in successive stages, with the aim of reducing the number of solutions/bidders.
What are innovation partnerships?

Innovation partnerships are a completely new procedure. This procedure is a new route to market for utilities and sits alongside the usual tender procedures, ie. open procedure, restricted procedure, competitive dialogue, and negotiated procedure. It is designed for particularly complex procurements. Before using this process, a utility would first need to determine that use of the Open or Restricted procedure is not appropriate for award of the contract.

Innovation partnerships are intended to enable long-term working arrangements (a partnering type arrangement as opposed to a legal partnership) between the public and the private sector to develop an ‘innovative’ good, work or service, which the public sector subsequently purchases. What counts as innovative is set out in the Regulations but may include a new or significantly new product such as a new construction process or marketing method.

Innovation partnerships are potentially a good talking point for bidders when engaging with utilities but bidders will clearly need to be careful about protecting any confidential information and intellectual property rights. There are some limited rules in these areas in the 2016 Regulations.

The procedure for the award of an innovation partnership is based on the negotiated procedure which may provide some degree of familiarity in this unchartered territory. There are some additional rules which may assist bidders too, such as the obligation on utilities to be clear on the minimum requirements that bidders must meet when submitting high level proposals to deliver the innovative product sought and for these minimum requirements not to be varied in negotiations with bidders.

Many suppliers are asking what innovation partnerships might be suitable for. They are clearly intended by the EU as a basis for addressing EU societal, environmental and economic goals. Could they ever become a norm for more day-to-day procurements here in the UK? This would seem unlikely but not impossible: unlikely in view of additional constraints on how innovation partnerships must be structured and operated laid down in the 2016 Regulations; but not impossible given that an innovative product need not be ‘new’ but rather ‘significantly improved’.

Will you still be vetted in the same way at the pre-qualification stage?

The list of grounds on which a utility may decide to exclude a potential bidder has been expanded to include deficient past performance of contractual obligations, 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 also be required to do so under the Public Contracts Regulations 2015.

Bidders would be advised to verify in advance of taking part in any tender process under the 2016 Regulations that their organisation does not meet any of the mandatory or discretionary grounds for exclusion. If there is a risk that they could do, they should consider whether they could avail themselves of the new self-cleaning mechanism, where applicable. This mechanism allows bidders the opportunity to make the case why, despite satisfying a specific ground, they ought not to be excluded from the tender process. The case should be backed by evidence of active collaboration with authorities, organisational measures taken to address the misconduct, etc.

Bidders should also be aware of certain new rules in the 2016 Regulations regarding what utilities may ask of them and the transparency utilities must give to bidders at the pre-qualification stage of the process. For example:

- a requirement that generally utilities may not set a minimum annual turnover requirement that exceeds two times the estimated contract value
- utilities must state the methods and criteria for determining ratios (eg. assets and liabilities) applicable to an organisation
- utilities may seek confirmation from you that none of your sub-contractors fall within any of the mandatory or discretionary grounds for exclusion which have been updated
- the new self-cleaning mechanism, under which bidders may demonstrate why, despite falling within an exclusion ground, they ought not to be prevented from bidding for a contract
- where a tender is abnormally low, the utility now has a duty to investigate and, if the bidder’s explanation does not satisfactorily account for the low price or cost, the utility can exclude the bidder.

Are you still entitled to the same degree of transparency on tender evaluation?

Yes. Utilities are still obliged to disclose the criteria on which they are relying to determine the most economically advantageous tender (‘MEAT’) and any associated weightings or order of priority. Under the 2016 Regulations all contract awards must be based on the MEAT; lowest price can no longer be used as the headline award criteria. Case law regarding disclosure of sub-criteria, weightings and evaluation methodology will continue to apply as the 2016 Regulations do not go into this further level of detail.

A few additional points worth noting for bidders in relation to tender evaluation under the 2016 Regulations:

- Use of life-cycle costing is promoted (but not mandated) in order to encourage utilities to factor in internal costs such as energy consumption, end of life costs, etc associated with a particular contract;
- the Regulations legitimise evaluation of the qualifications and experience of staff at award where the quality of the staff assigned to a contract may affect contract delivery;
- utilities are obliged to take steps to verify the accuracy of information provided by a bidder if it has any doubts as to its veracity (eg. the ability of a bidder to meet a utility’s specification or delivery date).
Contract Management

Contract Variation

Bidders will be familiar from their own change control discussions with utilities that procurement law is a key consideration within these discussions and that procurement law so regulates more than just the initial tender process. The 2016 Regulations cement this understanding and spell out more precisely when a change to a previously tendered contract will give rise to the need for a utility to go back out to the market. The Regulations do this by defining limited circumstances where a contract may be varied without the need to run a new procurement process, including where:

(a.) the change in question is low value/below threshold (however, any proposed changes to a contract must be viewed cumulatively and not in isolation)

(b.) the change, irrespective of its monetary value, has already been provided for in the initial procurement documents in ‘clear, precise and unequivocal’ review clauses provided that (i) such clauses state the scope/nature of the possible change and the conditions under which they may be used and (ii) the change does not alter the overall nature of the contract

(c.) the change involves the provision of additional works/services/supplies, irrespective of their value, that have become necessary and were not provided for in the initial procurement documents, where the initial contractor cannot be changed for (i) economic or technical reasons, or (ii) without significant inconvenience or substantial duplication of costs for the utility

(d.) the need for change could not have been foreseen by a diligent contracting authority, provided these changes do not affect the overall nature of the contract

(e.) The Regulations provide a ‘safe harbour’ for changes which are deemed to be ‘not substantial’. Where the modification does not affect the nature of the contract, is not above the threshold (currently £328,352 for supplies; £328,352 for services; and £4,104,394 for works) and does not exceed 10% (supplies/services) or 15% (works) of the contract value, it will be permissible

(f.) the change is not ‘substantial’, this being defined with reference to the familiar ‘materiality’ tests established in the Pressetext judgment.

Of particular interest to suppliers looking to acquire new businesses or to restructure is the new provision in the 2016 Regulations that allows a new supplier to step into the shoes of the originally appointed supplier, in whole or in part, either where there is an unequivocal review clause/option or following corporate restructuring including takeover, merger, acquisition or insolvency, provided certain conditions are satisfied:

- The new contractor fulfils the original selection criteria
- There are no other substantial modifications to the contract
- The changes are not aimed at circumventing the application of the Regulations.

Utilities which have modified a contract in either of the cases described in paragraph (b) and (c) above must send a notice to that effect, in accordance with Regulation 71, for publication. Such a notice must contain certain prescribed information, such as, a description of main activity exercised; a description of the procurement before and after the modification to include the nature and extent of the works, the nature and quantity of value of supplies or nature and extent of services; a description of the circumstances which have rendered the change necessary; and a description of any increases in price as caused by the change.

Contract Termination

The 2016 Regulations enable a utility to terminate a contract in three situations and, even if these situations are not set out in a contract, these rights to terminate will be implied into the contract. If bidders do not see these three new grounds for termination in public utilities contracts for which they are bidding, they would be advised to clarify the utility’s intention and the terms associated with their application to avoid any surprises further down the track.

The three situations are:

- there is a substantial modification as defined in the new Regulations which would have required a new procurement procedure
- at the time of contract award, the supplier met one of the grounds for mandatory exclusion under the Regulations and should therefore have been excluded
- the contract should not have been awarded to the supplier in view of a serious infringement of the obligations under the Treaties and the Directive that has been declared as such by the Court of Justice of the European Union.

Bidders should look out for the guidance promised by the Cabinet Office in this area, which will include model contract clauses. If bidders have to deal with this issue in the meantime with utilities, they would be well advised to clarify the notice periods associated with the exercise of these rights of termination, the impact of termination in these circumstances and whether a utility would still look to exercise its right to terminate in the case of a substantial modification proposed by the utility, rather than the bidder.

Greater transparency of contract award decisions and tender processes

In view of new, more substantial reporting and recording obligations on utilities under the 2016 Regulations, it is worth noting the potential information that utilities ought to have and that therefore could be requested by third parties, whether under the Regulations themselves or the Freedom of Information Act. This information should include:

- a report on every contract, framework agreement or dynamic purchasing system to which the 2016 Regulations apply in their entirety containing information such as the contract value, the names of bidders rejected at the pre-qualification stage and the reasons for their rejection and any conflicts of interest identified and how they were addressed
- where the utility is a ‘contracting authority’, copies of all concluded contracts where the contract value exceeds £1 million (supplies or services) or €10 million (works). Contracts must be retained at least for the duration of the contract.

Continued on next page >
In light of this, bidders should be aware that it is now more likely that information they provide to utilities could later become available within the public domain.

**Have my potential remedies changed under the 2016 Regulations?**

No. Your rights to information during the standstill period and the availability of remedies (pre and post contract award) have not changed under the 2016 Regulations. These standstill/remedies rules continue to apply to contracts and framework agreements fully regulated by the 2016 Regulations, including contracts subject to the ‘light touch regime’. As with most changes of law, the new 2016 Regulations open up potentially new grounds for challenge, such as the new ‘self-cleaning’ mechanism and whether a bidder has taken ‘sufficient measures’ to demonstrate that they should be allowed to bid despite the existence of a relevant ground for exclusion.

**How do the new Regulations help SMEs?**

Making public utilities procurement more SME friendly was high on the EU’s agenda, as well as that of the UK Government. Changes introduced by the 2016 Regulations which are aimed at improving accessibility for SMEs include:

- option of division of contracts into lots (however, the decision as to whether to split the contract into lots is left to the discretion of utilities. Unlike under the Public Contracts Regulation 2015, there is no obligation for a utility to provide an indication of the main reasons for their decision not to subdivide into lots);
- early market engagement
- shortened timeframes for procurement procedures
- more information on sub-contracting arrangements
- a great push for fully electronic procurement processes (by October 2018)
- restriction on the minimum turnover requirement.

**Rounding up**

We are already working with a wide range of contractors, suppliers, service providers and intermediaries to help them adjust to the new 2016 Regulations. We also understand that a number of suppliers need to understand public procurement law from the perspective not just of the bidder but also of the utility, if they are instructed as agent to run tender processes on behalf of a utility.

**If we can be of assistance, please do not hesitate to contact our Public Procurement Team:**

Caroline Ramsay  
Partner  
EU & Competition Team  
T: +44 (0)20 7054 2504  
M: +44 (0)7584 205908  
E: caroline.ramsay@pinsentmasons.com

If we can be of assistance, please do not hesitate to contact our Public Procurement Team: