

A guide to public sector procurement

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This guide provides an overview of public sector procurement. Public sector organisations must comply with both EU and UK procurement legislation particularly where contracts are over a certain value. Public sector procurement can be complex but this guide sets out some of the key areas suppliers should consider when bidding for a public sector contract.

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1. Introduction to public sector procurement

Public expenditure of goods, services and works costs the UK billions every year. The size of the public procurement market is approximately 20% of GDP. Public sector organisations such as NHS Trusts, Local Authorities, Central Government Departments and Educational establishments procure a number of goods and services which include temporary and permanent staff. These public sector organisations will have to comply with the EU and UK procurement rules if the contracts are over a certain value. They also have to demonstrate that tax payers' money is spent sensibly and that there is value for money in a procurement exercise. A public sector contract is usually referred to as a 'tender' and companies go through the process of bidding for the contract. At the heart of public sector procurement are cost savings, opening public service contracts to all suppliers regardless of their size and promoting economic growth. There are a number of advantages in winning government contracts even in austere times. Although the process is challenging, especially for small-to-medium enterprises (SMEs) in terms of cost, time and resources, a number of REC members still continuously and successfully bid for contracts because supplying to public sector clients can be lucrative and in some sectors it is the only route that is available for providing their recruitment services.

2. What are the perceptions of public sector procurement?

Some of the concerns raised by REC members when they are considering whether or not to bid for a contract are:

- the process requires substantial investment in time, finances and resources but there is no guarantee of a successful outcome;
- there are legal complexities which might require costly legal representation;
- the date when the OJEU(Official Journal of the European Union) is published to the actual contract award could be very long, especially if there are legal challenges;
- the deadlines for tender submissions are fixed and with the Public Contract Regulations 2015 (PCR 2015) they are even shorter;
- SMEs typically can't bid on the same level playing field as larger companies who are in a better position to satisfy the requirements in the selection criteria and have dedicated procurement specialists that prepare more competitive bids; the lack of awareness of tendering opportunities; and

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- having to go through the process again when a framework agreement comes to an end.

The above concerns led the Government to ensure that facilitating SME access to public procurement was a key objective when Cabinet Office released the consultation on the PCR 2015. The intention was to remove barriers for SMEs as historically some contracts contained disproportionately high technical and financial qualification levels that automatically excluded SMEs from bidding. The previous coalition Government stated that “Our goal is for 25% of central government spending to go to SMEs by 2015”. Although PCR 2015 contains provisions to boost SME participation, it still remains to be seen whether or not SMEs are now finding it easier to bid for and win public sector contracts.

3. Which legislation governs public sector procurement and what are the recent changes?

The EU public procurement regime is set out in EU directives. The directives have now been implemented in England, Wales and Northern Ireland’s domestic legislation. The existing procurement Regulations are:

- 1) The Public Contracts Regulations 2015 (PCR 2015) which came into force on 26 February 2015 and replaced the Public Contracts Regulations 2006
- 2) The Utilities Contracts Regulations 2016, which came into force on 18 April 2016 and replaced the Utilities Contracts Regulations 2006 and,
- 3) The Concession Contracts Regulations 2016 came into force on 18 April 2016.

The previous Public Contract Regulations 2006 (PCR 2006) were perceived to be complex, bureaucratic and rigid.

The Government’s priority in the reforms to the Regulations contained in the PCR 2015 was to make public sector contracts more accessible and reduce barriers to competition.

3.1. Key changes

Some of the key changes to the legislation contained in the PCR 2015 are:

- there is no distinction between Part A and Part B services but instead of Part B services, a light touch regime has been introduced for certain services i.e. health, education and social services, where the contract value meets the threshold
- encouragement of contracting authorities to divide larger contracts into smaller LOTS to increase SME participation

- limiting the proof of financial annual turnover of suppliers to twice the estimated value of the contract
- less reliance on lengthy pre-qualification questionnaires and more self-declarations by suppliers to reduce the red tape
- contracting authorities require bidders to explain their pricing and cost when abnormally low bids are submitted
- modification of contracts could be permitted where there are non-material changes without requiring new a tendering exercise but this is subject to certain conditions

4. When does the PCR 2015 apply?

For the PCR 2015 to apply, the following conditions must be met:

- the procuring organisation must be a contracting authority;
- the contract must be for services, supplies or public works;
- the estimated value of the contract should exceed the relevant EU financial thresholds; and
- there are no applicable exemptions.

The procuring organisation is referred to as the 'contracting authority' and the definition of a 'contracting authority' in the PCR 2015 is "the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law and includes central government authorities but does not include Her Majesty in her private capacity".

Schedule 1 in the PCR 2015 lists the central government authorities that fall within the definition of a contracting authority. Schedule 2 specifies the activities that constitute works and schedule 3 sets out all the social and other specific services.

The PCR 2015 applies to entities governed by public law. Therefore where a public body is funded by a combination of public and private money, case law has established that in order to determine whether the entity is a contracting authority will depend on the division of the funding received in the year in which the relevant procurement process began.

5. What are the key principles in procurement?

The EU Treaty stipulates the following principles that must be complied with during the public procurement process:

- free movement of goods;
- non-discrimination;
- freedom of establishment; and
- freedom to provide services



The above principles form part of the legislative framework on which the procurement rules are based.

In addition to the fundamental EU treaty principles set out above, some other vital principles have developed from cases heard in the European Court of Justice:

- equality of treatment;
- mutual recognition;
- proportionality; and
- transparency

Contracting authorities must ensure that they adhere to the above principles during the procurement process.

6. What are the applicable thresholds?

The PCR 2015 applies to contracts awarded by contracting authorities that meet the relevant EU threshold (provided an exemption does not apply). Threshold Levels from 1st January 2016 will be in place until the end of 2017, these are outlined below. Revised thresholds from 1st January 2018 are also outlined below.

Type of contract	Previous threshold (from 1 January 2016 to 31 December 2017)	Revised threshold (from 1 January 2018)
Public supply and services contracts and design contests (central government)	£106,047	£118,133
Public supply and public services contracts (all other contracting authorities)	£164,176	£181,302
Public works contracts and works concessions (all contracting authorities)	£4,104,394	£4,551,413
Contracts for social and other specific services	£589,148	£615,278

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7. How will I know when a contract has been advertised?

Typically contracting authorities are required to advertise contracts that meet the applicable threshold in order to ensure that there is equal access to contract opportunities. Contracts that are below the threshold but have a contract value of £10,000 for Central Government and £25,000 contract value for non-Central Government have to be advertised in order to comply with the general principles of EU procurement law.

The information in the advertisement will be set out in the Official Journal of the European Union (OJEU) or Prior Information Notice (PIN). As well as the OJEU, the contracts finder website contains information about contracts worth over £10,000. If a PIN is used it simply explains the contracting authority's purchasing intentions and makes the public aware that a procurement exercise will take place within the next 12 months. In addition, some contracting authorities deliberately use a PIN to reduce procurement timescales.

The PIN should include the following:

- the name of the contracting authority and their details as well as their main activity;
- contract identification number;
- where and how the procurement documents can be accessed;
- Common Procurement Vocabulary code;
- description of the procurement in terms of the extent and nature of works, nature and quantity or value of supplies, nature and extent of services together with the value of the contract; and
- other relevant information

After the OJEU notice is published, suppliers that wanted to bid previously completed a pre-qualification questionnaire (PQQ) which would have been attached to the OJEU. The PQQ contained questions that mainly relate to the bidders' financial and economic strengths; experience and technical/professional capability. The responses were reviewed and the suppliers that could demonstrate that they can deliver what was required were invited to bid for the contract.

The Crown Commercial Service (CCS) is an executive agency and trading fund of the Cabinet Office and is responsible for improving government commercial and procurement activity. CCS issued a policy note back in September 2016 and confirmed that the Standard Selection Questionnaire (SSQ) would replace the usual Pre-Qualification Questionnaire from 9th September 2016.

7.1. Standard Selection Questionnaire

The SSQ is a self-declaration form completed by bidders and contains the following three sections:

Potential Supplier Information — this covers the supplier's basic information including contact details, company information, trade memberships, group bidding and subcontractors;

Exclusion Grounds — this is the supplier's self-declaration confirming that they do not meet the criteria for mandatory and discretionary exclusion from bidding for the contract which includes participating in criminal activity, terrorist offences, corruption, fraud, money laundering, child labour or other forms of human trafficking;

Selection Questions — this is the supplier's self-declaration regarding its ability to meet the selection criteria in respect of its financial standing, technical and professional capabilities.

Please see the link to the policy note from CCS which includes the SSQ [here](#).

8. Which procedures can a contracting authority follow and what are the time scales?

There are five main procurement procedures that a contracting authority may adopt under the PCR 2015:

- **Open procedure**

This procedure is open to the market so anyone can bid. It is also typically used for simple procurement exercises where the requirements are straightforward and is more commonly used in the recruitment sector. Bidders have 35 days from the date of the OJEU contract notice to submit their bids. If electronic submissions are used the response period will be reduced to 30 days. If a PIN was used, the period becomes even shorter as bidders will have 15 days to submit a bid and the contracting authority will evaluate the responses.

- **Restricted Procedure**

In the restricted procedure, bidders have to confirm their interest in a response to an OJEU contract notice by completing the PQQ or SSQ. Their suitability is then assessed. The restricted procedure is different to the open procedure as it limits the number of bidders by using a qualitative selection criteria. A minimum of 5 bidders are invited to the next stage. The time limits for the response to PQQ or SSQ is 30 days and the time limit for responding to the Invitation to Tender is also 30 days. Although where a PIN is used the timescale is reduced to ten days.

7 • **Competitive procedure with negotiation**

This procedure substitutes the negotiated procedure in the PCR 2006. This procedure can be quite challenging and certain criteria have to be met which include complex requirements with specific

technical and commercial characteristics which cannot be understood without direct engagement with the bidders. There is also a requirement to complete a PQQ or SQQ, and a minimum of 3 bidders will be invited to tender. The timescales are the same as the restricted procedure but this can also be negotiated with bidders. The procedure takes place in stages but there will be no further negotiation after final tenders have been submitted.

- **Competitive dialogue procedure**

The competitive dialogue procedure was one of the procedures in the PCR 2015 and it is typically used for complex and large contracts. There is also a pre-qualification stage where bidders can respond to the OJEU notice. The contracting authority will only choose bidders that meet their criteria to participate in a dialogue where they will discuss financial, legal, technical and all other aspects of the procurement separately. A minimum of three bidders will be selected and the time frame is 30 days to respond to the contract notice. After a dialogue with each bidder the contracting authority should have a clear idea of the solution or solutions they need and will close the dialogue after submission of the final tenders.

- **Innovation partnership**

The innovation partnership procedure is a new procedure introduced by the PCR 2015 for when the contracting authority needs an innovative product, service or work that is not available in the open market. This procedure in practice is the competitive procedure combined with negotiation to create a partnership of one or a few operators who specialise in research and development. During the pre-qualification stage, the minimum time limit for requests to participate is 30 days from the date on which the OJEU is released. Again there will be a minimum of three participants. This procedure does not appear to be suitable for the recruitment sector.

9. What are the evaluation and award criteria for submitting a bid?

Contracting authorities must assess and award contracts on the basis of the most economically advantageous tender (MEAT) and the key considerations are:

- price;
- quality;
- technical capability;
- accessibility;
- social, environmental and innovation characteristics (if applicable);
- fair trading;
- the bidder's qualification and experience of assigned staff in terms of contract performance;
- technical assistance and after sales service;
- delivery conditions; and
- period of completion

Each procurement procedure has four stages:

1. **Specification** — the relevant information about the proposed contract must be included in procurement documents and made available electronically (on the internet) from the date of publication of the OJEU/contract notice (or date on which an invitation to confirm interest is sent).
2. **Assessing supplier suitability** — a contracting authority can reject tenderers before evaluating the tender on exclusion grounds and selection criteria.
3. **Tender evaluation/contract award** — again based on the most economically advantageous tender.
4. **Notification** — tenderers must be notified of the award decision and a standstill period of 10 or 15 days is applied before entering into the contract.

10. What is a framework agreement?

A number of contracts are awarded under framework agreements. This is defined in the PCR 2015 as:

“an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.”

A framework agreement is a mechanism that allows contracts to be awarded without a further call for competition, provided that the relevant conditions set out in the framework documents are met. Framework agreements are typically lengthy documents that include separate service level agreements that set out agreed rates. The terms and conditions for specific purchases referred to are referred to as call-off contracts.

The maximum duration of a framework agreement is 4 years under the PCR 2015 unless a longer term can be justified in quite exceptional circumstances. The contract notice will usually refer to the use of a framework agreement.

9 Contracting authorities must ensure that framework agreements are not used inappropriately or in a manner that will restrict prevent or distort competition. The Crown Commercial Service has produced a useful guide on framework agreements which can be accessed using the link [here](#).

11. What are the specific issues in the health care sector?

From 1st April 2016 NHS trusts that are required to comply with the Agency Rules must procure all agency staff via the framework agreements or arrangements approved by NHS Improvement. The framework operators had to apply to have their agreements approved and NHS Improvement published a list of the framework agreements that are approved.

Employment businesses can only supply clinical and non-clinical staff to the NHS under one of the approved frameworks. Although, if there are exceptional patient safety grounds then an NHS Trust can use an off framework agency provided the request is approved by the NHS Trust board. This requirement is part of the Health Secretary's objective to reduce agency spend and to encourage agency staff to take up permanent roles in the NHS or work under a NHS Trust bank. The list of approved frameworks can be found [here](#).

The leading procurement bodies for clinical staff are [Crown Commercial Service](#), [Collaborative Procurement Partnership](#) and [Health Trust Europe](#). They all have approved framework status with NHS Improvement. The respective category leads often attend the REC Health and Social Care meetings to provide updates on various tendering exercises and inform members of procurement pipelines.

12. Is there scope to modify a contract after it has been awarded?

Under the previous Public Contracts Regulations (PCR) 2006, material changes that were made to the scope of an existing contract resulted in a risk that the arrangement could be perceived to be a new contract and therefore should be retendered. However, under the PCR 2006, what constituted a material change was not definitive across the board. It was left to the courts to establish the principles that confirmed whether or not the modifications were so substantial that it required the contract to be retendered.

The leading case that addressed contract modifications was *Presstext Nachrichtenagentur GmbH v Republik Österreich & others* (June 2008). This case confirmed that the key question was whether the modifications were so materially different in character from the original contract that the parties would have had to renegotiate the essential terms of that contract to reflect the modification.

In the PCR 2015, modifications to contracts is one of the crucial developments that partly stem from case law. Regulation 72 of the PCR 2015 lists six conditions when a contracting authority can change a public contract without having to go through a new procurement exercise and they are:

- the procurement documents include a definitive and unambiguous review clause that permits the modification;
- the modifications, despite their financial value, are not substantial;
- the modifications are valued below the threshold and under 15% for the contract value for works and under 10% for contract value for supplies and services;
- the modifications required could not have been anticipated by the contracting authority and they will not change the overall nature of the contract;
- in respect of additional supplies, works or services, if the supplier cannot be changed then the costs will be considerably duplicated and the contract will be inconvenient to run; or
- there is a replacement of the original supplier with a new supplier as a result of insolvency or cooperate restructuring

13. What options are available if my bid is unsuccessful?

After the standstill period, the contract should commence provided there are no legal challenges by unsuccessful bidders.

If there is a legal challenge, pending its conclusion, the court will suspend the award of the contract.

If the bidder's challenge is successful, the court could do one of the following:

- set aside the decision;
- require the contracting authority to make amendments to certain documents; or
- make an award of damages to the bidder to cover the loss incurred as a result of the contracting authority's breach of the PCR 2015.
- If the contract has been awarded, the court can make an order declaring the contract ineffective provided the claim is brought within 30 days from when the bidder first knew or should have known there were grounds to issue proceedings. Courts can extend the 30 days for up to a maximum of three months.

If a bid is unsuccessful and there are no grounds to issue proceedings, some suppliers seek alternative routes to supply such as subcontracting via a managed service company (master or neutral vendor) that has been awarded the contract, provided the terms proposed are commercially viable and the margins are workable. Other suppliers in readiness for another public sector contract could consider joining a collaborative consortium with other suppliers to make a joint bid.

14. What is the Cabinet Office Mystery shopper?

- 11** As part of the SME agenda, Cabinet Office developed a Mystery Shopper Scheme in February 2011 so businesses can inform them of poor public sector procurement practices. The scheme provides a

clear, structured and direct route for suppliers to raise concerns when all attempts at resolving issues with a contracting authority have failed.

In order to hold contracting authorities to account, in 2015 the Small Business Enterprise and Employment Act introduced a statutory basis for procurement investigations. However, their powers are limited as the recommendations to the defaulting contracting authority are non-binding therefore they cannot stop the award of a contract or insist that the contracting authority awards the contract to a particular supplier. In addition, the investigation does not replace legal proceedings.

If bidders wish to report a poor public procurement exercise they can submit feedback via an online form or completely anonymously by emailing the Cabinet Office, see link [here](#).

15. Further resources

Below are a list of useful links that provide further information about public sector procurement:

- The [Crown Commercial Service's Procurement Pipeline](#) with a list of ongoing procurements;
- Guidance on how to become a [Crown Commercial Service supplier](#);
- A [Standard Selection Questionnaire \(SQ\) template](#) provided by the Cabinet Office and Crown Commercial Service;
- Information about the [NHS Collaborative Procurement Partnership](#);
- Information about [HealthTrust Europe](#) – a group purchasing organisation that supports public (and private) sector organisations by strengthening provider performance;
- The [Crown Commercial Service](#) website which is useful for public sector procurement updates and its [guidance brief](#) on framework agreements;
- A [list of framework agreements](#) that have approved by NHS Trust Development Authority (TDA); and
- A [guidance brief](#) on the Gov.UK website for small-to-medium enterprises (SMEs) that are doing business with the government.

REC Legal

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