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Public procurement in the UK

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A practice note looking at the public procurement regime that applies in England and Wales from Brexit IP completion day (11.00 pm on 31 December 2020) following the withdrawal of the UK from the EU. It includes a review of who must comply, contract thresholds, in-house contract awards, the obligations if the rules do apply and the remedies for a failure to comply with the rules.

This note was updated to reflect the Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1319) which (except as provided within the PPAR 2020) came into force at 11.00 pm on 31 December 2020.

Note: The Cabinet Office has issued procurement guidance in response to the outbreak of the 2019 novel coronavirus disease (COVID-19). The guidance is addressed in Legal update, Cabinet Office publishes PPN 01/20: Responding to COVID-19, Legal update, Cabinet Office publishes PPN 02/20: Supplier relief due to COVID-19, Legal update, COVID-19: PPN 03/20 published on use of procurement cards (Cabinet Office) and Legal update, Cabinet Office publishes PPN 04/20: Recovery and transition from COVID-19. The EC has also published guidance on using the public procurement framework related to the COVID-19 crisis, which is addressed in Legal update, COVID-19: EC publishes guidance on purchasing COVID-19-related supplies and services using EU public procurement framework . See also Legal update, COVID-19: guidance on supporting vital service provision in PFI/PF2 contracts published (Infrastructure and Projects Authority) The contents of this note are potentially affected by this guidance and should be read in conjunction with it.

Scope of this note

Public procurement is the purchase of goods, works or services by public sector bodies. This note considers the special rules that apply to such procurements.

The procurement rules establish a legal framework governing the procedures and principles for the award of public contracts, which fall within the scope of the rules and exceed specified financial values. This legal framework is intended to ensure that contracts are awarded fairly, transparently and without discrimination and that all potential bidders are treated equally. In particular, in most cases, the public body awarding the contract is required to advertise the contract through the UK e-notification service and follow specified procedures for selecting candidates and assessing tenders.

UK public procurement law before Brexit

EU-derived procurement framework

While the UK was a member of the EU, EU legislation flowed into UK law through the mechanisms in the European Communities Act 1972 (section 2) (now repealed). The EU legislation primarily comprised EU Directives and EU principles.

EU Directives

Prior to Brexit, the following directives set out the EU legal framework for public procurement (Procurement Directives):

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- Directive 2014/23 on the award of concession contracts transposed in England, Wales and Northern Ireland with effect from 18 April 2016 by the Concession Contracts Regulations 2016 (SI 2016/273) (CCR 2016), see Practice note, Concessions Contracts Regulations 2016: procuring concessions contracts).
- Directive 2014/24 on public procurement and repealing Directive 2004/18 transposed in England, Wales and Northern Ireland with effect from 26 February 2015 by the Public Contracts Regulations 2015 (SI 2015/102) (PCR 2015).
- Directive 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17 transposed in England, Wales and Northern Ireland with effect from 18 April 2016 by the Utilities Contracts Regulations 2016 (SI 2016/274) (UCR 2016), see Practice note, Utilities procurement: an introduction to the Utilities Contracts Regulations 2016.

General EU principles

The Procurement Directives were adopted further to the principles of the Treaty on the Functioning of the European Union (TFEU), in particular the principles of:

- Equal treatment. (see Legal update: No unequal treatment where successful tenderer has advantage acquired from performance of previous contract (General Court)).
- Transparency.
- Non-discrimination.
- Proportionality.

See *Stagecoach East Midlands Trains Ltd v Secretary of State for Transport [2020] EWHC 1568 (TCC) (17 June 2020)* at paragraphs 26-37, 57-75 for an explanation of the law on applicable EU principles.

Implementation in the UK

The Procurement Directives were implemented into UK law by regulations. The current regulations (together the UK Regulations) in force in England, Wales and Northern Ireland are:

- The PCR 2015.
- The Concession Contracts Regulations 2016 (SI 2016/273) (CCR 2016).
- The Utilities Contracts Regulations 2016 (SI 2016/274) (UCR 2016).

These regulations do not extend to Scotland where separate, but similar, regulations have been adopted.

The UK Regulations were the result of a "copy-out" approach to transposition adopted by the Cabinet Office and so, with a small number of areas that are notable exceptions, very closely mirrored the wording of the corresponding Directive.

The PCR 2015 did, however, also include a package of new rules that are domestic in origin, being a product of UK government public procurement policy. These new rules are applicable to below threshold contracts (see Practice note, Additional requirements for below and above threshold contracts (Part 4, PCR 2015)).

Agreement on Government Procurement (GPA)

While it was a member of the EU, and during the transition period, the UK was part of the World Trade Organization's (WTO) GPA through its EU membership.

The GPA is a voluntary trade agreement within the WTO, aiming to ensure open, fair and transparent conditions of competition in the government procurement markets. Parties to the GPA benefit from increased access to the procurement markets of other parties to the GPA.

The GPA is comprised of two parts:

- The main rules, which establish requirements for non-discrimination, transparent award procedures and remedies for affected suppliers.
- The market coverage schedules (or annexes) for each GPA party, which specify what procurement opportunities (including type, threshold value and exceptions) each party has agreed to open up to other GPA parties and will therefore be subject to the main GPA provisions.

Where a GPA party (including the UK through its prior EU membership) agrees in the annexes that certain goods, services or works are covered, it must generally (subject to general and specified exceptions) give suppliers situated in other GPA party countries the opportunity to bid for those goods services or works, with guaranteed rights to fair treatment and non-discrimination. By way of an example of a specified exception, Annex 5 (Services) of the EU (and UK) GPA schedules states that services are covered in respect of a particular GPA party's providers only to the extent that such party has covered the services in its own Annex 5. Similarly, Annex 2 (sub-central entities) does not grant rights to US providers.

GPA parties must have "domestic review procedures" that allow suppliers to challenge breaches of the GPA or the national legislation giving effect to the GPA. The EU procurement directives (and procurement regulations) implemented the commitments that the EU made under the GPA. Accordingly, if the GPA applied to a public contract being awarded in the UK (because of the threshold and nature of the contract), a supplier

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in a GPA country had the same rights as an EU-based supplier and could therefore bring a claim (and seek remedies) under the procurement regulations.

Withdrawal from the EU: legislation and agreements

European Union (Withdrawal) Act 2018

The European Union (Withdrawal) Act 2018 (EUWA) is the legislative measure that, together with the European Union (Withdrawal Agreement) Act 2020 (WAA), which amends the EUWA to give effect to the UK-EU withdrawal agreement (withdrawal agreement), prepares the UK's legislative framework for after its withdrawal from the EU.

These measures include:

- **Repeal of the European Communities Act 1972** and exit from the European Union on 31 January 2020 (exit day).
- **A transition period** up to 31 December 2020 (IP completion day) during which EU law including the procurement regulations would remain in effect.
- **Conversion of EU law into UK law.** At the end of the transition period, the majority of EU law was converted into UK law, and preserved EU-derived domestic legislation (such as the procurement regulations) which would otherwise have lapsed. This created a new body of retained EU law. For more information, see Practice note, UK law after end of post-Brexit transition period: overview: Creation of retained EU law: legislating for continuity.
- **Secondary implementing legislation.** The powers to make secondary legislation, including, under section 8, regulations that deal with deficiencies (such as provisions in the procurement regulations which refer to the European Commission) in retained EU law. For a more detailed discussion of the WAA, see Practice note, European Union (Withdrawal Agreement) Act 2020.

UK-EU withdrawal agreement

The withdrawal agreement came into force when the UK left the EU on exit day, but many of the withdrawal agreement provisions deal with the period after IP completion day. These include the separation provisions in part three on procurement procedures pending at the end of transition (see Procurement procedures pending at the end of transition period).

Brexit statutory instruments

Much of the retained EU law created under the EUWA required immediate amendment to work in a UK context post-transition. Many of these amendments were achieved by a series of statutory instruments made under EUWA and WAA powers.

The following are the main Brexit SIs relevant to public procurement:

- Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (*SI 2020/1319*) (PPAR 2020). The PPAR 2020 amend the PCR 2015, CCR 2016, UCR 2016 and other retained EU law and existing UK primary legislation. For a detailed summary of the changes made by the PPAR 2020, see Legal updates, Public Contracts Regulations 2015 amended by Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1319): Brexit SI and Concession Contracts Regulations 2016 amended by the Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1319): Brexit SI.
- Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019 (SI 2019/697) and Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2020 (SI 2020/1450) which make technical amendments to the Defence and Security Public Contracts Regulations 2011 (*SI 2011/1848*) (DSPCR 2011). The DSPCR 2011 are outside the scope of this note.

UK independent membership of the GPA

On 7 October 2020, the WTO's GPA Committee approved the UK's accession to the GPA at the end of the transition period. To take advantage of this decision, the UK was required to submit an instrument of accession, which it did on 2 December 2020 and become an independent member of the GPA on 1 January 2021. The UK coverage schedules substantially replicate the EU coverage schedules under the GPA.

Trade Bill 2019-21

The Trade Bill 2019-21 includes provisions that provide the government with the necessary powers to implement the UK's obligations under the GPA, now that it is an independent party. This includes a power to amend domestic legislation. For more information about the Bill please see Practice note, Trade Bill 2019-21: Implementation of Government Procurement Agreement. See also Practice note, The UK's status at the WTO after Brexit.

UK-EU trade and co-operation agreement

The UK and EU agreed a deal on their future trading relationship post Brexit on 24 December 2020, the UK-EU trade and co-operation agreement. The text of the UK-EU trade and co-operation agreement (and other future relationship agreements) was published in the

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Official Journal of the European Union on 31 December 2020, subject to final legal linguistic revision. The definitive text will be published by 30 April 2021. The European Union (Future Relationship) Act 2020 implements the future relationship agreements into UK law (see Practice note, European Union (Future Relationship) Act 2020).

Procurement provisions in the UK-EU trade and co-operation agreement

The UK-EU trade and co-operation agreement contains specific provisions relating to public procurement (provisionally Title VI: Public Procurement and Annex PPROC-1). The provisions incorporate the GPA rules (as between UK/EU procurement) and provide certain further rights, protections and clarifications for UK and EU operators. An in-depth analysis of these provisions is outside the scope of this note, but they include:

- **Wider coverage than GPA.** Covered procurement (that is, EU/UK procurement activity that is caught by the agreement) is broader than that provided for under the GPA. In particular, as under the PCR 2015, most of the light touch regime services are covered by the EU/UK commitments whereas these are not covered by the GPA schedules. The notable change from the position under the PCR 2015 is that healthcare services (including administrative services and the supply of medical personnel) are not covered. In addition, certain utilities are subject to the EU/UK coverage which are not covered by the GPA schedules, notably utilities providing gas and heat networks and privately owned utilities with special and exclusive rights.
- **National treatment beyond covered procurement.** When procuring a contract which is outside the scope of the GPA schedules as supplemented by the EU/ UK Agreement (eg below threshold) and not within a specific exception (eg, the healthcare exception), the procuring party must treat EU or UK suppliers (as the case may be) established in its territory through the constitution, acquisition or maintenance of a legal person, no less favourably than established suppliers from its own country (*Chapter 3, Article PPROC.13*). This is not a general equal treatment principle as it does not relate to cross border services, it is a provision which requires equal treatment in relation to EU suppliers established in the UK (and vice versa).

UK procurement law after the transition period

The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1319) (PPAR 2020) were made on 19 November 2020. Except as provided within the PPAR 2020, the regulations came into force at 11.00 pm on 31 December 2020 (IP completion day).

The Schedule to the PPAR 2020 makes provision in relation to procurements that are ongoing on IP completion day. In this section of the note we will examine the UK regime as it stands after the end of the transition period, identifying key changes made by the PPAR 2020. For more information see Practice note, Brexit: implications for public procurement law and Legal update, Public Contracts Regulations 2015 amended by Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1319): Brexit SI .

See also Legal update, Brexit: Procurement Policy Note PPN 10/20 on procurement after the transition period.

Who must comply with the rules

The PCR 2015 apply to bodies that are "contracting authorities". Contracting authorities include:

- Government departments.
- Local authorities.
- Police and fire authorities.
- NHS Trusts.
- Various non-departmental government bodies, such as the British Library, the Competition and Markets Authority and the Gambling Commission.
- The House of Commons.

The PCR 2015 (and GPA schedules) distinguish between central government authorities and sub-central authorities. The Crown and all the bodies listed in Schedule 1 to the PCR 2015 are central government authorities. Contracting authorities which are not in the list of central government authorities are sub-central authorities. Local authorities, schools and fire and police authorities are all sub-central authorities. The distinction is important as sub-central authorities benefit from certain flexibilities in the PCR 2015 including a higher threshold for services contracts, see Thresholds as well as exceptions as to whom duties are owed under the GPA (see Agreement on Government Procurement (GPA)).

The definition of a contracting authority under the PCR 2015 covers "bodies governed by public law" which means:

> "bodies that have all of the following characteristics:
>
> (a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
>
> (b) they have legal personality; and
>
> (c) they have any of the following characteristics:

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(i) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law;

(ii) they are subject to management supervision by those authorities or bodies; or

(iii) they have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law".

(Regulation 2, *PCR 2015*.)

It has been held that needs in the general interest, not having an industrial or commercial character "are generally needs which are satisfied otherwise than by the availability of goods and services in the market place and which, for reasons associated with the general interest the State chooses to provide itself or over which it wishes to retain a decisive influence." (CJEU in *Arkkitehtuuritoimisto Riitta Korhonen Oy and Others v Varkauden Taitotalo Oy (Case C-18/01)* at paragraph 47).

In *Alstom Transport v Eurostar International Limited [2012] EWHC 28 (Ch)*, Mr Justice Roth held that even though Eurostar did not at the relevant time face any competition in its market and had received substantial state aid, it would in the future face competition and would be expected to take procurement decisions on economic grounds. In all the circumstances, Eurostar was of a commercial character and was not a contracting authority.

In *LitSpecMet UAB v Vilniaus lokomotyvu remonto depas UAB and another [2017] EUECJ C-567/15,* (which concerned a request for a preliminary ruling from the Regional Court, Vilnius, Lithuania to the ECJ), the question at issue was the status of a company which was wholly owned by the Lithuanian State railway company. The subsidiary claimed that it was not a "public body" since it was not established "for the ... purpose of meeting needs in the general interest, not having an industrial or commercial character". The ECJ, in its preliminary ruling, held that:

- A company which was wholly owned by a contracting authority (whose activity consisted of meeting needs in the general interest) and which carried out both internal transactions for that contracting authority and transactions on the competitive market had, subject to certain conditions, to be classified as a "body governed by public law".
- The conditions were that the activities of that company were necessary for the contracting authority to exercise its own activity and meet needs in the general interest and that the company could be guided by non-economic considerations. (See Legal update: ECJ rules that company wholly owned by a contracting authority can be a body governed by public law).

In *Federazione Italiana Giuoco Calcio (FIGC) and another v De Vellis Servizi Globali Srl (Cases C-155/19 and C-156/19) EU:C:2021:88*, the ECJ ruled that an entity entrusted with tasks of a public nature exhaustively defined by national law may be regarded as having been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, even though it was established not in the form of a public authority but of an association governed by private law and some of its activities, for which it enjoyed a self-financing capacity, were not public in nature. (See Legal update, National sports federation established under private law may be subject to EU public procurement rules if it was under control of sufficiently influential public authority (ECJ)).

Some entities may be caught unexpectedly by the PCR 2015. For example, registered providers of social housing (RPs) have been regarded as contracting authorities since September 2004, when the UK government accepted the European Commission's view that registered social landlords are bodies governed by public law (see ODPM press release of 10 September 2004 and *Commission v France (Case 237/99)*). While the sector remains highly regulated, reforms introduced by the Localism Act 2011 may mean that the assumption that RPs are invariably to be treated as contracting authorities is no longer correct. In particular, allowing rents to rise (initially to 80% of the market rent, though social rent rise policy changed in 2020) is likely to reduce the dependency of RPs on government funding and confer on RPs a more commercial character. The need for a case by case analysis is also seen in the education sector where universities are increasingly self-funding (see University of Cambridge (Law relating to undertakings) [2000] EUECJ C-380/98 (03 October 2000) (Case C-380/98).

The PCR 2015 also apply to associations involving one or more of the bodies listed above.

Bodies are not subject to the PCR 2015 if they:

- Are not listed by name in the PCR 2015.
- Do not fall within a category listed in the PCR 2015.
- Do not fall within the general definition of bodies governed by public law set out above.

For information concerning the utilities regime, see Practice note, Utilities procurement: an introduction to the Utilities Contracts Regulations 2016.

For information concerning the grant of concession contracts, see Practice note, Concession Contracts Regulations 2016: procuring concession contracts.

This note concentrates on the PCR 2015.

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Which contracts of a contracting authority are covered?

The PCR 2015 apply when a contracting authority seeks offers in relation to:

- A proposed public supply contract (see Ask, Do the Public Contracts Regulations 2015 cover the purchase of second hand goods?).
- A proposed public works contract.
- A proposed public services contract.
- A proposed contract for the provision of certain social or other specific services (in which event the "light-touch" regime will apply and the procurement will be subject to lesser procedural requirements).
- A proposed framework agreement or dynamic purchasing system (DPS), where the subject matter involves any of the above (see Framework agreements and centralised purchasing).

Under the PCR 2015, "public contracts" are defined to mean:

> "contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services" (regulation 2, PCR 2015).

Public contracts must therefore be:

- In writing.
- For pecuniary interest or "consideration". (See Legal update: National rules attempting to take private "classified" hospitals treated as equivalent to public hospitals outside public procurement regime not permitted under EU Public Procurement Directive (2004/18/EC) (ECJ): Concept of a contract "for pecuniary interest". The consideration need not necessarily consist of the payment of money (see Legal update, Tender cannot be automatically rejected on sole ground that proposed price was EUR 0.00 (ECJ)).

Case law on development agreements has clarified that these agreements amount to the procurement of works only where the contractor "assumes a direct or indirect obligation to carry out the works which are the subject of the contract and that that obligation is legally enforceable in accordance with the procedural rules laid down by national law" (*Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben (Case C-451/08)* at [63]). It is insufficient that the arrangement is such that the contractor is likely to carry out works, there must be a binding commitment to carry out such works (*R (Midlands Co-Operative Society Ltd) v Tesco Stores Ltd [2012] EWHC 620*).

See also *R (Faraday Development Ltd) v W Berkshire Council [2016] EWHC 2166*, in which the High Court noted that as there was no binding obligation to carry out the works, the contract was not caught by the PCR 2006. The first instance decision was overturned on appeal. The Court of Appeal ruling on 14 November 2018 applied a purposive interpretation to the EU rules and held that the Council had contractually committed itself to procuring works from the developer even though the obligation on the developer to carry out the works would only arise later if and when it drew down on the land. By entering into the development agreement without conducting a tender procedure the Council agreed to act unlawfully in the future. In effect, the Court of Appeal looked at the arrangement as a whole and concluded that its essential object was a procurement of works. See Legal update: Development agreement containing contingent obligations on developer was "public works contract" under PCR 2006 (Court of Appeal).

However, the PCR 2015 **will not apply** if the proposed contract, framework agreement or DPS:

- Falls within one of the express exclusions (see Types of contract).
- Has an estimated value which (net of VAT) is below the relevant threshold (see Thresholds) (but see Obligations in respect of contracts below the financial thresholds).

Types of contract

In-house arrangements and shared service providers

One exceptional case in which purchases are not regarded as "public contracts" is where the services, works or supplies are to be supplied by an in-house unit.

Case law has established that, when the following two conditions are met, an agreement between a contracting authority and its contractor will be an "in-house" administrative arrangement, rather than a contract with an external provider, and as such will fall outside the scope of the public procurement rules if both of the following apply:

- The contracting authority exercises control over the provider awarded the contract which is "similar to that which it exercises over its own departments".
- The provider performs the "essential part" of its activities with the contracting authority or with other controlling authorities.

(*Teckal SRL v Comune de Viano (Case C-107/98)*)

The CJEU also confirmed, notably in *Coditel Brabant SPRL v Commune of Uccle (Case C-324/07)*, that the

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in-house test can be met in circumstances where the requisite control is exercised jointly by a number of public bodies; for more information, see Legal update, ECJ ruling on award of public service concession. In *Brent London Borough Council and others v Risk Management Partners Ltd [2011] UKSC 7*, the Supreme Court held that the direct award of contracts to LAML, a limited liability company jointly owned, financed and established by a number of local authorities for the sole purpose of providing insurance services to the participating authorities, fell within the Teckal exemption, see Legal update, Supreme Court ruling on "in house" procurement.

The case of *Commission v Germany (Case C-480/06) [2009] ECR I-4747* (*Hamburg Waste*) confirmed that public authorities can cooperate to perform public interest tasks by using their own resources, without being obliged to call on outside entities not forming part of their own departments.

Vertical and horizontal "in-house" arrangements

The PCR 2015 codified both the *Teckal* and *Hamburg Waste* exemptions, in each case with certain added clarification. Regulation 12 exempts from the application of public procurement law certain contracts between (a) contracting authorities and entities controlled by them and (b) co-operating contracting authorities. These arrangements can take various forms, but will be characterised as one of the following:

- A "vertical" arrangement, involving a sole controlling authority or a shared system of control (after *Teckal* and its subsequent line of cases).
- A "horizontal" arrangement, where two or more contracting authorities genuinely co-operate with each other to meet public service obligations that each is entrusted to perform (though each authority need not necessarily have the **same** obligations).

Regulation 12(1) sets out three conditions that must be fulfilled in order for the vertical exemption to apply:

- The contracting authority exercises a control over the legal person concerned that is similar to the control that it exercises over its own departments.
- More than 80% of the activities of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority.
- There is no direct capital participation in the controlled legal person.

Regulation 12(2) also provides that the exemption applies to a "reverse Teckal" situation where the controlled person awards the contract to the controlling authority, or a "horizontal Teckal" where it awards the contract to another person controlled by the authority.

There are also specific provisions clarifying that authorities jointly controlling the provider:

- Must have representatives on the decision-making bodies of the provider.
- Are able to jointly exert decisive influence over the strategic objectives and significant decisions of the provider.

(*Regulations 12(4) and (5), PCR 2015*.)

Regulation 12(7) codifies the *Hamburg Waste* judgment. It provides that an agreement concluded between two or more contracting authorities shall not be deemed to be a public contract where all of the following apply:

- The agreement establishes or implements a co-operation between the participating contracting authorities, with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common.
- The agreement is governed only by considerations relating to the public interest.
- The participating contracting authorities perform on the open market less than 20% of the activities concerned by the co-operation.

For more information on public to public contracts and the applicable case law, see Practice note, Public to public collaboration and the procurement rules.

Renewals, extensions and material changes to an existing contract

A proposed extension, renewal or amendment to an existing contract may be considered equivalent to a new contract if it constitutes a material change. If it does, the contracting authority may need to undertake a new competitive tender process in accordance with the PCR 2015.

Material changes are those which demonstrate the intention of the parties to renegotiate the essential terms of the original contract. Amendments to a contract may be regarded as material where they:

- Introduce conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenders other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted.
- Extend the scope of the contract considerably to encompass services not initially covered.
- Change the economic balance in favour of the contractor in a manner not provided for in the terms of the original contract.

(*Pressetext Nachrichtenagentur v Republik Oesterreich (Bund) (Case C-454/06)*.)

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For more information, see Practice note, Varying public contracts.

In general, the extension or renewal of a contract on the terms advertised, tendered and evaluated in the original procurement and provided for in the contract such that no negotiation is required, should not constitute a material change.

The PCR 2015 codified the tests formulated in *Pressetext* (regulation 72). Regulation 72 provides further clarity on the situations in which a new contract can and cannot be awarded without advertisement and states that a new procurement procedure shall be required for modifications other than those permitted by Regulation 72 (*regulation 72(9)*). The permitted modifications are summarised below:

- Modification to a contract or framework agreement is permitted without a new procurement procedure where it is provided for in the initial procurement documents in clear, precise and unequivocal review clauses and where the scope, nature and conditions of the change are stated. However, the modifications will not be permissible where they alter the overall nature of the contract or framework agreement. (*Regulation 72(1)(a)*.)
- Modification is allowed where additional works, services or supplies have become necessary and where a change of contractor cannot be made for either "economic or technical" reasons, or where doing so would cause "significant inconvenience" or "substantial duplication of costs". This limb will only apply where the price increase (on each successive modification) does not exceed 50% of the original contract value (and the successive modifications are not aimed at circumventing the regulations). An ex post notice, describing the modification made, must be published in the OJEU (amended by the PPAR 2020 to the UK e-notification service) in this event containing the information set out in part G of Annex V to the Public Contracts Directive (with certain changes required by the PPAR 2020). (*Regulation 72(1)(b)*.)
- Modifications are permitted where the need arises from circumstances which "a diligent contracting authority" could not have foreseen, and the modification would not change the overall nature of the contract, and where each increase in price is less than or equal to 50% of the contract value (and successive modifications are not aimed at circumventing the regulations). Again, an ex post notice, describing the modification made, is required to be published in the OJEU (amended by the PPAR 2020 to the UK e-notification service) in this event containing the information set out in part G of Annex V to the Public Contracts Directive (with certain changes required by the PPAR 2020). (*Regulation 72(1)(c)*.)
- A new contractor may be appointed without a new procurement procedure where there is a "clear, precise and unequivocal review clause or option" (that conforms to regulation 72(1)(a) of the PCR 2015) or "universal or partial succession" following corporate restructuring (such as a merger or insolvency), where the initial selection criteria are met, and providing there are no "substantial modifications". (*Regulation 72(1)(d)*.)
- A modification is authorised where it is not deemed "substantial". A modification will be substantial where it:
  - introduces conditions which, had they been part of the original procurement, would have allowed for the admission of other candidates or for the acceptance of a different tender, or attracted additional participants;
  - changes the economic balance of the contract in favour of the contractor, in a way not provided for in the initial contract or framework agreement;
  - extends the scope of the subject-matter "considerably"; or
  - introduces a new contractor (except where permitted).

  (*Regulation 72(1)(e)*.)
- A safe harbour is provided that allows modifications to be made without a new procurement procedure being required, where the value of the modification is below the relevant threshold and:
  - less than 10% of the initial contract value (in the case of contracts or framework agreements for services or supplies); or
  - less than 15% of the initial contract value (in the case of contracts or framework agreements for works).

  (*Regulation 72(5)*.)

  Nevertheless, in order for the modification to be permitted by regulation 72(5), the overall nature of the contract or framework agreement must remain unaltered.
- Regulation 73(1) (termination of contracts) provides that contracting authorities must ensure that every public contract they award contains provisions enabling the authority to terminate the contract where:
  - the contract has been subject to a substantial modification which would require a new procurement procedure further to regulation 72(9);
  - the contractor ought to have been excluded further to regulation 57; and
  - where there is a serious infringement of the obligations under the Treaties and the Public

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Contracts Directive confirmed in a declaration by the ECJ in a procedure under Article 258 of the TFEU (*Regulation 73(1)(c)*). However, regulation 73(1)(c) has been removed by the PPAR 2020 subject to transitional provisions.

For more information, see Practice note, Varying public contracts.

Excluded contracts

Having established that there is a contract for works, services or supplies, it is then necessary to determine whether any relevant exclusions apply. Certain types of contracts are listed in the PCR 2015 as being expressly excluded:

These include:

- Contracts awarded by utilities (subject to the Utilities Contracts Regulations 2016 (SI 2016/274)) (*Regulation 7*).
- Contracts where the principal purpose is to permit the contracting authority to provide or exploit public telecommunications networks or to provide to the public a telecommunications service (*Regulation 8, PCR 2015*).
- Contracts awarded further to certain international treaties or agreements entered into with another country or international organisation (*Regulation 9, PCR 2015*).
- Contracts for the acquisition of land and rights over land (*Regulation 10, PCR 2015*).
- Contracts for programme material or broadcasting time (*Regulation 10, PCR 2015*).
- Arbitration or conciliation services contracts. (See Legal update, Legal and arbitration services lawfully excluded from competition (ECJ)) (*Regulation 10, PCR 2015*).
- Contracts for legal services connected with litigation or the exercise of official authority. (See Legal update, Legal and arbitration services lawfully excluded from competition (ECJ)) (*Regulation 10, PCR 2015*).
- Loan contracts and contracts for financial services related to the issue or transfer of shares and other instruments (*Regulation 10, PCR 2015*).
- Employment contracts. (See Legal update: Procurement exemption for employment contracts covered fixed term contracts awarded on basis of objective criteria although reliance upon such exemption subject to judicial review (ECJ)) (*Regulation 10, PCR 2015*).
- Certain civil defence and protection services contracts. (*Regulation 10, PCR 2015*).
- Public transport services contracts by rail or underground. (See Legal update, Contracts for rail transport can be awarded directly (ECJ) and Legal update, 30-year period for existing Article 8(3)(b) contracts calculated from coming into force of Regulation (EC) 1370/2007 on public passenger transport services by rail and road (ECJ)) (*Regulation 10, PCR 2015*).
- Political campaign services contracts. (*Regulation 10, PCR 2015*).
- Public service contracts awarded to one or more contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with anything which is retained EU law by virtue of section 4 of the EUWA 2018 because of the effect which the TFEU had immediately before IP completion day in giving rise to any of the rights, powers, liabilities, obligations, restrictions, remedies and procedures mentioned in that section. (See Ask, Does Section 16(2) of the Fire and Rescue Act 2004 mean that only other fire and rescue authorities can be delegated another fire authority's function?) (*Regulation 11, PCR 2015, as amended by PPAR 2020*).
- Works contracts that are subsidised up to 50% by a contracting authority. (*Regulation 13, PCR 2015*).
- Contracts for research and development services (unless the benefits are to accrue exclusively to the contracting authority and the service is wholly remunerated by the contracting authority) (*Regulation 14, PCR 2015*) (See Ask, Does regulation 14 of the Public Contracts Regulations 2015 apply if two or more contracting authorities meet the conditions in that regulation?).
- Contracts the performance of which must be accompanied by special security measures or where the protection of essential national security interests requires its exclusion or contracts falling within the scope of the Defence and Security Public Contracts Regulations 2011 (SI 2011/1848). (*Regulation 15, PCR 2015*).
- Concession contracts within the meaning of the Concession Contracts Regulations 2016 (SI 2016/273) (see Practice note, Concession Contracts Regulations 2016: procuring concession contracts).

Light touch regime

The PCR 2015 provide that social and other specific services (including healthcare, cultural, educational and legal services) are subject to a light touch regime (regulations 74-76*, PCR 2015*).

Services subject to the light touch regime (listed in Schedule 3 to the PCR 2015) include:

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- Legal services (unless excluded by regulation 10(1)(d)).
- Education and vocational health services.
- Health and social services.
- Recreational, cultural and sporting services.

The light touch rules require that contracting authorities intending to award a public contract for these services shall make known their intention by submitting either a contract notice or prior information notice to the UK e-notification service (further to amendments to regulation 51 made by the PPAR 2020) for publication (except where a negotiated procedure without a call for competition can be used: see Procedures). Following award, a contract award notice must also be published.

Contracting authorities are free to determine the procedures applicable to the award of light touch regime contracts, but these must be at least sufficient to ensure compliance with the principles of transparency and equal treatment. Time limits should be reasonable and proportionate and the authority should not depart from the conditions for participation, time limits and award procedures set out in the contract notice or prior information notice (unless to do so would not breach principles of non-discrimination and transparency) (see Advertising).

The light touch regime makes it clear that authorities are able to take into account, in the award of contracts, factors such as the need to ensure continuity, affordability and availability of services as well as the specific needs of categories of users.

The applicable threshold for light touch regime services is relatively high (see Thresholds).

For more information on the light touch regime, see Practice note, Light touch public procurement regime (PCR 2015)

Mutuals

There are specific provisions (regulation 77) designed to enable authorities to reserve the right to participate in tender processes, for certain contracts covered by the light touch regime of up to three years to not-for-profit organisations with a public service mission and where management is based on employee participation.

Regulation 6 of the PPAR 2020 provides that the reference in the call for competition to Article 77 of the Public Contracts Directive must be replaced by a reference to regulation 77.

For more information, see Practice note, Light touch public procurement regime (PCR 2015): Reserved contracts: procurement processes limited to bids from the voluntary and employee owned sectors.

Mixed contracts

The rules on mixed contracts are set out in regulation 4 of the PCR 2015. It is usually clear which category a contract falls into (works, supplies, services or light touch regime services). Sometimes, however, the contract will be a mixed contract (for example, containing elements of both supplies and services, or some excluded contract characteristics). In such cases, it is important to determine the type of contract, because the correct categorisation may determine whether or not, or the extent to which, the PCR 2015 will apply. The applicable threshold will differ according to contract type (see Thresholds).

For mixed contracts that have as their subject matter two or more categories (supplies, services or works), the correct categorisation is made by reference to the **main subject matter** of the contract. If the mixed contract comprises both services and supplies, or services covered by both the main regime and services covered by the light touch regime, the main subject matter is determined by reference to which part has the greater value.

Where a mixed contract comprises part that is subject to the PCR 2015 and part that is excluded, the correct treatment depends on whether the parts are separable. If they are separable but the authority decides to procure them together, then the contract is subject to the full regime. If they are not separable, the treatment depends on which part forms the main subject matter of the contract.

Framework agreements and centralised purchasing

Framework agreements can represent a time-saving means for contracting authorities to procure services, works or supplies.

A framework agreement is "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." (Regulation 33(2) , *PCR 2015*.)

A framework agreement does not generally give rise to a binding obligation on a supplier to supply, or on a contracting authority (or other public purchaser for whose benefit the framework agreement has been set up) to buy. As such, a framework agreement is not strictly a contract. However, regulation 88 of the PCR 2015 defines contracts to include framework agreements for the purposes of remedies, and regulation 33 requires framework agreements to be tendered as if they were a public contract.

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Framework agreements establish the terms under which individual contracts for supplies, services or works (known as "call-off" contracts) may be entered into by the procuring authority (or those authorities identified in the call for competition) during a given period. This period must not, save in exceptional circumstances, exceed four years. Provided they follow certain specific rules (see Letting a call-off contract), the contracting authority can then enter into call-off contracts with its chosen supplier during the term of the framework agreement as and when the need arises, without the need to re-advertise the opportunity.

For the purpose of applying the thresholds (see Thresholds), it is necessary to estimate the aggregate value of all the potential call-off contracts over the lifetime of the agreement.

Framework agreements may be concluded with a single provider or several providers. In the case of single provider frameworks, the PCR 2015 require that any call-off contracts are awarded "within the limits laid down in the framework agreement". There is therefore very limited scope to change or add to the original tendered specification or terms. Specific rules govern framework agreements concluded with more than one provider (framework panels) (see *regulation 33 of the PCR 2015*).

Letting a call-off contract

There are two possible options for awarding call-offs from framework panels:

- **Option one:** if the terms of the framework agreement are specific enough to cover the particular requirement and the rules determining how the winner is to be chosen from the panel are set out in the tender documents, the award may be made without re-opening the competition.
- **Option two:** where the framework agreement does not establish all the terms applicable to a particular contract, a mini competition must be held with all the suppliers within the framework capable of meeting the particular need based on the same terms as those applied for the award of the framework agreement and where necessary more precisely formulated terms. The contract is to be awarded on the basis of the award criteria set out in the procurement documents for the framework agreement.

The Crown Commercial Service issued Guidance on framework agreements (updated October 2016) .

Centralised purchasing bodies

A central purchasing body (CPB) which is itself a contracting authority may validly set up a framework agreement.

Regulation 37 of the PCR 2015 sets out the requirements for the use of a CPB. This makes it clear that a contracting authority satisfies its obligations where it acquires works, services or supplies from a CPB or by using contracts or frameworks established by a CPB. However, the authority must ensure that it complies with obligations to which it is subject in doing so (for example, under the rules on making call-offs under a framework or a DPS). In practice, this means that a contracting authority that seeks to rely on a generic framework agreement established by a CPB must take care to ensure that it is fit for its purposes without the need to make substantial changes or, in the case of a single provider framework, negotiate key terms (such as pricing).

Regulation 37 makes it clear that contracting authorities can contract with another contracting authority to provide procurement services for it, without the need to go out to tender for these services.

For further information, see Practice note, Framework agreements let under the public procurement regime.

Thresholds

Save for those parts applicable to below threshold contracts, the PCR 2015 only apply when the estimated value of the contract equals or exceeds the relevant threshold. The estimated value of the contract is net of VAT and includes any renewals or extensions and all the contracts envisaged for the duration of a DPS or framework agreement, adding together all the lots in which the contract is divided. Where a public service contract does not indicate a total price and is for a period longer than four years, or is of indefinite duration, the contract value is calculated on the basis of a four-year term (under which the estimated monthly value of the contract is reckoned, and a multiplier of 48 is then applied) (*Regulations 5 and 6, PCR 2015*).

For information on the applicable thresholds, see Checklist, Public procurement thresholds: checklist. Regulation 6 of the PPAR 2020 substitutes specific sterling thresholds for the references to the sums specified in the Public Contracts Directive. Further, a new regulation 5A (review and amendment of certain thresholds) provides that every two years, the Minister for the Cabinet Office must review the relevant threshold sums to verify whether they correspond with the thresholds established for those purposes in the GPA. It contains the required method for making that calculation. The first review under this regulation must relate to the 24-month period ending with 31 August 2021.

The PCR 2015 contain specific anti-avoidance rules that deter contracting authorities from deliberately dividing up contracts in order to bring them below the relevant

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thresholds. The general rule is that "a procurement must not be sub-divided with the effect of preventing it from falling within the scope of" the PCR 2015 unless "justified by objective reasons". In relation to specific contract types:

- **Works.** The estimated value shall take into account the value of the supplies and services to be made available provided they are necessary for executing the works (regulation 6(10)*, PCR 2015*).
- **Supplies or services.** If a purchaser has a requirement which is regular in nature or intended to be renewed within a given period, the threshold is based on the value of the supplies or services of the same type (during a 12 month period) (*regulation 6(16)*).

See also Legal update, Ask Local Government: If a council builds two facilities in different parts of the borough which will be managed by one operator, does the council need to aggregate the cost of the works under the Public Contracts Regulations 2015?

Obligations in respect of contracts below the financial thresholds

Contracts that fall below the financial thresholds are not caught by the main provisions of the PCR 2015, though will be subject to the rules on below threshold contracts if the contract value is over £10,000 (central government) or £25,000 (sub-central authorities).

These rules:

- Require publication of the opportunity on the government's "Contracts Finder" website setting out when interested economic operators must respond and any requirements for participation. (*Regulation 110, PCR 2015*).
- Prohibit the use of a separate pre-qualification stage (though relevant and proportionate suitability questions may still be asked). (*Regulation 111, PCR 2015*).

NHS healthcare services contracts are exempt from these rules and the remedies under the PCR 2015 do not apply to the rules on below threshold tenders (see Remedies).

Disapplication of general Treaty principles

Before the transition period ended, if another EU member state had a "cross-border interest" in providing the goods, services or works that a contracting authority required, this engaged the TFEU principles and principles derived from these by CJEU case law. These TFEU principles applied whether or not the procurement was caught by the EU procurement directives and an action could be brought by an economic operator based on enforceable EU obligations in the field of public procurement, further to regulation 89 of the PCR 2015, where there was cross border interest.

Section 4 of the EUWA converted certain directly effective rights under EU treaties into UK law at the end of the transition period (see Practice note, UK law after end of post-Brexit transition period: overview: Section 4: saving for rights etc under section 2(1) of the ECA 1972). These "retained EU obligations" are enforceable in the field of public procurement by an economic operator further to regulation 89 of the PCR 2015, as amended by the PPAR 2020. However, these rights have been curtailed by regulation (subject to the provisions of the withdrawal agreement), notably:

- The Freedom of Establishment and Free Movement of Services (EU Exit) Regulations (2019/1401) (FEFMR 2019) disapply directly effective rights of establishment and free movement of services derived from the TFEU and other sources, meaning that EU companies will be unable to rely on such rights to challenge UK law (or tenders) that restrict access to the UK internal market.
- Regulation 25 of the PPAR 2020 disapplies any rights, powers, liabilities, obligations, restrictions, remedies and procedures in the field of procurement that are derived from Article 18 of the TFEU (non-discrimination on grounds of nationality) to the extent not already disapplied by FEFMR 2019.

Furthermore, the EUWA specifically provides that any breach of the general principles of EU law after IP completion day (being the end of the transition period) will no longer be actionable in the UK courts (*paragraph 3*, Schedule 1, EUWA).

In effect, it is difficult to see what relevant and enforceable "retained EU obligations" in the procurement field will survive the end of the transition period for procurements not caught by the procurement regulations, save those which relate to tenders launched prior to the end of 2020.

For procurements caught by the PCR 2015 as amended, regulation 18 continues to apply the principles of equal treatment, transparency and proportionality, which are the essence of the general principles of EU law.

For more information, see Practice note, European Union (Withdrawal) Act 2018: legislating for Brexit: EU law based claims.

Reserving below threshold procurements

On 15 December 2020, the Cabinet Office published Procurement Policy Note 11/20: Reserving below threshold contracts, which provides options to consider when procuring below threshold contracts. The options, which may be used alone or both together, are:

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- **Reserve by supplier location.** This would mean running a competition but specifying that only suppliers located in a geographical area can bid. It could be reserved as UK-wide or by a single county (metropolitan or non-metropolitan) but should not be defined by nations of the UK. Supplier location should be described by reference to where the supplier is based or established and has substantive business operations, and not by location or corporate ownership.
- **Reserve the procurement for Small and Medium Sized Enterprises (SMEs) and Voluntary, Community and Social Enterprises (VCSEs).** This would involve running a competition in which only SMEs and VCSEs can bid.

The content of PPN 11/20 only applies to central government departments, but other contracting authorities are encouraged to comply. This PPN reflects disapplication of the former TFEU principles (subject to exceptions for procurements in Northern Ireland arising due to the Northern Ireland Protocol).

For more information on the below threshold regime, see Practice note, Additional requirements for below and above threshold contracts (Part 4, PCR 2015).

Obligations if the rules apply

Advertising

Before the end of the transition period, the procurement regulations required contracting authorities to publish certain notices in relation to their above threshold procurements in the Official Journal of the European Union (OJEU). After 23.00 on 31 December 2020, any notices that would previously have been sent to the EU Publications Office (including contract notices, prior information notices and contract award notices) must be published on the UK's e-notification service, 'Find a Tender' (FTS). This requirement is reflected in the procurement regulations by amendments made by the PPAR 2020.

Regulation 51 of the PCR 2015 (now headed publication on the UK e-notification service) provides that notices shall be submitted to the UK e-notification service for publication and the requirement to send notices to the EU Publications Office in the prescribed format is omitted and references to the EU Publications Office are substituted by those to the UK e-notification service. The UK e-notification service is defined as a single web-based portal which is provided by or on behalf of the Cabinet Office. A notice is submitted to the UK e-notification service if the information comprising the notice is entered in the portal in such form or manner as the portal may elicit it and in compliance with any specific instructions that are given within the portal about how the information is to be entered.

On 23 November 2020, the Cabinet Office published Procurement Policy Note 08/20: Introduction to Find a Tender, together with some frequently asked questions about FTS. Many of the frequently asked questions have been superseded by Annex A to Procurement Policy Note 10/20: Public Procurement after the Transition Period ends on 31 December 2020 which includes information on FTS and other aspects of the end of the transition period. Together, PPN 08/20 and the frequently asked questions set out practical information for contracting authorities about FTS.

While contract notices may continue to be published on Contracts Finder or Devolved Administration systems such as Sell2Wales or e-Sourcing NI, these notices must not be published before the FTS publication and must not provide additional information (as provided by regulation 52 PCR 2015 as amended by PPAR 20). For information on when to publish on Contracts Finder under the PCR 2015, see Practice note, Additional requirements for below and above threshold contracts (Part 4, PCR 2015): Publishing contract opportunities on Contracts Finder and Publishing contract award notices on Contracts Finder.

The requirement to send notices to FTS does not apply to procurements launched before the end of the transition period. For these, the pre-transition requirement to publish notices in the OJEU continues to apply. Despite this, PPN 08/20 encourages contracting authorities to also send these notices to FTS, so that suppliers only have one place to look for UK opportunities. However, this is not a legal requirement.

Contracts in relation to which a call for competition is not required

When a contract is caught by the PCR 2015, a contracting authority will normally need to publish a notice to advertise the opportunity (see Advertising). However, in certain circumstances the negotiated procedure may be used **without** publishing a contract notice (see regulation 32). The most common of these circumstances are:

- In the absence of tenders, suitable tenders or applications in response to an invitation to tender by the contracting authority using the open procedure or the restricted procedure provided the terms of the contract offered in the original tender have not been substantially altered. (*Regulation 32(2)(a), PCR 2015*).
- Where the works, supplies or services can be supplied only by a particular economic operator because:
  - the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;
  - competition is absent for technical reasons or for the protection of exclusive rights, including intellectual

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property rights but only where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement.

(*Regulation 32(2)(b), PCR 2015*).

- In so far as strictly necessary, in cases of extreme urgency for reasons unforeseeable by, and not attributable to, the contracting authority, the time limits of the prescribed procedures cannot be met. (*Regulation 32(2)(c), PCR 2015*). (See Legal update, Cabinet Office: Procurement Policy Note 01/21: Procurement in an Emergency published).

The PPAR 2020 has amended the reporting requirement in regulation 32(2)(a) which formerly gave the Commission the right to request a report where this provision was relied on. A report must now be sent (if requested) to the Cabinet Office, the Welsh Ministers where the contracting authority is a devolved Welsh authority or the relevant Northern Ireland department.

For further information see Practice note, Negotiated procedure without prior publication of a notice.

Lots

One of the steps that contracting authorities are encouraged to take, in order to open up procurement to participation by small and medium-sized enterprises, is to divide large contracts into separate lots where possible. In regulation 46 of the PCR 2015, this encouragement takes the form of a provision that allows contracting authorities to award contracts in the form of separate lots, and gives them the ability to decide the size and subject matter of those lots. There is no requirement for these things to happen: contracting authorities may do so if they wish.

However, authorities must provide an indication of the main reasons for any decision not to subdivide into lots. A record of those reasons is required to be transmitted to the Cabinet Office, the Welsh Ministers or a Northern Ireland department, as appropriate, if requested as part of contracting authorities' reporting requirements (as provided in regulation 84 PCR 2015, as amended by the PPAR 2020); it may also be communicated in the contract notice or "procurement documents".

Contracting authorities may decide to limit the number of lots to be awarded to a particular tenderer, but are required to state the maximum number of lots per tenderer in the contract notice or invitation to confirm interest. Contracting authorities will have the ability to combine into a single contract separate lots that are awarded to a single tenderer.

Conflicts of interest

The regime contains an express rule aimed at preventing the harm caused by conflicts of interest. The PCR 2015 require authorities to "take appropriate measures" to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures, so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

Regulation 24 goes on to provide a non-exhaustive list of situations in which a conflict of interest would arise, namely any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest, which might be perceived to "compromise their impartiality and independence" in the context of the procurement procedure. Staff members include, for these purposes, those engaged by professionals advising the authority in the conduct of the procurement procedure.

The High Court found in *Counted4 CIC v Sunderland City Council [2015] EWHC 3898* (an application to lift an automatic suspension) that a serious issue existed as to whether the defendant had breached regulation 24 by allowing a contract manager to participate in bid evaluation in circumstances where the incumbent contractor was the claimant and had concerns over the contract manager's impartiality. See Legal update: High Court refuses to lift suspension of award to NHS Foundation Trust of contract for substance misuse services.

Procedures

The contracting authority must follow one of five award procedures provided for in the PCR 2015. Details of the five procedures are set out in the table below. Each of the procedures will be based on the following key stages:

- Advertisement.
- Pre-qualification (other than in the case of the open procedure) and evaluation of pre-qualification responses.
- Invitation to tender/participate in a dialogue/negotiate.
- Dialogue or negotiation (competitive dialogue, competitive procedure with negotiation and innovation partnership procedures only); in the case of the competitive dialogue procedure and competitive procedure with negotiation, this stage may include the phased de-selection of bidders from the procurement.
- Submission of tenders (in the case of the competitive dialogue and negotiated procedure, this may be "final" tenders/solutions; other bidding rounds may have preceded this one)
- Evaluation of bids.
- Award Decision.
- Standstill.
- Completion of contract.

Minimum time limits apply to certain phases of each award procedure and these are set out in Checklist,

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Public procurement procedures: minimum time limits. For more information on the competitive dialogue procedure and the competitive procedure with negotiation, see Practice note, Competitive dialogue procedure, Practice note, New and revised public procurement procedures (PCR 2015).

Procedure	Key features	Permitted circumstances
Open	• All interested parties can submit a tender • No negotiation with bidders is permitted (see Ask, With the open procedure is it possible to allow bidders to provide their own terms and conditions, whereby they are scored on their ability to meet the needs of the public entity including balance of risk?) • Suitable where tenders will be easy to evaluate	• There are no restrictions on when this procedure can be used, but the requirement to evaluate all tenders received may make the process cumbersome. It is therefore suitable only for the most straightforward procurements
Restricted	• Interested parties can submit an expression of interest, but only those meeting the contracting authority's pre-qualification or selection criteria (which may involve a shortlisting process) will be invited to tender • A minimum of five suppliers must be invited to tender (unless fewer suitable candidates have applied and these are sufficient to ensure genuine competition) • Contract awarded to the most economically advantageous (MEAT) tender. No provision for any negotiation.	• There are no restrictions on when this procedure can be used
Competitive dialogue	• Interested parties meeting the contracting authority's selection criteria may be invited to participate in dialogue • A minimum of three suppliers must be invited to dialogue (unless fewer candidates have applied and these are sufficient to ensure genuine competition, that is, at least two) • The contracting authority enters into a dialogue with bidders to develop one or more suitable solutions to meet its needs • During the course of the dialogue the contracting authority is able to reduce the number of bidders (down-selecting) • When one or more appropriate solution(s) have been identified, the dialogue phase concludes and final tenders, either based on a chosen solution or on each tenderer's proposed solution are invited • The contracting authority assesses the tenders and selects the best tender based on the pre-specified and transparent award criteria. There is very limited scope for negotiation at this stage: only clarification of aspects of the bid and finalisation of terms is permitted • The award criteria must not solely be based on price, they must identify the most economically advantageous tender	• May be used to procure contracts for works, supplies or services where one or more of the following apply: – the needs of the contracting authority cannot be met without adaptation of readily available solutions; – they include design or innovative solutions; – the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of the risks attaching to them; – the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, common technical specification; or – where, in response to an open or a restricted procedure, only irregular or unacceptable tenders were submitted, provided that the contracting authority includes in the procedure all of, and only, the tenderers that meet certain criteria and submitted tenders in accordance with the formal requirements of the failed procedure

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Procedure	Key features	Permitted circumstances
Competitive procedure with negotiation	• A selection is made of those who respond to the advertisement and only they are invited to submit an initial tender for the contract • The contracting authority may then open negotiations with the tenderers to seek improved offers	• Same as for competitive dialogue
Innovation Partnership	• The establishment of a structured partnership for the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they correspond to the agreed performance levels and costs	• May be used where the following apply: – authorities must be seeking innovative ideas where solutions are not already available on the market. This "need" must be expressly stated in the contract notice alongside the minimum requirements, performance levels and maximum costs; and – there must also be an intention to include both the development of the outcome and its subsequent purchase (subject to meeting agreed performance levels and maximum costs) in the procurement

SQ stage: selecting the bidders

Under the restricted and competitive dialogue procedures, the competitive procedure with negotiation and the innovation partnership procedure, contracting authorities will generally send out a selection questionnaire (SQ or PQQ), or equivalent, seeking information about bidders. The SQ should set out the SQ eligibility and selection criteria and methodology used to assess whether bidders are qualified to bid and to shortlist (where appropriate) candidates prior to the tender stage. Shortlisting criteria must be transparent and non-discriminatory.

Eligibility

On receipt of completed SQs, the authority will apply its pre-qualification criteria to the responses received to select those suppliers it will invite to submit tenders (or participate in competitive dialogue). The authority must disqualify any supplier it knows has been convicted of involvement in organised crime, corruption, bribery, fraud or money laundering, or if any other of the grounds for mandatory exclusion set out in regulation 57(1) to 57(3) of the PCR 2015 apply. In relation to modern slavery, see Legal update, Public Procurement (Electronic Invoices etc.) Regulations 2019 made. The authority may also, at its discretion, disqualify a supplier on certain grounds listed in regulations 57(4) and 57(8) of the PCR 2015.

Discretionary grounds include:

- Violations of environmental, social and labour laws and commitments arising under certain national or international laws (such as those dealing with forced or child labour).
- Where there is proof of non-payment of taxes or social security contributions.
- Irremediable conflicts of interest.
- Where there are "sufficiently plausible indications" to conclude that the bidder has entered into anti-competitive arrangements aimed at distorting competition.
- Where there are "significant or persistent deficiencies" in past contract performance, which have led to early termination of the prior contract in question, or to damages or other comparable sanctions.

Regulations 57(9)-(10) require contracting authorities to exclude a candidate after the pre-qualification stage if any of the mandatory grounds come to light at a later stage in the procurement process. If a discretionary ground comes to light in the same way, authorities may exclude candidates from further participation. However, they must not exclude on a mandatory or discretionary basis if the candidate in question has provided sufficient evidence to demonstrate that it has made good any wrongdoing, so as to demonstrate its reliability (self cleaning).

Regulation 56 (general principles in awarding contracts etc), which enables contracting authorities not to award a contract where the relevant tender does not comply with applicable environmental, social and labour law obligations, no longer refers to certain listed Treaties that the EU has entered into. This provision has been amended to enable the UK Government to add to or de-ratify the listed Treaties. Paragraph (2A) provides that where the UK has ratified a further international agreement

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establishing obligations in any of those fields, the Minister for the Cabinet Office may make regulations deeming that the agreement is listed. Paragraph (2B) provides that where the UK has ceased to ratify an international agreement that is already listed, the Minister for the Cabinet Office may make regulations deeming that the agreement is not listed. Such regulations are subject to the consent of the Welsh Ministers and Northern Ireland Department (*regulation 84A introduced by PPAR 2020*).

Selection criteria and financial standing

The rules in regulation 58 of the PCR 2015 in relation to selection criteria (on suitability, economic and financial standing and technical and professional ability) largely replicated the previous rules in the Public Contracts Regulations 2006 with two notable changes:

- Any minimum yearly turnover requirement on potential bidders should not exceed twice the estimated contract value except in duly justified cases (*regulation 58(9)*).
- With regard to technical and professional ability, authorities may impose requirements ensuring that potential bidders have the necessary experience to perform the contract to an appropriate standard, demonstrated if necessary by suitable references from past contracts.

Government guidance on SQs

Regulation 107 of the PCR 2015 states that contracting authorities must have regard to guidance issued by the Cabinet Office. On 26 September 2016, the Government published Procurement Policy Note Standard Selection Questionnaire (SQ) Action Note 8/16 9th September 2016, which applies to all contracting authorities in England and contracting authorities in Wales and Northern Ireland that exercise reserved functions, for above threshold procurements under the PCR 2015. The guidance requires contracting authorities to adhere to a standard SQ containing a standardised set of questions. PPN 8/16 was supplemented by Procurement Policy Note 04/19: Taking account of a supplier's approach to payment in the procurement of major contracts. See also Legal update: Cabinet Office publishes Procurement Policy Note 01/19 relating to exclusions, conflicts and whistleblowing in public procurement.

For more information on the use of SQs generally, see Practice note, Selection criteria and standard selection questionnaires (SQs).

Evaluating bids and award stage

Basis of evaluation

Regulation 67 of the PCR 2015 requires the sole basis for a contracting authority's award decision to be "the most economically advantageous tender".

The MEAT criterion encompasses a lowest price or cost approach (which is unlikely to be suitable except in the most straightforward procurements). It also covers a "best price-quality ratio" approach (which can be used for any procurement type and is mandatory in an innovation partnership procedure).

Cost can include a "cost-effectiveness" approach, and an assessment based on life-cycle costing is permitted. Regulation 68 defines what life-cycle costing means and requires any evaluation which is based on life-cycle costing to adhere to certain specific rules. Social and environmental aspects may also feature as award criteria.

Regulations 68(5) and (6), which provided for common methods for the calculation of life-cycle costs to be set by the EU, have been omitted by operation of the PPAR 2020.

It is also expressly acknowledged that the "organisation, qualification and experience of staff assigned to performing the contract" may be taken into account where this "can have a significant impact on the level of performance of the contract." (*Regulation 67(3)*).

All award criteria must be "linked to the subject-matter of the contract" in question. However, following the case law (see *Case C-448/01, EVN AG and Wienstrom GmbH v Republik Österreich* and *Case C-368/10 - European Commission v Kingdom of Netherlands*), a wide definition of "linked to the subject-matter of the contract" is used (*regulation 67(5)*) which includes:

> "where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in
>
> (a) the specific process of production, provision or trading of those works, supplies or services, or
>
> (b) a specific process for another stage of their life cycle, even where those factors do not form part of their material substance."
>
> Further to regulation 67, award criteria must not have the effect of conferring an unrestricted freedom of choice on the authority. In addition, award criteria using MEAT must be accompanied by specifications, which allow authorities to verify the information submitted by bidders against the award criteria themselves. Weightings attached to award criteria must be communicated to suppliers in advance of tender, although these may be expressed by reference to a range and in the rare cases where weighting is not possible, authorities may indicate the order of importance of the criteria.

All award criteria must ensure the possibility of effective competition and cannot be used to favour a particular candidate. For more information on evaluating tenders, see Practice note, Evaluation of tenders.

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Regulation 56(4) allows authorities to ask tenderers to submit missing information, clarify or complete the documentation provided subject to the equal treatment and transparency principles.

Case law

The requirements of the PCR 2015 are supported by a raft of case law on the formulation, transparency and application of award criteria. The UK and EU case law suggests a relatively high burden of advance disclosure of all elements to be taken into account in identifying the most economically advantageous tender, including sub-criteria, the weighting of sub-criteria and even sub-sub-criteria and their weightings (*Lettings v London Borough of Newham [2008] EWHC 1583 (QB); Lianakis v Dimos Alexandroupolis (Case C-532/06)*). However, the Court of Appeal in *J Varney & Sons Waste Management Ltd v Hertfordshire County Council [2011] EWCA Civ 708* confirmed the ruling in the earlier EU case of *ATI EAC v ACTV Venezia, Case C-331/04*, that evaluators are permitted to attach weightings to sub-criteria (before bids are opened and without disclosing these) provided that these do not alter the disclosed award criteria, do not give rise to discrimination and could not, had they been disclosed earlier, have altered the preparation of tenders.

The EU rules require that tender criteria are sufficiently clear and transparent so that a diligent tenderer can understand them. In *Healthcare at Home Ltd v The Common Services Agency [2014] UKSC 49*, the Supreme Court applied the "reasonably well-informed and normally diligent bidder" (or RWIND) test, originally articulated by the CJEU in *Case C-19/00 SIAC Construction Ltd v County Council of the County of Mayo ([2001] ECR I-7725) (at paragraph 42)*. The CJEU held that the RWIND test is an objective standard and is applied by reference to a hypothetical tenderer. The CJEU stated that the relevant question is not whether it had been proved that all actual or potential tenderers had in fact interpreted the criteria in the same way, but whether the court considered that the criteria were sufficiently clear to permit a uniform interpretation by all reasonably well-informed and normally diligent tenderers.

In *Lancashire Care NHS Foundation Trust, Blackpool Teaching Hospitals NHS Foundation Trust v Lancashire County Council [2018] EWHC 1589 (TCC)*, Stuart-Smith J (as he then was) stated at paragraph 11 that: "What matters, in my judgment, is that the authority should identify (a) what the tenderer is required to address and (b) how marks are going to be awarded. Once it does that, it must (subject to exceptions that do not apply in this case) stick to what it has said it requires of tenderers and how it has said it will mark the tenders. Provided it does so, it does not matter whether the language of criteria and sub-criteria are used at all. .... Put another way, "potential tenderers should be aware of all the elements to be taken into account by the contracting authority in identifying the economically most advantageous offer, and their relative importance, when they prepare their tenders...": see Case 532/06 Lianakis [2008] ECR I-251 at [36]." (See Legal update: Opaque contract award decision set aside (High Court)).

It is important that a contracting authority distinguishes correctly between selection criteria and award criteria. Selection criteria may only be applied at the pre-qualification stage in order to short-list bidders to be invited to tender and are not permitted to be assessed during the award stage (Lianakis Case C-532/06*, OGC Action Note 04/09 29 April 2009*).

- **Selection criteria:** criteria that relate to the tenderer. These are used to assess the tenderer's ability to perform the contract in question, as well as its financial standing and eligibility.
- **Award criteria:** criteria that relate to the tender. These are used to identify the tender that is the most economically advantageous.

In the conduct of the procurement and assessment of tenders, contracting authorities must act in accordance with the equal treatment principle. In *Fabricom SA v Belgium (C-21/03 and C-34/03) [2005] 2 CMLR 25 at paragraph 27*), the court held that "it is settled case law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified."

The transparency principle also requires good record keeping so that the reasons can be provided for the award decision and individual scores. See *Lancashire Care NHS Foundation Trust, Blackpool Teaching Hospitals NHS Foundation Trust v Lancashire County Council [2018] EWHC 1589 (TCC) at paragraphs 52 to 54*.

The proportionality principle imposes a duty on authorities to allow correction or clarification in certain exceptional circumstances, where there is an obvious error or ambiguity which can be easily resolved rather than rejecting a tender without giving the tenderer this opportunity. See *Tideland Signal Limited v EC Commission [2002] 3 CMLR 33 at paragraphs 33 to 37*. This duty does not arise where the clarification provided post tender would in reality lead to the submission of a new tender. See paragraph 17 of judgment of Coulson J (as he then was) in *R. (Hersi and Co) v Lord Chancellor [2017] EWHC 2667 (TCC) (31 October 2017)*.

In evaluating bids, a contracting authority has a significant margin of appreciation and the court will only interfere with its decision where it has committed a manifest error. The standard is broadly equivalent

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to Wednesbury unreasonableness or irrationality and the bar is therefore high. See *Woods Building Services v Milton Keynes Council [2015] EWHC 2011 (TCC) (14 July 2015)* at paragraphs 14 to 15 and *EnergySolutions EU Ltd v Nuclear Decommissioning Authority [2016] EWHC 1988 (TCC) (29 July 2016)* at paragraphs 308 to 316.

However, where a manifest error is established, the court will go on to rescore bids in order to assess the materiality of the errors, whether they made a difference to the tender outcome and thus whether the breach caused loss: see *EnergySolutions EU Ltd v Nuclear Decommissioning Authority [2016] EWHC 1988 (TCC) (29 July 2016) at paragraphs 328 to 330*.

Abnormally low tenders

Regulation 69 of the PCR 2015 provides that contracting authorities must require tenderers to explain the price or costs proposed in the tender where the tender appears to be abnormally low. It sets out a number of areas that such explanations could relate to including the economics of the manufacturing process and the technical solution chosen. A contracting authority may only reject a tender where the evidence supplied does not satisfactorily explain the low level of price or costs proposed. It must reject the tender where the tender is abnormally low due to non-compliance with the Treaty provisions referred to in regulation 56(2) (international obligations relating to environmental, social and labour law).

Regulation 69 also provided that a tender could be rejected where the tender was abnormally low due to receipt of State aid. The references to State aid were removed by PPAR 2020. However, the EU-UK Cooperation Agreement refers at Article PPPROC 9 to the ability of authorities to verify whether the price takes into account the grant of subsidies, further to Article XV of the GPA.

The applicable legal principles on abnormally low tenders were summarised by Fraser J in *SRCL Ltd v National Health Service Commissioning Board (also known as NHS England) [2018] EWHC 1985 (TCC) (27 July 2018)* at paragraphs 193 to 206. In particular:

- There is no general duty on authorities to investigate whether a tender is abnormally low.
- If the authority considers that a particular tender is abnormally low and considers that it should reject the tender for that reason, there is a duty on the authority to require the tenderer to explain its prices.
- There is no definition of the words "abnormally low". However, the expression must encompass a bid which is low (almost invariably lower than the other tenders) and the bid must be beyond and below the range of anything which might legitimately be considered to be normal in the context of the particular procurement.
- A contracting authority has a discretion as to what test it uses for identifying what may be an abnormally low tender.

Abandonment

Regulation 55 of the PCR 2015 expressly envisages the possibility of the authority abandoning the tender. This may take place prior to the award decision or possibly later when the decision is challenged. Tenderers must be informed of the grounds for such a decision. There is a broad discretion as to whether to abandon a procurement but the decision is subject to general principles of transparency, equal treatment and proportionality and must therefore be within the range of reasonable decisions that an authority could properly take having regard to all relevant considerations. See the summary of principles at paragraph 12 of the judgment of Stuart-Smith J in *Amey Highways Ltd v West Sussex Council [2019] EWHC 1291 (TCC)* and further discussion at paragraphs 120 to 144 of *Ryhurst Limited v Whittington Health NHS Trust [2020] EWHC 448 (TCC)*.

A finding that the abandonment decision was lawful does not remove an accrued cause of action which arose in an economic operator's favour prior to the decision (where a breach of duty by the authority can be proved to have caused the operator loss or damage, on the basis for example, that the operator can show that it was the MEAT tenderer and ought to have been awarded the contract). See paragraphs 51 to 79 of *Amey Highways Ltd v West Sussex Council [2019] EWHC 1291 (TCC)*. See also the judgment of Stuart-Smith J in *MSI-Defence Systems Limited v The Secretary of State for Defence [2020] EWHC 1664* at paragraphs 73 to 76, rejecting the strike out of an accrued cause of action arising from the failure to award the contract to the claimant in circumstances where the authority had decided to rewind the tender and reinvite bids.

For more information, see Practice note, Abandoning a public procurement process.

Post-award stage: mandatory standstill

In order to ensure that suppliers have time to consider feedback and seek an effective remedy for breach of the rules, a formal pre-contract debrief and standstill requirement is provided for by the PCR 2015. This requires a 10 day standstill following the provision to the unsuccessful bidders of information on the relative advantages and characteristics of the winning bid, the identity of the bidder and details of when the standstill period ends.

As stated by the Court of First Instance in *Strabag Benelux NV v Council of the European Union (Case T-183/00) [2003] ECR II-138, paragraphs 54-58*:

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> "The reasoning followed by the authority which adopted the measure must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and, on the other, to enable the court to exercise its supervisory jurisdiction."

For more information on the debrief and standstill provisions, see Practice note, Remedies in public procurement law: Standstill.

Contract award notices

See Ask, The Public Contracts Regulations 2015 state that an authority should publish a Contract Award Notice within 30 days. Is that calendar or working days?

See Ask, In the Public Contract Regulations 2015 (PCR 2015), regulation 86(6)(b) allows a contracting authority to withhold any information which would prejudice the legitimate commercial interests of a particular economic operator. Must the contracting authority meet the provisions of regulation 86(5) of the PCR 2015 in order to rely on regulation 86(6) or are they stand alone provisions?

See Ask, Authorities are required to publish Contract Award Notices within 30 days and Concession Award Notices within 48 days. Is that from the date of legal completion of the contract, the issue of the standstill letter (namely, the date of notice of the contract award decision) or the expiry of the standstill period?

See Ask, Are you required to publish a contract award notice when using the negotiated procedure without prior publication (regulation 32(2)(b)(iii)) to award a public contract?

Electronic procurement

Public procurement relies increasingly on electronic communications (the internet and email). The PCR 2015 set out various minimum requirements in respect of all communications (including electronic). They also introduce some formal procurement procedures based solely on electronic means such as DPSs and e-auctions.

Under the PCR 2015, contracting authorities must publish contract notices electronically (regulation 51(1)).

Contracting authorities must also offer unrestricted and full direct electronic access, free of charge, to the procurement documents from the date of publication of the contract notice (*regulation 53*).

"Procurement documents" include any document produced or referred to by the contracting authority to describe or determine elements of the procurement or the procedure, including the contract notice, technical specifications, descriptive document and proposed conditions of contract.

Regulation 53 allows some exceptions to the mandatory use of electronic communications. These exceptions only apply:

- To substantiated cases of urgency (accelerated procedures).
- Where practical limitations arise from specific file formats, tools, equipment or the need for physical or scale models.
- Where the contracting authority needs to place limits on the confidential information involved.

The PCR 2015 provide for a switch to fully electronic communication, in particular e-submission, in all procurement procedures (regulation 22). For more information, see Practice note, Procurement reforms and e-procurement.

Dynamic Purchasing Systems

For an examination of the operation of dynamic purchasing systems, see Practice note, Dynamic purchasing systems.

Procurement procedures pending at the end of transition period

The separation provisions in part three of the withdrawal agreement expressly require that procedures that were ongoing at the end of the transition period must be completed in accordance with EU law, specifically "relevant rules". For more information, see Practice note, Brexit: withdrawal agreement text: Ongoing public procurement and similar procedures.

Part 2 to the Schedule of the PPAR 2020 implements the specific public procurement separation provisions of part three of the withdrawal agreement.

Paragraph 3 provides that "steady state amendments" (which amend the PCR 2015 to remove provisions which are no longer appropriate after Brexit) do not affect any procedure launched under the PCR 2015 before, and not finalised by, IP completion day (except that regulation 61 (recourse to e-Certis) ceases to be saved nine months after IP completion day).

"Procedure" for these purposes includes a framework tender, a tender for a dynamic purchasing system and a procedure where the call for competition is a PIN or a periodic indicative notice.

A procedure is "launched" when a call for competition or any other invitation to submit applications has been made in accordance with the PCR 2015 or, where the PCR 2015 do not require such a call or invitation, when

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the contracting authority contacted economic operators in relation to the procedure.

A procedure is "finalised" on publication of a contract award notice in accordance with the PCR 2015, or on conclusion of the contract where the PCR 2015 do not require the publication of such a notice, or where the contract is not awarded, when the tenderers or persons otherwise entitled to submit applications are informed of the reasons why the contract was not awarded.

Paragraph 4 provides that if a framework agreement was concluded and had not expired before IP completion day or was concluded after IP completion day but the tender procedure was launched before IP completion day, steady state amendments do not affect any procedure relating to the performance of the agreement, including the award of call off contracts under the agreement, under regulation 33 of the PCR 2015.

Relevance of CJEU procurement case law

The treatment of CJEU case law post-transition for the purposes of the interpretation of retained EU law (which includes the procurement regulations) is dealt with in sections 6 and 7C of the EUWA as amended and the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (*SI 2020/1525*). These set out the rules for when UK courts can or must follow previous case law (subject to the terms of the withdrawal agreement) as follows:

- Retained EU case law means CJEU decisions and general principles of EU law developed by the CJEU, as they had effect in EU law immediately before the end of the transition period, and which relate to retained EU law.
- Retained law is binding on the lower courts, until the Supreme Court or the Court of Appeal (or their closest equivalent courts in Scotland and Northern Ireland) depart from the retained EU case law, or until UK legislation modifies the relevant retained EU law that is being interpreted.
- When interpreting retained EU law which the UK has further modified post-transition, and if doing so is "consistent with the intention of the modifications", UK courts can decide whether or not to follow retained EU case law.
- Retained EU case law includes interpretative rules and principles developed in UK and EU case law.
- In deciding whether to depart from any retained EU case law, the Supreme Court must apply the test it would apply in deciding whether to depart from its own case law (whether it appears right to do so) and the Court of Appeal must apply the same test.
- Other than in the circumstances specified by the withdrawal agreement, UK courts are not bound by any CJEU decisions made or general principles developed after the end of the transition period, but may have regard to them, where relevant.
- Subject to limited exceptions in the withdrawal agreement, the UK will no longer be able to make referrals to the CJEU.
- Questions on the validity, meaning or effect of relevant "separation agreement" law are to be decided in accordance with the withdrawal agreement (section 7C of the EUWA as amended). This includes the EU law relevant to tenders subject to the transitional provisions (see Procurement procedures pending at the end of transition period).
- The withdrawal agreement (Articles 4(4) and (5)) requires any of its provisions referring to EU law or to concepts or provisions of EU law, in their implementation and application, to be interpreted in conformity with relevant CJEU case law handed down before the end of the transition period and that due regard shall be had to EU case law handed down after the end of the transition period. In practice, this means that the UK courts are obliged to continue to apply EU case law principles to disputes in relation to procurements subject to the transitional arrangements, even where the UK higher courts have diverged from those principles.

For more information, see Practice note, Interpretation of retained EU law and UK-EU withdrawal agreement and Practice note, UK-EU withdrawal agreement: CJEU jurisdiction.

Rights of non-UK bidders

Broadly speaking, non-UK bidders will have the same rights to bid for UK procurement opportunities as they did before the transition period ended. GPA bidders will continue to have rights under the PCR 2015 provided the tender is within the relevant EU GPA schedule. EU bidders will continue to have similar but slightly broader rights on the basis of the coverage of the UK-EU Trade Agreement:

- Regulation 89 of the PCR 2015 (duty owed to EEA operators) has been amended by the PPAR 2020 to apply only to UK and Gibraltar economic operators.
- However, regulation 90 (duty owed to economic operators from certain other states), as amended by the PPAR 2020, now provides that, for a period of 12 months after 31 December 2020, the duty in regulation 89 (to comply with Parts 2 and 3 of the PCR 2015 and any enforceable retained EU procurement obligation in respect of a contract falling within Part 2) is a duty owed also to an economic

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operator from a country other than the UK, but only where Condition 1 or Condition 2 or Condition 3 applies to the procurement concerned.

- Condition 1 is that the economic operator is from a GPA state, the procurement may result in the award of a contract and immediately before IP completion day that GPA state had agreed with the EU that the GPA will apply to a contract of that description.
- Condition 2 is that the economic operator is from an EU country, other than the UK, the procurement may result in the award of a contract and immediately before IP completion day the EU had agreed with a GPA state that the GPA will apply to a contract of that description.
- Condition 3 is that, immediately before IP completion day, there was an international agreement, other than the GPA, by which the EU was bound and (on the assumption that the UK were a member state) in accordance with that agreement, the economic operator is, in respect of the procurement concerned, to be accorded remedies no less favourable than those accorded to economic operators from the EU in respect of matters falling within the scope of the duty owed in accordance with regulation 89.

- The extension of the duties under the PCR 2015 to certain non-UK bidders will only apply for 12 months from 31 December 2020. They will therefore lapse on 31 December 2021, except in relation to procurements that commenced before that date (see Part 4 of the Schedule to the PPAR 2020). The explanatory memorandum to the PPAR 2020 confirms that, once the powers under the Trade Bill become available, the government will probably revoke and replace the duties under the procurement regulations towards economic operators from GPA parties and states with whom the UK has international agreements. The UK became a member of the GPA on 1 January 2021, meaning that EU and other non-UK bidders from GPA countries will continue (after 2021) to have rights to bid for UK procurement opportunities to the extent that the UK's coverage schedules allow.
- As explained above, the EU-UK Trade and Cooperation Agreement goes further in certain respects than the EU GPA schedules. The PCR 2015 as amended should therefore be read as providing EU economic operators with rights in relation to procurements covered by the EU-UK agreement (see Practice note, European Union (Future Relationship) Act 2020 and Practice note, UK replacement of EU trade agreements).

Prompt payment of undisputed invoices

Contracting authorities must ensure their contracts contain provisions requiring:

- Them to pay undisputed invoices within 30 days (subject to any contractual or statutory obligation to pay earlier).
- Them to consider and verify all invoices submitted by a contractor in a timely fashion and that undue delay in doing so is not sufficient justification for failing to regard an invoice as valid and undisputed.
- Any sub-contract awarded by the contractor includes the same provisions, and that such terms are passed down through the supply chain.

(Regulation 113, *PCR 2015*.)

Where these provisions are not included in a public contract, they will be implied.

(See also Legal update, State must ensure that public authorities pay their debts on time (CJEU)).

Contracting authorities must have regard to guidance published by the Cabinet Office which recommends model provisions, including provisions defining the circumstances in which an invoice is to be regarded as being, or as having become, valid and undisputed (see EU procurement directives and the UK regulations (guidance)).

See also Legal update, Public Procurement (Electronic Invoices etc.) Regulations 2019 made which provide that e-invoices must be accepted and processed. Such a term will be implied where there is not an express term to this effect. These regulations have been supplemented by PPN 03/19 which is explained in Legal update, Cabinet Office publishes Procurement Policy Note 03/19 concerning e-invoicing. This PPN sets out the required actions for contracting authorities and other contracting entities further to the majority of the provisions of the Public Procurement (Electronic Invoices etc.) Regulations 2019 (*SI 2019/624*) coming into force on 18 April 2019. The PPN includes, in Annex A, a model e-invoicing contract clause and states that central contracting authorities should include it in applicable contracts with immediate effect. Subject to certain exceptions, sub-central contracting authorities and utilities have until 18 April 2020 to comply with the new requirements but may voluntarily do so earlier.

Records and reports

Regulation 83 (retention of contract copies) was amended on IP completion day by the PPAR 2020 to provide that contracting authorities must, for the duration of the contract, keep copies of all contracts with a value of at least:

- £884,720 in the case of public supply contracts or public service contracts; and
- £8,847,200 in the case of public works contracts.

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Contracting authorities must grant access to those contracts, but access may be denied to the extent provided for in the rules on access to documents and data protection applicable in the relevant part of the UK (regulation 83*, PCR 2015*).

Regulation 84 provides that authorities are required to make and retain tender reports that contain a list of specified details, including:

- The names of selected and rejected tenderers and the reasons for selection and rejection.
- Details of subcontractors.
- Circumstances justifying the use of the competitive negotiated procedure and competitive dialogue procedure.
- Conflicts of interest identified and action taken.

Authorities are also required to document the progress of tenders, including sufficient documentation to justify decisions taken at every stage, such as the preparation of tender documents, dialogue and selection and award of tenders.

These "regulation 84" reports will be largely disclosable in any procurement litigation, and generally should be made available to claimants or potential claimants at an early stage of or prior to a claim without them having to resort to applications for specific disclosure. They may also be requested by the Cabinet Office Minister (or Welsh Ministers/Northern Ireland Department).

(Regulation 84 PCR 2015, as amended by PPAR 2020.)

See *TCC Guidance Note on Procedures for Public Procurement Cases (Appendix H to the TCC Guide) at paragraphs 6 and 25* and Legal update: TCC Guidance on public procurement cases published.

Other domestic legislation and policies

Aside from international and EU derived public procurement rules, there are a variety of domestic driven policies and rules regulating the exercise of public procurement functions by public bodies. For example, the Local Government 1988 contains provisions prohibiting local authorities from taking into account "non-commercial considerations" in procurement, and includes a prohibition on considering the country or territory of origin of a provider's supplies (see Practice note, PCR 2015: sustainable procurement: The prohibition of "non-commercial" policies under the Local Government Act 1988). These rules and legislation are not directly affected by Brexit and are outside the scope of this note.

However, the PPAR 2020 have amended some primary legislation which applies to public procurement.

Regulation 3 of the PPAR 2020 substitutes references to the Publications Office of the European Union with those to the UK e-notification service in the Greater London Authority Act 1999.

Section 155(2) of the Equality Act 2010 provides that regulations under sections 153 or 154 may impose duties on a contracting authority within the meaning of the Public Sector Directive in connection with its public procurement functions. Regulation 4 of the PPAR 2020 substitutes the reference to the Public Sector Directive by that to the PCR 2015 and defines "public procurement functions" as those regulated by Part 2 of the PCR 2015.

Enforcement and remedies

Who can bring a claim?

For an analysis of the scope of the definition of "economic operator" with particular reference to not-for-profit providers, see Legal update, Non-profit-making bodies unlawfully precluded from participating in public procurement procedure even though entitled to offer same services under national law (ECJ). See also Legal update, Consortium without legal personality is not an economic operator under the PCR 2015 (TCC). In *Community R4C Ltd v Gloucestershire County Council [2020] EWHC 1803 (TCC)*, CR4C argued that the contracting authority, (council), should have tendered for the provision and management of an energy from waste plant. This was intended to have been conducted under a contract signed in 2013 (which was preceded by a procurement exercise), but additional contractual arrangements had to be put in place in 2016 (2016 contract). CR4C claimed that the 2016 contract constituted a new contract under the PCR 2015, while the council stated that this was an insubstantial modification to the 2013 contract and did not require a fresh procurement exercise by virtue of regulation 72. CR4C sought damages. In a preliminary issue judgment, the TCC held that CR4C was not an economic operator at the time of the hypothetical procurement because it did not then have legal personality and was not offering works or services to meet the requirements of the hypothetical tender. CR4C only registered as a Community Benefit Society after the hypothetical tender.

The rights of non-UK economic operators under regulation 90 of the PCR 2015, as amended by the PPAR 2020, are explained in Rights of non-UK bidders.

Further to regulation 91 of the PCR 2015, a breach "is actionable by any economic operator which, in consequence, suffers or risks suffering loss or damage". This could include a consortia member or key sub-contractor as well as a tenderer.

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Limitation period

The limitation period is as follows:

- Proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.
- The court may extend the time limit where it considers that there is a good reason for doing so.
- The court must not exercise its power to extend the 30 day time limit so as to permit proceedings to be started more than three months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

Proceedings are to be regarded as started when the claim form is issued.

(Regulation 92 PCR 2015.)

The test for actual or constructive knowledge applied by the courts is when the claimant had knowledge of the basic facts which clearly indicate an infringement. This may be before it is informed that it was unsuccessful (*Jobsin v Department of Health [2002] I CMLR 44*; *Turning Point Ltd v Norfolk County Council [2012] EWHC 2121 (TCC)*.

The issue of limitation often arises in relation to amendments to statements of case made following disclosure. In *Accessible Orthodontics (O) Ltd v NHS Commissioning Board [2020] EWHC 785 (TCC) (21 April 2020)* at paragraphs 31 to 33, the court found that although the amendments (based on debrief reports provided some 18 months previously) challenged the scoring of the winning tenderer's bid for the first time (the previous claim having related to the scoring of the claimant's tender), they did not amount to a new claim and were not therefore subject to any limitation period.

In some cases, the courts have in the past taken a strict approach in relation to applications for extensions to the 30 day limitation period (see *Turning Point Ltd v Norfolk County Council [2012] EWHC 2121 (TCC)* and *Mermec UK Ltd v Network Rail Infrastructure Ltd [2011] EWHC 1847 (TCC)*). However, the courts have indicated more recently that they are open to the grant of extensions where there was good reason based on all the circumstances (*Perinatal Institute v. Health Quality Improvement Partnership [2017] EWHC 1867 (TCC) and [2018] EWHC 545 (TCC) and Amey Highways Ltd v West Sussex County Council [2018] EWHC 1976 (TCC)*), although see the stricter approach taken in *Riverside Truck Rental Ltd v Lancashire County Council [2020] EWHC 1018 (TCC)* (see Legal update, Procurement and judicial review challenges to contract award ruled out of time (TCC)).

Remedies

The remedies available under the PCR 2015 include:

- An order to set aside a decision of a contracting authority in the course of a tender procedure.
- The award of damages to an operator which has suffered loss or damages as a result of a breach.
- The remedy of prospective ineffectiveness of the contract where the relevant grounds are met (for example, failure to advertise an awarded contract, or breach of the procurement rules matched with a breach of the standstill or suspension provisions).
- Financial penalty imposed on the contracting authority.

(Regulations 97 – 100 , *PCR 2015*.)

Different time limits apply to the ineffectiveness remedy under regulation 93 (30 days where a compliant contract award notice has been published or from when the unsuccessful bidder has been informed of the outcome and given relevant reasons. Otherwise, 6 months from the date of the contract).

The automatic suspension of a contract award process once proceedings are issued (under regulation 95 of the PCR 2015) can be brought to an end on the application of the contracting authority. The court considers whether, if the automatic suspension were not in operation, it would not be appropriate to make an interim order suspending the award (applying *American Cyanamid*). For more information on the remedies available under the PCR 2015, see Practice note, Remedies in public procurement law.

Future UK procurement regime reform

On 15 December 2020, the UK government published a green paper, 'Transforming public procurement', consulting on proposals to amend the UK's public procurement regime. The consultation deadline is 10 March 2021. For a summary of the proposals outlined in the green paper, see Legal update, Government publishes proposals for post-Brexit transformation of the public procurement regime (long update).

Checklist of key practical considerations for contracting authorities

- Consider at the outset what needs to be procured, what sort of potential bidders could deliver the requirement, what contractual structure would be

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optimal and what sort of tenders would deliver the requirement on a best value basis, that is, what does "good" look like?

- Consider the risk profile of the contract. See Legal update, MHCLG publishes report on review into risks of fraud and corruption in local government procurement.
- Consider the social value of your approach to procurement and whether social or environmental criteria or conditions may be appropriate and permissible.
- Consider breaking the tender into lots in order to make it more accessible for SMEs and the possibility of limiting the number of lots that bidders can apply for.
- Consider early on whether the PCR 2015 will apply, and, if so, to what extent (including whether a contract notice is needed and whether any exclusions or exemptions might be available).
- Engage with the market prior to the tender procedure ensuring that no favouritism is shown to particular potential bidders and no conflicts of interest are created.
- Consider the below threshold regime for smaller contracts.
- Consider carefully which procedures may be followed and which of those is most appropriate.
- Design the requirement and selection and award criteria, having regard to the range of permissible criteria under the PCR 2015.
- Consider carefully the questions, criteria, weighting and other tender rules (dealing for example with clarifications and abnormally low tenders) so as to ensure that the tender documents are clear and fit for purpose.
- Carry out conflict of interest checks on the evaluators and other procurement staff and provide proper training for evaluators and moderators, ensuring everyone knows their role.
- Explain to bidders:
  - how the process will be run;
  - what will happen at each stage;
  - the selection and award criteria and scoring methodology; and
  - how bidders will be selected and bids evaluated.
- Keep full records of the tender process and documentation, including minutes of all key meetings and detailed records of all evaluation and moderation sessions and fully document all decisions made and the reasons for those decisions.
- Follow the tender rules ("do what you say you are going to do").
- Ensure equal treatment of candidates, in particular with regard to provision of information, selection and award.
- Once a decision has been made to award the contract, ensure sufficient information is provided to unsuccessful bidders in sufficient time before the contract is concluded by following the standstill rules.

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