The Public Contracts Regulations 2015

Unravelling the key changes
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Introduction

The purpose of this guide is to highlight some of the key changes being introduced by the new Public Contracts Regulations 2015 (“PCR 2015”) when compared to the existing regime set out in the Public Contracts Regulations 2006 (as amended) (“PCR 2006”). PCR 2015 transpose Directive 2014/24/EU (the “Public Contracts Directive”) into UK legislation and provide updated as well as new rules governing the purchasing activities of “contracting authorities”.

Under PCR 2015, “contracting authorities” means, “the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law, and includes central government authorities”.

PCR 2015 largely came into force on 26 February 2015. The new rules will only apply to new procurement processes beginning or taking place after this date.

There are some key exceptions to the commencement date, including the following:

- **1 April 2015** – obligations on the use of Contracts Finder are deferred until this date save for contracting authorities which perform their functions on behalf of the Crown.
- **18 April 2016** – any procurement for health care services for the purposes of the NHS within the meaning and scope of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 started before this date is not covered by PCR 2015.
- **18 April 2017** – Central Purchasing Bodies will need to comply with electronic communications from this date.
- **18 April 2017** – the European Single Procurement Document must be available exclusively in electronic form from this date.
- **18 October 2018** – the rules on using e-Certis (the online repository established by the European Commission) come into force on this date.
Scope of PCR 2015 and general rules

- Procurement within the meaning of PCR 2015 is now expressly defined as “the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose”.
- Provisions are included which expressly state that a procurement should not be designed with the intention of excluding it from the scope of PCR 2015 or of artificially narrowing competition. In addition to complying with existing duties of transparency, equal treatment and non-discrimination, PCR 2015 has clarified that this also requires contracting authorities to act in a proportionate manner.
- The UK Government has confirmed that “administrative measures” will be used to implement the obligation in Article 18(2) of the Public Contracts Directive to take “appropriate measures” to ensure suppliers comply with various social, environmental and labour law obligations. The Cabinet Office will publish guidance on this.
- New exclusions have been included in PCR 2015, including for services contracts covering certain legal services and loans.
- On the other hand, service concessions will no longer be exempt once the UK implements the Concessions Directive 2014/23/EU and consultation on the new concessions regulations is likely to be issued by the Cabinet Office later this year.
- New provisions are included relating to the award of contracts between entities in the public sector. These include provisions to codify and clarify the “Teckal” exemption which allows the award of contracts between contracting authorities and controlled entities provided the following conditions are met: (i) the contracting authority exercises control over the entity similar to that to which it exercises over its own departments; (ii) more than 80% of activities of the entity relate to the performance of tasks entrusted to it by the authority; and (iii) there is no direct private capital participation in the entity (with the exception of non-controlling and non-blocking forms of private capital participation required by national law in conformity with the EU Treaties). PCR 2015 also provide for contracts to be exempt where contracting authorities jointly control an entity based on similar tests to the above and for “Reverse Teckal” where the controlled entity (if a contracting authority itself) can award a contract to its controlling contracting authority.
- PCR 2015 will only apply to certain research and development CPV codes when benefits accrue exclusively to the contracting authority for its own use, and are paid for wholly by the contracting authority.
- The thresholds are reviewed every two years by the Commission. As we are part way through the cycle, the main thresholds for works, services and goods contracts remain the same until 31/12/15. A new threshold for service contracts which are subject to the “light touch” regime (see page 17) is introduced:

<table>
<thead>
<tr>
<th>Type</th>
<th>Threshold</th>
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</thead>
<tbody>
<tr>
<td>Works</td>
<td>£4,322,012</td>
</tr>
<tr>
<td>Goods/Services *</td>
<td>£111,676/£172,514</td>
</tr>
<tr>
<td>“Light touch”</td>
<td>£625,050</td>
</tr>
</tbody>
</table>

Conflicts of interest REGULATION 24

- PCR 2015 contain new conflict of interest provisions.
- Possible conflicts are stated to include staff members with financial, economic or other personal interest which might be perceived to compromise their impartiality or independence. Conflicts may also arise with incumbent suppliers.
- The obligations require a contracting authority to take appropriate measures to effectively prevent, identify and remedy conflicts of interest. In circumstances where measures cannot be taken to remedy conflicts, a contracting authority may have discretion to exclude the relevant bidder.

* Entities listed in Schedule 1 will be subject to the lower threshold for these types of contracts
Electronic communication and access to documents

REGULATIONS 22 AND 53

- Subject to certain limited exceptions, all communication and information exchange must be carried out by electronic means. These exceptions include where the specialised nature of the procurement means that specific tools or file formats are needed which are not open to all and generally available or require a licence or where physical or scale models are required which cannot be transmitted by electronic means. There may also be circumstances in which information of a particularly sensitive nature requires a high level of protection which cannot be ensured by using electronic tools or devices.

- The reasons why electronic communications are not being used (ie where a contracting authority is relying on one of the listed exceptions) must be set out in the Regulation 84 report (see page 18).

- PCR 2015 require that all contracting authorities offer unrestricted and direct access (free of charge) to all procurement documents from the date of publication of the contract notice in OJEU and that the contract notice must include a reference to the internet address where the documents can be accessed. The definition of “procurement documents” is widely drafted meaning any document produced or referred to by a contracting authority which describes elements of the procurement or procedure including the contract notice, technical specification, proposed conditions of contract and formats for the presentation of documents by candidates or tenderers (eg pre-qualification questionnaires and invitations to tender). The requirement to make available all procurement documents at the outset applies to every procurement process unless one or more of the listed exceptions for the use of electronic communications apply.

- Oral communication can be used provided that its content is documented to a “sufficient degree”. However, oral communication cannot be used in relation to essential elements (defined as including the procurement documents, the request to participate, etc) of the procurement procedure.

- Oral communications with tenderers which could have a substantial impact on the content and assessment of tenders is also required to be documented by appropriate means which may include audio records.

Procedures and timescales

REGULATIONS 26-32

The open and restricted procedures remain a free choice for contracting authorities to select. The competitive procedure with negotiation (an updated version of the negotiated procedure) and competitive dialogue procedure remain available only in specific circumstances but these have been merged and widened and therefore should be easier to justify. These two processes are available where:

- needs cannot be met without adaptation of readily available solutions;
- contract cannot be awarded without negotiations due to nature, complexity, legal/financial make-up or risks;
- technical specifications cannot be established with sufficient precision;
- they involve design or innovative solutions; or
- irregular (eg late submissions, abnormally low tenders) or unacceptable (eg not required qualifications/ price exceeds published budget) tenders have been received in response to open/ restricted processes.

The ability to award contracts by way of the negotiated procedure without an advert remains in place provided you fall into the specific (considered to be exceptional) circumstances listed for its use which largely reflect the provisions in PCR 2006.

In addition, contracting authorities will be able to utilise the new innovation partnership procedure as set out below.
Open procedure

Under the open procedure, any interested party may submit a tender in response to the call for competition which will be an OJEU notice. The new minimum timescales are set out on page 8. It should be noted that the issue of a prior information notice (PIN) can shorten the timescales under the open procedure but cannot itself be used as the call for competition. New provisions within PCR 2015 entitle a contracting authority to examine tenders before verifying whether exclusion grounds are absent and selection requirements are satisfied provided a contracting authority does so in an impartial and transparent manner and the contracting authority ensures a contract is not awarded to a supplier which should have been excluded or has failed to meet the selection requirements.

Restricted procedure

Under the restricted procedure, any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection requested by the contracting authority. The new minimum timescales are set out on page 8. A call for competition can be made by means of a contract notice or, for certain types of contracting authorities (see page 12), by way of a PIN.

Competitive procedure with negotiation

Following qualitative selection, all selected economic operators are invited to negotiate but this procedure can be carried out in successive stages provided this is indicated to bidders upfront (like the competitive dialogue procedure). The procedure has been clarified to confirm that contracting authorities may negotiate initial and all subsequent tenders but not the final tender. Contracting authorities may reserve the right to award following receipt of initial tenders without negotiation but this must be made clear at the start. The new minimum timescales are set out on page 8. Again, a call for competition can be made by means of a contract notice or, for certain types of contracting authorities (see page 12), by way of a PIN.

Competitive dialogue procedure

The competitive dialogue procedure largely remains the same as that under PCR 2006 except towards the end of the process. Following close of dialogue and receipt of final tenders, tenders may be “clarified, specified and optimised” but this must not involve changes to the essential aspects of the tender or procurement. Post evaluation, the contracting authority may “negotiate” with the winning tenderer to “confirm financial commitments or other terms by finalising the terms of the contract” provided this does not materially modify the essential aspects of the tender or the procurement. The language here appears wider than that used in PCR 2006 but in each case, care must be taken as a contracting authority must ensure that changes do not risk competition being distorted or risk causing discrimination. Minimum timescales are set out on page 9. Note that a PIN cannot be used as a call for competition so an authority using this procedure will need to commence its tender process by publishing a contract notice in the usual way.

Innovation Partnership

This is a new route adopted by the EC for public procurement which is aimed at increasing innovation. The economic operators taking part are known as partners. The basic features of the innovation partnership procedure include:

- the contracting authority will seek offers for one or more partners to assist in the development of an innovative product, service or works not yet on the market, and the subsequent purchase of the innovative solution without the need for a separate procurement procedure for the purchase, provided the final purchase corresponds to pre-agreed levels of performance and maximum costs;

- the procurement can be run with one or several partners carrying out separate R&D activities;

- the partnership procurement shall be structured to follow R&D activities and the duration/value of each phase should reflect the degree of innovation and sequence of the activities;

- the partnership procurement shall set intermediate targets to be attained by the partners taking part and provide for payment in appropriate instalments;

- termination after each phase (in full or per partner) can be reserved upfront;

- the procurement can be carried out in successive stages provided this is indicated upfront;

- the initial and each subsequent tender is to be negotiated but the final tender must not be negotiated; and

- the minimum requirements and the award criteria must not be negotiated. Minimum timescales are set out on page 9. Note that a PIN cannot be used as a call for competition so a contracting authority using this procedure will need to commence its tender process by publishing a contract notice in the usual way.
The new time limits under PCR 2015 are set out below. Without prejudice to these minimum timescales, contracting authorities must have regard to the complexity of the contract and the time required for drawing up tenders when setting the time limits. If the tender documents are not available electronically at the call for competition for one of the grounds set out in Regulation 22 (see page 6) then 5 days must be added on to the tender period, except in cases of substantiated urgency in relation to the open, restricted and competitive procedure with negotiation.

### Open Procedure

**Minimum time period for tender deadline:**
- reduced from 52 to 35 days.
- may be reduced from 35 to 15 days where a PIN is published not being a call for competition (previously 22 days although could be further reduced).
- may be reduced from 35 to 30 days where electronic tender submission (minimum before was 40 days).
- may be reduced where state of urgency (duly substantiated by the contracting authority) from 35 to 15 days.

### Restricted Procedure

**Minimum time period for requests to participate:**
- reduced from 37 to 30 days.
- runs from contract notice or invitation to confirm interest if a PIN is used for call for competition.
- may be reduced where state of urgency (duly substantiated by the contracting authority) from 30 to 15 days.

**Time period for tender submissions:**
- *reduced from 40 days to 30 days.*
- *may be reduced further from 30 days to 10 days where PIN is published (not used as call for competition).*
- *may be reduced where state of urgency (duly substantiated by the contracting authority) from 30 to 10 days.*
- *may be reduced from 30 to 25 days where electronic tender submission is permitted.*
- *sub-central authorities may agree a deadline with all selected bidders. In absence of agreement, period must be at least 10 days.*

### Competitive Procedure with negotiation

**Minimum time period requests to participate as per restricted procedure.**

Option for sub-central contracting authorities to agree timescales as per restricted procedure.
<table>
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<th>Negotiated procedure without a call for competition</th>
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<td>Minimum time period</td>
<td>Reduced from 37 to 30</td>
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Framework agreements  REGULATION 33

- The key principles relating to framework agreements under PCR 2015 are largely the same as those set out in PCR 2006 although there is additional clarification in places to further emphasise the need for transparency.
- PCR 2015 introduce a new concept of a “hybrid” call off process which provides for part direct award, part mini competition. For frameworks incorporating this approach to call off’s, a contracting authority is required to set out in the procurement documents how the choice will be made (on objective criteria) between a direct award and a mini competition and specify which terms may be subject to reopening of competition. PCR 2015 also indicate that this approach could be lot specific, ie it does not have to apply across all lots within a framework.

Dynamic Purchasing System  REGULATION 34

- Dynamic Purchasing Systems (“DPS”) are retained in PCR 2015. These systems are essentially open frameworks and provide for an electronic process for commonly used supplies, services or works. Contracting authorities must allow all economic operators the ability to participate during the validity of the DPS. They are not often used as, once the system is set up, PCR 2006 currently requires a further notice to be placed in OJEU in order to tender under the system. This requirement to publish a further OJEU notice is not required under PCR 2015 and the UK Government hopes more use will be made of DPS under PCR 2015.
- To set up a DPS now, the restricted procedure must be used by a contracting authority (under PCR 2006, the open procedure was used). A contract notice or PIN must be used, which confirms that it is a call for competition.
- The minimum time period for receipts of request to participate will be 30 days under PCR 2015.
- The minimum time period for the receipt of tenders is 10 days from the date on which the invitation to tender is sent.
- The 4 year maximum duration contained in PCR 2006 has been deleted, albeit contracting authorities are required to indicate the period of validity of the system in the call for competition.

Electronic auctions/catalogues  REGULATIONS 35 AND 36

- The use of e-auctions has been retained under PCR 2015, albeit some changes have been introduced to improve transparency.
- Other new provisions are as follows:
  - the use of electronic catalogues must be identified in the call for competition/ITT;
  - If electronic catalogues are required as part of framework mini-competitions:
- tenderers can adapt to requirements and resubmit catalogues; or
- contracting authorities can collect information and adapt these to the requirements of the contract in question and then request confirmation from tenderers (tenderers may object to collection).
Central Purchasing Bodies  REGULATION 37

- Contracting authorities may acquire supplies or services, or both, from a central purchasing body in respect of activities conducted on a permanent basis in one of the following forms: (a) the acquisition of supplies or services, or both, intended for contracting authorities; (b) the award of public contracts or the conclusion of framework agreements for works, supplies or services intended for contracting authorities. Use of a central purchasing body is common practice and PCR 2015 recognise that contracting authorities can award a contract to a central purchasing body for the provision of central purchasing activities without having to award those services through a tender process.

- Where a contracting authority uses a central purchasing body to acquire supplies or services, PCR 2015 confirm that this fulfils the authority’s obligations under the regulations. However, a contracting authority will remain responsible for compliance with PCR 2015 in certain circumstances, eg in running a call off under a framework established by a central purchasing body.

Joint procurements  REGULATION 38

- PCR 2015 introduce new provisions to clarify procurements being carried out jointly and means contracting authorities may be responsible for complying with PCR 2015 even if they are not conducting the tender process themselves. Clarity of each contracting authority’s responsibilities is therefore needed at the outset:

  - Entirely joint procurement means joint responsibility for fulfilling obligations even if one contracting authority manages the procurement process on behalf of another contracting authority.

- However, where discrete parts of the procurement process are not carried out jointly each party has sole responsibility for fulfilling obligations under PCR 2015 for their relevant part although they will still have joint responsibility for parts carried out jointly.

Pre-procurement market engagement  REGULATIONS 40 AND 41

- PCR 2015 permit soft market testing provided this does not distort competition and is transparent and non-discriminatory. The UK Government actively encourages the use of soft market testing to deliver more effective and efficient procurement processes.

- Where organisations have been involved at pre-procurement stage (whether in soft market testing or otherwise, eg incumbents), a contracting authority must ensure that there is a level playing field when the tender process starts such as providing information which has been made available at pre-procurement stage.

- Bidders may be excluded from the procurement in circumstances where their prior involvement would distort competition (and there are no other means of ensuring equal treatment which can be applied).
Variants  REGULATION 45

- Contracting authorities may now require as well as permit bidders to submit variants (and must set out the minimum requirements they must meet).
- Contracting authorities may specify that a variant can only be submitted if a standard bid is submitted or can allow just variants but this must be clear in the procurement documents.
- PCR 2015 confirm that contracting authorities must ensure that the award criteria can be applied to both non-variant and variant tenders.

Lots  REGULATION 46

- PCR 2015 introduce a change in emphasis in relation to lots to encourage SMEs.
- As before, contracting authorities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots.
- Contracting authorities may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or (if a PIN is used as a call for competition) in the invitation to confirm interest. Authorities must set out how this will work in practice including the objective criteria which will determine which lots will be awarded where the application of the award criteria results in one tenderer being awarded more than one lot.
- The UK has not mandated the use of lots, as permitted under the Public Contracts Directive but if contracting authorities decide not to divide an opportunity into separate lots, it must include the reasons for this in the Regulation 84 report (see page 18).

Prior Information Notices  REGULATION 48

- There is no longer a mandatory requirement for a contracting authority to publish a PIN above a certain threshold.
- PINs may be used as a call for competition by sub-central contracting authorities (authorities other than central government authorities) for the restricted or competitive procedure with negotiation. Additional information must be included in the PIN if used for this purpose.
- A contracting authority cannot rely on a PIN until 35 days after sent for publication.
- Maximum validity is 12 months (except for social and other specific services) (ie those covered by the “light touch” regime) (see page 17).
Notices REGULATIONS 48 TO 52

- Contract award notice timescales have been reduced to 30 days from 48 days.
- The UK Government has decided not to implement the requirement for contract award notices for call-offs (under framework agreements) to be sent on a quarterly basis to the Official Journal.
- PCR 2015 introduce a new prohibition on publication of notices at national level before publication in the Official Journal. However, following confirmation of receipt of the contract notice by the Official Journal, contracting authorities are permitted to publish notices at national level 48 hours after that receipt even if they have not received confirmation of publication in the Official Journal.

Bidder feedback REGULATION 55

- PCR 2015 continue to require contracting authorities to inform each candidate and tenderer (as soon as possible) of decisions reached concerning the conclusion of a framework agreement, the award of a contract or admittance to a dynamic purchasing system.
- An economic operator’s right to request information remains (and a response must be provided quickly and no later than 15 days of a request) and the majority of this information would be provided in any event in the standstill letter. The new provisions also include a new right to request details of the conduct and progress of negotiations and dialogue with bidders which is in addition to information made available in the standstill letter.
Eligibility and selection  REGULATIONS 56–64

- PCR 2015 recognise “compliance checks” requiring contracting authorities to verify that bids submitted comply with the rules and requirements applicable to the tender as well as checking whether grounds for exclusion apply and selection criteria is satisfied.

- A contracting authority is also now expressly entitled to clarify errors, missing or incomplete bids but we would urge caution here as PCR 2015 require that any such request is made in full compliance with the principles of equal treatment and transparency.

- PCR 2015 also confirm that checking a tenderer remains “eligible to tender” is an ongoing obligation, ie contracting authorities must continue to verify that there are no exclusion grounds or changes in circumstances which would mean an operator fails to meet selection criteria.

- A number of changes are included in relation to the mandatory and discretionary grounds for exclusion including additional discretionary grounds where conflicts cannot be remedied or where persistent poor performance has led to contract termination or similar sanctions. Bidders are allowed to provide evidence to demonstrate reliability despite the existence of grounds for exclusion. PCR 2015 also provide a duration for the exclusion – 3 years from the date of conviction for mandatory grounds and 5 years from the date of the event for discretionary grounds.

- PCR 2015 also contain a number of changes to the selection criteria, including:
  - minimum annual turnover: (i) no more than 2 x estimated contract value, unless justified; (ii) applies per lot but can be combined if awarded more than one lot (note there are specific rules for frameworks and DPS).
  - technical experience: new supply chain management and tracking systems that the operator will apply when performing the contract.
  - education and qualifications if not to be used as award criteria.
  - a requirement to accept the European Single Procurement Document (ESPD) which is a self declaration, as preliminary evidence that there are no grounds for exclusion and that the selection criteria is satisfied. An authority can ask for supporting documents referred to in the ESPD at any time and must require the winner to provide up to date information to confirm this.
  - requirements on having recourse to e-Certis.
  - relying on other entities – contracting authorities may require joint liability (if an economic operator is relying on other entities for educational/professional purposes, that entity must be performing the relevant parts, must be checked for eligibility and there may be requirement to replace them in certain circumstances).
Evaluation  REGULATIONS 67 AND 68

- Contracting authorities are required to base the award of public contracts on the most economically advantageous tender assessed from the point of view of the contracting authority. This may be on the basis of price or cost and may include the “best price-quality ratio”.
- Life-cycle costing is also permitted and rules are set out on how to work out life-cycle costing etc in Regulation 68. The approach must be disclosed to bidders.

Abnormally low tenders  REGULATION 69

- A contracting authority is now obliged to seek reasons from bidders to explain prices and costs which appear to be abnormally low in relation to the works, supplies or services. Under PCR 2006, a contracting authority was only obliged to investigate if it was considering excluding a tenderer.
- A contracting authority may only reject a tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed.

Sub-contracting  REGULATION 71

- In the procurement documents, the contracting authority may ask the tenderer to indicate in its tender any share of the contract that it intends to sub-contract to third parties and any proposed subcontractors.
- New provisions are included which oblige a contracting authority to require the main contractor to notify it of the name, contact details and legal representatives of its sub-contractors in so far as known at the time. This relates to works contracts and in respect of services to be provided at a facility under the direct oversight of the contracting authority and must take place after the award of the contract but at the latest when the performance of the contract commences. Contracting authorities may extend this approach to supply and other services contracts and to lower tiers of sub-contractors.
- Contracting authorities may verify whether there are grounds for exclusion of sub-contractors under Regulation 57 (see page 14) and must require the main contractor to replace a sub-contractor if there are mandatory grounds for exclusion and may require replacement where there are discretionary grounds.
Modification of contracts  REGULATION 72

PCR 2015 provides that modifications to existing contracts are permitted without commencing a new procurement in the following circumstances:

- Where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options.
- For additional works, services or supplies by the original contractor, irrespective of their value, that have become necessary and were not included in the initial procurement where a change of contractor:*
  - cannot be made for economic or technical reasons; or
  - would cause significant inconvenience or substantial duplication of costs for the contracting authority;

However, any increase in price cannot exceed 50% of the value of the original contract.

- Where all of the following conditions are fulfilled:*  
  - the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;  
  - the modification does not alter the overall nature of the contract; and  
  - any increase in price is not higher than 50% of the value of the original contract or framework agreement.

*Note: the contracting authority must publish a notice in the OJEU when a contract has been modified under these headings.

- Where a new contractor replaces the one which had initially been awarded the contract as a consequence of either:
  - an unequivocal review clause or option which is clear, precise and unequivocal (referred to above); or
  - universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of PCR 2015.

- Where the modifications, irrespective of their value, are not substantial. A modification is considered to be substantial where one or more of the following conditions is met:
  - the modification renders the contract or the framework agreement materially different in character from the one initially concluded;
  - the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;
  - the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
  - the modification extends the scope of the contract or framework agreement considerably;
  - where a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than those envisaged above.

- Where the value of the modification (on a cumulative basis) is below both of the following values:
  - the relevant EU procurement thresholds; and
  - 10% of the initial contract value for service and supply contracts and below 15% of the initial contract value for works contracts.

Where a modification falls outside of the above circumstances, a new procurement process is required. To proceed in those circumstances without a new procurement will therefore amount to an unlawful direct award.
Termination  REGULATION 73

- Contracting authorities shall ensure that every public contract which they award contains provisions enabling the contracting authority to terminate the contract where (i) the contract has been subject to a substantial modification which would have required a new procurement procedure; (ii) the contractor has, at the time of contract award, been in one of the situations referred to in certain of the mandatory grounds for exclusion; or (iii) the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and the Public Contracts Directive (that has been declared by the Court of Justice of the European Union in a procedure under Article 258 of TFEU). Contracting authorities will need to consider how to capture this right to terminate, how this is treated (e.g., what kind of default this will be) and the consequences of exiting the contract including any compensation payable. The Cabinet Office will be issuing model clauses and guidance on this.

- To the extent that a public contract does not contain provisions enabling the contracting authority to terminate the contract on any of the grounds mentioned above, such a termination term shall be implied into the contract.

“Light Touch” regime  REGULATIONS 74-76

- Under PCR 2006, service contracts were divided into Part A (which were subject to the detailed regulatory regime) and Part B (which were only subject to limited obligations under that legislation). EU Treaty principles, including sufficient advertising and fair and transparent process, also applied to Part B services where there was cross-border interest.

- Under PCR 2015, Part B services have been replaced by a specific list of social and other services which are subject to the “light touch” provisions. These services are more limited than Part B services and there is no “open ended” service category.

- The service contracts which are limited to a “light touch” regime for procurements over 750,000 Euros (£625,050) are listed in Schedule 3. “Light touch” means that a contract notice or PIN used as a call for competition must be published in the Official Journal in the usual way and a contract award notice published once a contract has been awarded. The procedure can be determined by the contracting authority but must comply with principles of equal treatment and transparency and provide reasonable and proportionate timescales. PCR 2015 specifically says that a contracting authority may use or adapt procedures available for fully regulated procurements.

Reserved contracts for certain services  REGULATION 77

- For certain specific health, social and cultural services to which the light touch regime applies, PCR 2015 allows contracting authorities to reserve the award of contracts for those services to certain types of organisations as part of its call for competition. The organisations entitled to bid must meet the following conditions: (i) the organisation’s objective is the pursuit of a public service mission linked to the delivery of the services; (ii) profits are reinvested with a view to achieving the organisation’s objectives; (iii) the structure of management/ownership of the organisation performing the contract are based on employee ownership or participatory principles; and (iv) the organisation has not been awarded a contract for those services in the past 3 years.

- If a contracting authority decides to reserve these contracts to such organisations, the maximum duration of a contract which can be awarded is 3 years.
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Individual reports  REGULATION 84

- Contracting authorities are required to create and keep a written report on each contract, framework agreement and dynamic purchasing system entered into under PCR 2015.

- The information recorded must include information relating to the following (amongst other):
  - the qualification and selection of tenderers and the award;
  - where applicable, why electronic procurement is not used;
  - the use of the negotiated procedure without a call for competition;
  - how conflicts of interest have been managed; and
  - the non-application of the regulations in certain circumstances.

- In addition to the above, there is a general obligation on contracting authorities to document the progress of all procurement procedures including ensuring sufficient information is kept to justify decisions such as communications with economic operators and internal deliberations, preparation of procurement documents, any dialogue and negotiation, selection and award. Documentation must be kept for three years from the award of the contract.

Publication on Contracts Finder and Lord Young requirements  REGULATIONS 106, 108, 110-113

- PCR 2015 introduce a number of additional requirements governing the purchasing activities of contracting authorities. These came into force on 26 February 2015 in relation to authorities which exercise functions on behalf of the Crown and will come into force on 1 April 2015 for all other authorities. The requirements include:
  - Where a contracting authority sends a contract notice to the Official Journal, it must also publish the information on Contracts Finder within 24 hours of when it is entitled to publish at national level. The same applies in respect of contract award notices although this is not required within 24 hours;
  - Having regard to guidance in relation to pre-qualification which may include a standard form. Guidance will also indicate what is considered to be a reporting deviation from the guidance, requiring an authority to notify the Cabinet Office;
  - Prohibiting the use of pre-qualification questionnaires for below EU threshold contracts (although the services thresholds are used for works or “light touch” regime contracts in this context given that the works and “light touch” thresholds are quite high);
  - A requirement that 30 day payment terms (for undisputed invoices) to be included in public contracts and passed down the supply chain, and a requirement to report on late payment of invoices. If express provisions are not included, PCR 2015 imply specific terms into contracts. Guidance may be issued setting out model contract clauses; and
  - For central government authority contracts over £10,000 and sub-central authority contracts over £25,000, PCR 2015 include a requirement to publish contract opportunities on Contracts Finder and contract award notices.