

# Public procurement in the UK

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Status: **Law stated as at 09-May-2023** | Jurisdiction: **England, Wales**

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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.

**Note:** The Cabinet Office 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 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 as regards procurements commenced in 2020 and 2021 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.

For general guidance, see [Procurement Policy Note 02/22 – The Consultancy Playbook v1.1](#). The 2022 Sourcing Playbook is the third annual iteration (and is a rebranding) of the Outsourcing Playbook. It sets out how government departments should approach service delivery and how contracting authorities and suppliers should engage with each other. The Sourcing Playbook is published alongside the Consultancy Playbook and

various other guidance notes on matters such as cost modelling, delivery model assessment, bid evaluation and assessing financial and economic standing. These Playbooks apply to Government Departments, their Executive Agencies and Non Departmental Public Bodies and constitute good practice for the wider public sector.

## 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. The EU rules comprised EU directives and EU principles.

### EU Directives

Prior to Brexit, the following directives set out the primary EU legal framework (procurement directives):

- Directive 2014/23 on the award of concession contracts.

- Directive 2014/24 on public procurement and repealing Directive 2004/18.
- Directive 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17.
- Directive 2009/81/EC on defence and security procurement.
- There are also specific directives on remedies.

### 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 in England, Wales and Northern Ireland by:

- The Public Contracts Regulations 2015 (SI 2015/102) (PCR 2015).
- The Concession Contracts Regulations 2016 (SI 2016/273) (CCR 2016).
- The Utilities Contracts Regulations 2016 (SI 2016/274) (UCR 2016).
- The Defence and Security Public Contracts Regulations 2011 (SI 2011/1848) (DSPCR 2011).

(Together, the procurement regulations).

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

The 2015 and 2016 regulations were the result of a 'copy-out' approach to transposition adopted by the Cabinet Office and so, with a small number of notable exceptions, very closely mirror 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 \(Part 4, PCR 2015\)](#)).

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.

### Agreement on Government Procurement (GPA)

While 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 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 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 in a GPA country had the same rights as an EU-based supplier and could bring a claim (and seek remedies) under the procurement regulations. (See Rights of non-UK bidders for the changes made to the PCR 2015 to reflect the GPA accession).

## Withdrawal from the EU: legislation and agreements

### European Union (Withdrawal) Act 2018

The European Union (Withdrawal) Act 2018 (EUWA) is the legislative measure which, together with the European Union (Withdrawal Agreement) Act 2020 (WAA), prepared the UK's legislative framework for after its withdrawal from the EU.

This includes:

- **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 EU-derived domestic legislation (such as the procurement regulations) was preserved. 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](#).
- **The power to make implementing legislation.** This included, 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

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 procurement regulations 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 DSPCR 2011. The DSPCR 2011 are outside the scope of this note.

### UK independent membership of the GPA

The UK became an independent member of the GPA on 1 January 2021. The UK coverage schedules ([WTO: Appendix 1: The United Kingdom](#)) substantially replicate the EU's coverage schedules under the GPA.

On 28 July 2021, the Cabinet Office published the [United Kingdom's Revised Coverage Schedule to the Agreement on Government Procurement](#), reflecting changes which entered into force on 16 May 2021. The UK's Annex 1 was modified to show an updated list of central government authorities. The changes primarily reflect mergers and transfers of function, for example the Office of Fair Trading is replaced by the Competition and Markets Authority. NHS Foundation Trusts have also been added. The Public Procurement (Agreement on Government Procurement) (Amendment) (No 2) Regulations 2021 (*SI 2021/872*) amend Schedule 1 of the PCR 2015 with effect from 16 August 2021, to reflect the Annex 1 changes (see [Legal update, Public Procurement \(Agreement on Government Procurement\) \(Amendment\) \(No 2\) Regulations 2021 laid before Parliament](#)).

Various other minor amendments to the PCR 2015, UCR 2016 and CCR 2016 (as well as their Scottish equivalents) were made by the Public Procurement (Agreement on Government Procurement) (Amendment) Regulations 2021 (*SI 2021/573*) to give effect to UK obligations under the GPA.

These regulations were adopted under the Trade Act 2021.

For more information about the Trade Act 2021, see [Practice note, Trade Act 2021](#) in particular [Practice note, Trade Act 2021: Implementation of the Agreement on Government Procurement](#).

### UK-EU trade and co-operation agreement

The [UK-EU trade and co-operation agreement](#) (TCA) entered into force at 11.00pm (UK time) on 30 April 2021 (having previously applied on a provisional basis since the end of the transition period). It is the main agreement that governs the UK-EU trading relationship post-Brexit.

The European Union (Future Relationship) Act 2020 implements the future relationship agreements into UK law (see [Practice note, European Union \(Future Relationship\) Act 2020](#)).

For more information on the future relationship agreements, see [UK legal change post-transition and UK-EU agreements toolkit: Future UK-EU relationship](#).

### Procurement provisions in the TCA

The TCA contains specific provisions relating to public procurement (*Title VI: Public Procurement (Articles 276 to 294) and Annex 25*). 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 falls outside the GPA schedules as supplemented by the TCA (subject to specified exceptions such as national security and the protection of public health), the procuring party must still 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 (*Articles 287 to 288, TCA*).

[Procurement Policy Note 02/21: The WTO GPA and the UK-EU TCA \(February 2021\)](#) advises contracting authorities to familiarise themselves with the UK's

commitments in relation to procurement under the TCA. Where the agreement's provisions are not already implemented by the relevant procurement regulations, the European Union (Future Relationship) Act 2020 (section 29) effectively provides that those regulations are modified to give effect to their provisions.

Annex A of PPN 02/21 contains an overview of the procurement provisions in the TCA.

### International trade agreements

The Public Procurement (International Trade Agreements) (Amendment) Regulations 2021 (*SI 2021/787*) give effect in domestic regulations to the UK's procurement obligations covered by UK-third party international trade agreements signed with countries that had an agreement with the EU before exit day. It requires contracting authorities to give effect to those obligations when carrying out their procurements. This instrument is made under section 2 (implementation of international trade agreements) of the Trade Act 2021 and creates a new schedule in the PCR 2015 which lists the international trade agreements containing relevant procurement provisions. See [Legal update, Public Procurement \(International Trade Agreements\) \(Amendment\) Regulations 2021 come into force](#). See also Rights of non-UK bidders for the changes made to the PCR 2015 to reflect rights under international trade agreements other than the GPA.

### UK procurement law after the transition period

The 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](#).

The Cabinet Office has also published [Procurement Policy Note 05/21: National Procurement Policy Statement](#) (PPN 05/21) together with the [National Procurement Policy Statement](#) (NPPS). PPN 05/21 sets

out information and guidance on the NPPS requiring contracting authorities to have regard to certain national strategic priorities when exercising their public procurement functions. Contracting authorities should consider national priority outcomes (which are also termed social value outcomes) alongside any additional local priorities when they are conducting a procurement. These outcomes include creating new businesses, jobs and skills, tackling climate change and reducing waste, and improving supplier diversity, innovation and resilience. The national priorities are explained in further detail in the NPPS. See [Legal update, National Procurement Policy Statement and accompanying Procurement Policy Note 05/21 published](#). See also [Legal update, LGA publishes National Procurement Strategy for Local Government in England 2022](#).

For Wales see [Legal update, Welsh Government issues update on Wales Procurement Policy Statement \(September 2022\)](#).

### 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 and NHS Foundation 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 treated as 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:

- (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.” (ECJ 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, a reduced dependency on government funding and a more commercial character may take certain RPs outside the scope of the PCR 2015. 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.

### 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.
- A proposed public works contract.

- A proposed public services contract.
- A proposed contract for the provision of certain social or other specific services (for which the "light-touch" regime applies).
- 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 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 and Excluded contracts).
- Has an estimated value which is below the relevant threshold (see Thresholds) (but see also 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” arrangement and thus fall outside the scope of the public procurement rules:

- 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 ECJ also confirmed, notably in *Coditel Brabant SPRL v Commune of Uccle (Case C-324/07)*, that the 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 clarifications. These exempt 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.
- 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 private 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 for the purposes of regulation 12:

- 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.

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

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 *Presstext*. 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 “economic or technical” reasons and 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). A notice, describing the modification made, must then be published in the UK e-notification service 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)*)
- Modification is permitted where the need arises from circumstances that “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. (*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 permitted where it is not deemed “substantial”. A modification will be substantial where it:
  - renders the contract materially different in character from the one initially concluded;
  - 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.

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 UCR 2016) (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).
- Contracts awarded further to certain international treaties or agreements entered into with another country or international organisation (regulation 9).
- Contracts for the acquisition of land and rights over land (regulation 10).

- Contracts for programme material or broadcasting time (regulation 10).
- Arbitration or conciliation services contracts. (See [Legal update, Legal and arbitration services lawfully excluded from competition \(ECJ\)](#)) (regulation 10).
- 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).
- Loan contracts and contracts for financial services related to the issue or transfer of shares and other instruments (regulation 10).
- 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).
- Certain civil defence and protection services contracts. (regulation 10). (See [Legal update, Judgment on preliminary reference ruling from Italian court on direct award of medical transportation contracts to voluntary organisations \(ECJ\)](#)).
- 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).
- Political campaign services contracts (regulation 10).
- 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 (regulation 11).
- Works contracts that are subsidised up to 50% by a contracting authority (regulation 13).
- 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).
- 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 DSPCR 2011 (regulation 15).

- Concession contracts within the meaning of the CCR 2016 (regulation 2).

### 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:

- 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.

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). 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.

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, 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 framework agreement sets out all the terms governing the provisions of the works, services or supplies 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. (*Regulation 33(8)(a) PCR 2015*)
- **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 requirement 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. (*Regulation 33(8)(b)(c) and 33(11)*)

The Crown Commercial Service has issued [Guidance on framework agreements \(updated October 2016\)](#).

See *Consultant Connect Limited v NHS Bath and North East Somerset, Swindon and Wiltshire Integrated Care Board & Others* [2022] EWHC 2037 (TCC) for a recent example of a case where it was held that a direct contract award was made in breach of the framework rules and where the design of the procurement was made with the intention of artificially narrowing competition and/or the intention of unduly favouring or disadvantaging certain economic operators in breach of regulation 18 of the PCR 2015. The third grounds for a declaration of ineffectiveness were met and an order shortening the contract was made.

### 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 under the PCR 2015 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 without the need to go out to tender for these services.

For further information, see [Practice note, Collaborative procurement: taking advantage of a contract awarded by a central purchasing body](#).

### 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 was net of VAT but is inclusive of VAT from 1 January 2022 (regulation 5(1), PCR 2015 as amended by Public Procurement (Agreement on Government Procurement) (Thresholds) (Amendment) Regulations 2021) 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 (the estimated monthly value of the contract is calculated and a multiplier of 48 is then applied) (*regulations 5 and 6, PCR 2015*).

For information on the currently applicable thresholds, see [Checklist, Public procurement thresholds](#). 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.

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 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 account of both the cost of the works and the total estimated value of the supplies and services that are made available to the contractor by the contracting authority provided that they are necessary for executing the works (*regulation 6(10)*).
- **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)*).

### 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 £12,000 or more (central government) or £30,000 or more (sub-central authorities and NHS Trusts and Foundation Trusts) (inclusive of VAT from 1 January 2022):

- In circumstances where the authority decides to advertise a contract award opportunity, 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*)
- The rules also 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 operator 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 ECJ case law. These TFEU principles applied whether or not the procurement was caught by the 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.



See the ruling of HHJ Keyser QC in *Adferiad Recovery Limited v Aneurin Bevan University Health Board* [2021] EWHC 3049 (TCC) at [118] to [121]. [Legal update, Welsh Health Board granted summary judgment in a procurement claim challenging award of contract for mental health sanctuary service \(High Court\): Breach of EU retained law \(ground two\)](#).

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 key general principles of EU law. EU general principles will continue to play an interpretative role in relation to regulation 18 and other regulations which refer to those principles.

For more information, see [Practice note, European Union \(Withdrawal\) Act 2018: exceptions to savings and incorporation](#).

### 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 together, are:

- **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, 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.

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

From 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 now be submitted to and published on the UK's e-notification service, 'Find a Tender' (FTS)

(regulation 51). This requirement was introduced by the PPAR 2020.

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. (See also Annex A to [Procurement Policy Note 10/20: Public Procurement after the Transition Period ends on 31 December 2020](#).)

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 (regulation 52 PCR 2015). 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, Cabinet Office guidance and additional policy requirements at opportunity stage and Publishing contract award notices on Contracts Finder](#).

The requirement to send notices advertising the tender 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.

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

In certain circumstances, a negotiated procedure may be used **without** publishing a contract notice (see regulation 32 PCR 2015). 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)*).
- 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; or



- competition is absent for technical reasons or for the protection of exclusive rights, including intellectual 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)).

- 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)). (See [Legal update, Cabinet Office: Procurement Policy Note 01/21: Procurement in an Emergency published](#)).

An interesting question arises as to whether the application of regulation 32(2)(c) disapplies other parts of the PCR 2015, such as regulation 18. In other words, whether regulation 32(2)(c) means that a direct award can be made without considering alternative providers. On an appeal by the Minister for the Cabinet Office from a finding of apparent bias and breach of the PCR 2015 relating to the procurement of focus group services and a cross appeal relating to regulation 32(2)(c), the Court of Appeal held, in *R (Good Law Project) v Minister for the Cabinet Office* [2022] EWCA Civ 121, that in cases of extreme urgency there was no requirement for the authority to conduct an exercise comparing Public First with alternative providers. This was on the basis that the Minister was entitled to make his own evaluative assessment in a close-knit market as to which agency was best suited to his needs. (See also the (earlier) finding of O'Farrell J in *Good Law Project Limited and Everydoctor v The Secretary of State for Health and Social Care* [2022] EWHC 46 that the application of regulation 32(2)(c) does not disapply regulation 18, subject to the point that equal treatment would have no application where only one provider can supply the works, services or supplies).

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 SMEs, 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: 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 regulations contain 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 service providers advising the authority in the conduct of the procurement.

The court held 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](#).

In *Consultant Connect Limited v NHS Bath and North East Somerset, Swindon and Wiltshire Integrated Care Board* [2022] EWHC 2037, the court held that the procurement process which was undertaken breached principles of equal treatment and transparency and regulation 24

of the PCR 2015. See [Legal update, Challenge to joint procurement for contract to supply the NHS largely succeeds and breaches sufficient to justify an award of damages and payment of civil penalties \(High Court\): Breach of PCR 2015 \(issues three, five, six and seven\)](#).

See also [Legal update, Procurement Policy Note 04/21: Exclusions, Conflicts of Interest and Whistleblowing published](#).

### 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, 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
<b>Open</b>	<ul style="list-style-type: none"> <li>• All interested parties can submit a tender</li> <li>• No negotiation with bidders is permitted</li> <li>• Suitable where tenders will be easy to evaluate</li> </ul>	<ul style="list-style-type: none"> <li>• 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</li> </ul>
<b>Restricted</b>	<ul style="list-style-type: none"> <li>• 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</li> <li>• A minimum of five qualified candidates must be invited to tender (unless fewer qualified candidates have applied)</li> <li>• Contract awarded to the most economically advantageous (MEAT) tender. No provision for any negotiation.</li> </ul>	<ul style="list-style-type: none"> <li>• There are no restrictions on when this procedure can be used</li> </ul>
<b>Competitive dialogue</b>	<ul style="list-style-type: none"> <li>• Interested parties meeting the contracting authority's selection criteria may be invited to participate in dialogue</li> <li>• A minimum of three candidates must be invited to dialogue (unless fewer qualified candidates have applied)</li> <li>• The contracting authority enters into a dialogue with bidders to develop one or more suitable solutions to meet its needs</li> </ul>	<ul style="list-style-type: none"> <li>• May be used to procure contracts for works, supplies or services where one or more of the following apply: <ul style="list-style-type: none"> <li>– the needs of the contracting authority cannot be met without adaptation of readily available solutions;</li> <li>– they include design or innovative solutions;</li> </ul> </li> </ul>

Procedure	Key features	Permitted circumstances
	<ul style="list-style-type: none"> <li>During the course of the dialogue the contracting authority is able to reduce the number of bidders (down-selecting)</li> <li>When one or more appropriate solution(s) have been identified, the dialogue phase concludes and final tenders are invited based either on a chosen solution or on each tenderer's proposed solution</li> <li>The contracting authority assesses the tenders and selects the best tender based on the published award criteria. There is limited scope for negotiation at this stage: only confirming aspects of the bid and finalisation of terms is permitted</li> <li>The award criteria must not solely be based on price, they must identify the most economically advantageous tender</li> </ul>	<ul style="list-style-type: none"> <li>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;</li> <li>the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, common technical specification; or</li> <li>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</li> </ul>
<b>Competitive procedure with negotiation</b>	<ul style="list-style-type: none"> <li>A selection is made of those who respond to the advertisement and only they are invited to submit an initial tender for the contract</li> <li>The contracting authority may then open negotiations with the tenderers to seek improved offers</li> </ul>	<ul style="list-style-type: none"> <li>Same as for competitive dialogue</li> </ul>
<b>Innovation Partnership</b>	<ul style="list-style-type: none"> <li>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</li> </ul>	<ul style="list-style-type: none"> <li>May be used where the authorities have identified a need for innovative products/ services/works that are not already available on the market. This "need" and the minimum requirements must be stated in the procurement documents</li> </ul>

## 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 equivalent, seeking information about candidate 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 or negotiation).

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, Cabinet Office publishes guidance on tackling modern slavery in government supply chains](#). 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), 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 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) provide considerable flexibility as to the appropriate requirements and selection criteria, though all requirements must be related and proportionate to the subject-matter of the contract.

- With regard to financial standing, economic operators may be required to provide information on their annual accounts showing that they meet certain ratios, for example, between assets and liabilities. 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 quality 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. It is also an established principle that “*Failure to follow published policy, absent good reason for departing from it, is an established ground for judicial review.*” (See *R (Good Law Project Limited) and Others v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin) per Chamberlain J at [127]).

On 9 March 2023, the Crown Commercial Service and the Cabinet Office jointly published [Procurement Policy Note 03/23](#) (PPN 03/23), which comprises an updated standard Selection Questionnaire (SQ) and accompanying statutory guidance for above threshold procurements under the PCR 2015 and applies to all contracting authorities in England and contracting authorities in Wales and Northern Ireland which exercise reserved functions. PPN 03/23 replaces PPN 08/16. See [Updated public procurement Selection Questionnaire and statutory guidance published](#). The guidance requires contracting authorities to adhere to a standard SQ containing a standardised set of questions. It also clarifies certain points. For example, it is explained that where a potential supplier is relying on another member of its corporate group or a sub-contractor to meet selection criteria (eg using case studies involving the sub-contractor to show capability), that entity should be treated as being part of the bidder group/consortium and must complete Parts 1 and 2 (including the declaration on grounds of exclusion).

See also Procurement Policy Note 04/15: taking account of suppliers’ past performance and [Procurement Policy Note 04/19: Taking account of a supplier’s approach to payment in the procurement of major contracts](#). See also [Legal update, Procurement Policy Note 04/21: Exclusions, Conflicts of Interest and Whistleblowing published](#).

On 5 June 2021, the Cabinet Office published a PPN on carbon reduction plans (see [Legal update, Procurement Policy Note 06/21: Taking account of Carbon Reduction Plans in the procurement of major government contracts published](#)).

PPN 06/21 applies to all central government departments, their executive agencies and non-departmental public bodies (in-scope organisations) when procuring goods or services or works on or after 30 September 2021 with an anticipated contract value above

£5 million per annum (excluding VAT) which are subject to the PCR 2015 save where it would not be related and proportionate to the contract. As part of assessing a supplier's technical and professional ability, in-scope organisations should include, as a selection criterion, a requirement for bidding suppliers to provide a Carbon Reduction Plan (CRP) (using the template at Annex A of PPN 06/21) confirming the supplier's commitment to achieving "Net Zero" by 2050 in the UK, and setting out the environmental management measures that they have in place and which will be in effect and utilised during the performance of the contract.

The Welsh Government has published two further PPNs on its own decarbonisation plans to meet the target for net zero carbon emissions in the public sector in Wales by 2030 (see [Legal update, WPPN 06/21 concerning decarbonisation in public procurement in Wales published](#) and [Legal update, Welsh Procurement Policy Note \(WPPN 12/21\) concerning decarbonisation in procurement: Addressing CO2e in supply chains published](#)).

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

### 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" (MEAT).

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](#).

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 on award criteria

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 MEAT (*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 rules require that tender criteria are sufficiently clear and transparent, so that diligent tenderers could understand them in the same way. In *Healthcare at Home Ltd v The Common Services Agency* [2014] UKSC 49, the Supreme Court applied the “reasonably well-informed and normally diligent tenderer” (or RWIND) test, originally articulated by the ECJ in *Case C-19/00 SIAC Construction Ltd v County Council of the County of Mayo* ([2001] ECR I-7725) (at paragraph 42). The ECJ held that the RWIND test is an objective standard and is applied by reference to a hypothetical tenderer. The ECJ 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 \(High Court\)](#)).

See also [Bechtel v HS2: A case study on the nature of judicial oversight of procurement claims](#).

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*). The distinction is broadly as follows:

- **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.

The court considered the EU case law (*Dynamiki v Commission* 2008 T-345/03 and *Amplexor v Commission* T-211/17) on award criteria which seek to redress incumbency advantage recently in *Bromcom Computers Plc v United Learning Trust & United Church Schools Trust* [2022] EWHC 3262 (TCC). The test applied in the caselaw is that there is no obligation to neutralise incumbency advantage unless doing so is (a) technically easy to effect, (b) economically acceptable and (c) does not infringe the rights of the incumbent. However, any criteria must be linked to the subject-matter of the contract under regulation 67 and it was held in *Bromcom* that accepting a price rebate based on an existing contract (held by the incumbent) infringed regulation 67 of the PCR 2015.

### Equal treatment, transparency and proportionality

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.”

Stuart-Smith J (as he then was) added in *Stagecoach East Midlands Trains Ltd and others v Secretary of State for Transport* [2020] EWHC 1568 (TCC) at [26]:

“There is, however, a wide margin of discretion available to a contracting authority in designing and setting award criteria and the fact that some potential bidders will find it relatively more or less easy than it is for others to comply with those criteria does not establish or even necessarily provide evidence of a breach of the equal treatment principle. What is forbidden is unequal treatment that falls outside the margin of discretion that is open to a contracting authority or that is “arbitrary or excessive”.

The above statement was adopted by Fraser J in *Bechtel v HS2 Ltd* [2021] EWHC 458 (TCC) in finding that equal treatment is not a hard-edged principle.

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 and *Bechtel* at paragraphs 274 to 278, where a technical breach of the duty of transparency was established which was *de minimis* and had no causative effect. In *Bromcom*

*Computers Plc v United Learning Trust & United Church Schools Trust* [2022] EWHC 3262 (TCC), Waksman J held that a proper reasoned moderation exercise is necessary to satisfy the transparency principle and that “averaging” is not permissible as a form of moderation as it does not entail the giving of any reasons for the scores awarded.

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). See also the discussion of the principles governing clarification in *Inhealth Intelligence Limited v NHS England* [2023] EWHC 352 (TCC).

The proportionality principle also means that authorities must strike a sensible balance: “No contracting authority or utility is required to assume an enormous procedural burden, with the associated high costs, to protect itself to the *n<sup>th</sup>* degree from a challenge in a procurement competition.” (*Bechtel* at paragraph 313)

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 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. See also the comments of Fraser J on the nature of judicial oversight and the “suitable recognition of the institutional competence” of decision makers (*Bechtel* at paragraphs 18 to 25).

However, where a manifest error is established, the court may 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 *Energy Solutions 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 provisions referred to in regulation 56(2) (obligations relating to environmental, social and labour law).

Regulation 69 used to provide 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 284 to the ability of authorities to verify whether the price takes into account the grant of subsidies, further to Article XV of the GPA and regulation 69(2)(g) of the PCR 2015 now allows authorities to seek explanations relating to whether the price or costs take into account the grant of subsidies. See [Legal update, Public Procurement \(International Trade Agreements\) \(Amendment\) Regulations 2022 come into force](#).

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 and followed in *Bechtel* at paragraph 463. 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.
- Absent a satisfactory explanation, the authority must reject the tender where it is abnormally low due to non-compliance with obligations referred to in regulation 56(2) of the PCR 2015 (non-compliance with obligations in fields of environmental, social and labour law).
- Otherwise, the authority is entitled to reject the tender if the evidence does not satisfactorily account for the low level of price, but it is not required to do so.
- 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 and requires that candidates and tenderers are informed of the grounds for abandonment. This may take place prior to the award decision or possibly later when the decision is challenged. 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 reinstate 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 regulation 86 of the PCR 2015. Save in specified circumstances (notably where prior publication of a contract notice is not required or where the contract is called off from a framework), 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:

“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](#). See also the judgment of Fraser J in *Bechtel* at paragraphs 309 to 311.

### Contract award notices

Regulation 50 of the PCR 2015 provides that not later than 30 days after the award of a contract or the conclusion of a framework agreement, contracting authorities must send for publication a contract award notice on the results of the procurement procedure. Certain information may be withheld where its publication would impede law enforcement, be contrary to the public interest, would prejudice the commercial interests of a particular operator or might prejudice fair competition. See [Legal update, Judgment on preliminary reference ruling from Polish court on excessive treatment of confidential information in procurement procedures \(ECJ\)](#).

Following Brexit, publication is now required on the UK e-notification service.

In *R (Good Law Project Ltd) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin), the court held that, when awarding contracts for goods and services in the COVID-19 pandemic, the Secretary of State for Health and Social Care unlawfully failed to comply with regulation 50 of the PCR 2015 and with government policy requiring the publication of certain tender and contract documents. (See [Legal update, Secretary of State for Health and Social Care failed to comply with procurement regulations and government policy requiring publication of tender and contract documents when awarding contracts during COVID-19 pandemic \(High Court\)](#)).

### 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 introduced 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:

- 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, Electronic 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 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 ECJ procurement case law

The treatment of ECJ 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 ECJ decisions and general principles of EU law developed by the ECJ, as they had effect in EU law immediately before the end of the transition period, and which relate to retained EU law.
- In general, retained EU case law is binding on the lower courts (when interpreting retained EU law), 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.
- However, 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 ECJ 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 ECJ.
- 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).

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 had before the transition period ended. GPA bidders will continue to have rights under the PCR 2015 provided the tender is within the relevant GPA schedule. EU bidders will continue to have similar but slightly broader rights on the basis of the coverage of the TCA. In more detail:

- Regulation 89 of the PCR 2015 (duty owed to EEA operators) was amended by the PPAR 2020 to limit the duty owed (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) to UK and Gibraltar economic operators.
- Regulation 90 was amended by the PPAR 2020 to provide (in somewhat complex provisions which are no longer relevant to procurements commenced after 1 January 2022) that, for a period of 12 months after 31 December 2020, the regulation 89 duty was owed also to an economic operator from a country other than the UK where (a) 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; (b) 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 or

(c) 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. Regulation 90 has been omitted from the PCR 2015 since 1 January 2022.

- The Public Procurement (Agreement on Government Procurement) (Amendment) Regulations 2021 (SI 2021/573) (GPAP 2021) inserted regulation 90A of the PCR 2015 (duty owed to economic operators from GPA parties). This now provides that the duty in regulation 89 is a duty owed also to an economic operator from a GPA party where the GPA applies to the procurement concerned. The GPA applies to a procurement if it may result in the award of a contract and, at the date on which the contracting authority submitted a call for competition, a GPA party had agreed with the UK that the GPA would apply to a contract of that description and the economic operator was from that GPA party.
- The GPAP 2021 also added regulation 25A which provides that where the contracting authority and the procurement are covered by the UK’s relevant GPA coverage Appendices, the contracting authority shall accord to the works, supplies, services and economic operators of any GPA party treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the United Kingdom.
- The Public Procurement (International Trade Agreements) (Amendment) Regulations 2021 (SI 2021/787) (ITAR 2021) have inserted regulation 90B (duty owed to economic operators from countries with whom the UK has an international agreement, other than the GPA). This provides that the duty owed in accordance with regulation 89 is a duty owed also to an economic operator from a country in respect of which a relevant international trade agreement applies, but only where the agreement applies to the procurement concerned. A relevant international trade agreement applies if the procurement is covered by an agreement listed in a new Schedule 4A inserted by these regulations. See [Legal update, Public Procurement \(International Trade Agreements\) \(Amendment\) Regulations 2022 come into force](#).
- The ITAR 2021 have also inserted regulation 25B (conditions relating to international agreements by which the UK is bound, other than the GPA). This provides that where a relevant international trade agreement applies to a procurement, the contracting authority must accord to the works, supplies, services and economic operators of the signatories



to that agreement treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the UK. A relevant international trade agreement applies if the procurement is covered by an agreement listed in a new Schedule 4A inserted by these regulations.

- The TCA goes further in certain respects than the EU GPA schedules (see UK-EU trade and co-operation agreement).
- The PCR 2015 as amended should therefore be read as providing EU economic operators with rights in relation to procurements covered by the TCA (see [Practice note, European Union \(Future Relationship\) Act 2020](#)).

For the position in relation to the CCR 2016 see [Practice note, Concession Contracts Regulations 2016: procuring concession contracts: Rights of non-UK bidders](#).

## Enforcement and remedies

### Who can bring a claim?

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”.

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 [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), in a preliminary issue judgment, the court held that CR4C was not an economic operator at the relevant time because it did not then have legal personality and was not offering works or services to meet the requirements of the tender. CR4C only registered as a Community Benefit Society after the tender. See also [Practice note, Remedies in public procurement law: Standing](#).

The rights of non-UK economic operators under the PCR 2015 are explained in [Rights of non-UK bidders](#).

### Limitation period

The limitation period where the contract has not been entered into 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 facts which apparently clearly indicate, though they need not absolutely prove, an infringement (*SITA UK Limited v Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 156). This may be before it is informed that it was unsuccessful (*Jobsin v Department of Health* [2002] 1 CMLR 44; *Turning Point Ltd v Norfolk County Council* [2012] EWHC 2121 (TCC)).

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 since indicated that they may grant 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)). See also *Riverside Truck Rental Ltd v Lancashire County Council* [2020] EWHC 1018, [Legal update, Procurement and judicial review challenges to contract award ruled out of time \(TCC\)](#).

See also the recent statement of principles in *Bromcom Computers Plc v United Learning Trust* [2022] EWHC 18 (TCC) and the discussion in [Practice note, Remedies in public procurement law: Limitation periods](#).

### Remedies

The remedies available under the PCR 2015 include:

- An order to set aside a decision or action of a contracting authority in the course of a tender procedure (only available if the contract has not been entered into).
- 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 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](#).

### 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 to include 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 also [Legal update, Public Procurement \(Electronic Invoices etc.\) Regulations 2019 made](#). 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*) which came into force on 18 April 2019 and added regulation 113A to the PCR 2015. 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 had until 18 April 2020 to comply with the new requirements.

### 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.

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).

See *TCC Guidance Note on Procedures for Public Procurement Cases (Appendix H to the TCC Guide)* at paragraphs 6 and 25 and [Technology and Construction Court Guide](#).

### 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 and Local Government \(Exclusion of Non-commercial Considerations\) \(England\) Order \(SI 2022/741\)](#)). These rules and legislation are outside the scope of this note.

### 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. 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 \(long update\)](#). See also [Legal update, Government publishes response to consultation on proposals for transforming public procurement](#).

The Procurement Bill, which gives effect to the majority of these proposals, was introduced to Parliament on 11 May 2022. For a summary of the Bill’s core provisions as introduced to Parliament, see [Legal update, Procurement Bill 2022-23 introduced to Parliament](#) and [Legal update, New content: practice note on Procurement Bill 2022-23](#). To track the legislative progress of the Bill, see [Procurement Bill: tracker](#).

See also, [Legal update, Welsh Government introduces Social Partnership and Public Procurement \(Wales\) Bill \(full update\)](#).

### Checklist of key practical considerations for contracting authorities

- Consider at the outset what needs to be procured, what sort of potential tenderers could deliver the

requirement, what contractual structure would be optimal and what sort of tenders would deliver the requirement on a best value basis, that is, what does “good” look like?

- Consider the optimal risk profile (allocation between buyer and supplier) of the contract.
- Consider whether any provision needs to be made for modifications to the contract (eg annual price reviews) after it has been let.
- Consider the social value of your approach to procurement and whether social or environmental criteria or conditions may be appropriate and even required further to PPN 06/20.
- 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 (or UCR 2016 or CCR 2016) 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 whether the thresholds will be met and also 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 the 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, word count and attachments 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, plan how evaluation and moderation will take place, and provide proper training for evaluators and moderators, ensuring everyone knows their role.
- Explain to bidders the tender rules, including:
  - 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.
- Provide bidders with all the information they need (eg specification, TUPE details and draft contract).

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- 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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