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Guide to utilities procurement in the UK

July 2018

Introduction

This Guide provides an overview of the procurement rules as they apply to certain utility companies operating in the water, energy, transport and postal services sectors in the UK.

It is intended as an introductory guide for in-house lawyers and procurement managers. While we hope it is informative, the Guide should not be relied upon as legal advice.

If you would like any further information or have any queries please contact Graeme Young (details below) or another member of the team (see page 43).



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Legislation and rules

The Utilities Contracts Regulations

The principal procurement rules governing utilities in the UK are contained in the following two sets of regulations:

- In England, Wales and Northern Ireland: the **Utilities Contracts Regulations 2016** (SI 2016/274); and
- In Scotland: **the Utilities Contracts (Scotland) Regulations 2016** (SSI 2016/49), (together, the **UCRs**).

Where citing relevant provisions of the UCRs we have referred in this Guide to the relevant provision in the Utilities Contracts Regulations 2016 and highlighted any difference in the corresponding provision of the Scottish rules.

The UCRs implement in the UK the EU Utilities Directive (2014/25/EU) and the Remedies Directive (2007/66/EU) (together, the **Directives**).

The Concession Contract Regulations

Separate rules relating to the award of concession contracts by utilities are contained in the EU Concessions Directive (2014/23/EU). The Concessions Directive has been implemented in England, Wales and Northern Ireland through the Concession Contracts Regulations 2016 (SI 2016/273). There is a parallel implementation for Scotland in the Concession Contracts (Scotland) Regulations 2016 (SSI 2016/65).

The Concessions Directive and implementing UK regulations apply to entities subject to the UCRs where they are awarding a works or services concession contract. The main feature of a concession contract is the utility appointing a contractor for execution of works or the provision and the management of services the consideration of which consists (at least in part) in the right to exploit the works or services that are the subject of the contract. Utility concession contracts are fairly uncommon in the UK, but a recent example includes Luton Airport tendering concession agreements for the operation of car hire services at the airport. In this Guide we focus on the UCRs.

Other sector specific rules

In addition to the EU law based UCRs, there are also sector-specific procurement and competitive tendering rules for certain activities in the UK. These generally take the form of licensing regimes under which licences to undertake utility activities are competitively tendered to the market (e.g. regulations governing offshore electricity transmission assets, the OFTO regime) or other regulatory requirements to demonstrate best value and cost efficiency (e.g. the use of direct procurement by Ofgem and Ofwat as part of price control reviews). These more specific procurement rules are not considered as part of this Guide, though many of the features of them are common to those in the UCRs, for example in terms of requirements around advertising, transparency, equal treatment and non-discrimination.



Impact of Brexit

The UCRs form part of domestic UK law, being UK statutory instruments implementing EU Directives. It follows that these rules will apply at least until Brexit, which in practice is likely to mean that they will apply as they do now at least until the end of the proposed transition period ending 31 December 2020. Prior to that date, they will have to be applied in a manner consistent with the underlying EU Directives and the case-law of the European Courts.

Post-Brexit, or at least after the end of the transition period, there will be scope for the UK (and Scottish) Government to introduce amendments and to 'diverge' from the rules as they are applied in the EU. The extent to which the post-Brexit rules are likely to diverge will however depend on the UK's continuing international commitments under the WTO Government Procurement Agreement (**GPA**) and future commitments it is likely to agree in terms of Free Trade Agreements and international access to procurement markets.





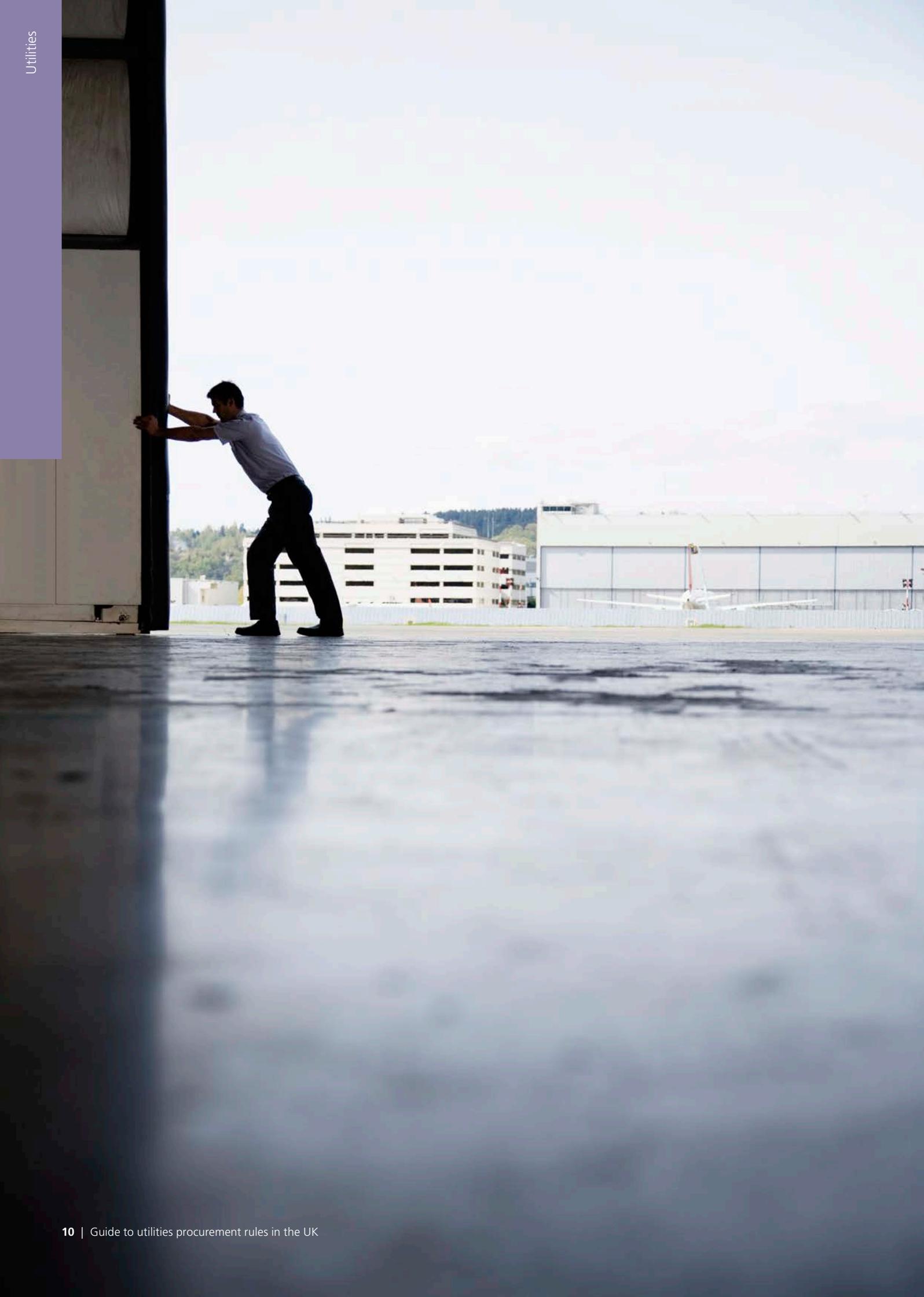
Application

In general terms, the UCRs apply where the following three conditions are satisfied:

- the entity awarding the contract is a '**utility**';
- the contract is for **works, services or supplies associated with a prescribed relevant utility activity**; and
- the estimated value of the contract exceeds the relevant financial **thresholds**.

In the following sections of this guide we look at each of these three conditions.





Utilities

The entities covered by the UCRs are defined as ‘utilities’ and must be:

- **contracting authorities** (i.e. public bodies tasked with performing public functions, such as local authorities); or
 - **public undertakings** over which contracting authorities may directly or indirectly exercise a dominant influence, by virtue of their ownership or financial participation or the governing rules (a ‘dominant influence’ is presumed where a contracting authority holds the majority of the capital, controls the majority of the shareholder voting rights or can appoint more than half of the administrative, managerial or supervisory board); or
 - **private undertakings operating on the basis of ‘special or exclusive rights’** deriving from authorisations granted by the State, for example authorisations or licences to operate a gas or water network. (The Utilities Directive helpfully clarified that rights which have been granted by means of a procedure based on objective criteria, in particular pursuant to EU legislation, and for which adequate publicity had been ensured, do not constitute special or exclusive rights (Recital 20)).
- **ports and airports** – activities relating to the exploitation of a geographical area for the purpose of the provision of airports or maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway;
 - **transport services** – activities relating to the provision or operation of networks providing a service to the public in the field of transport by (i) railway; (ii) automated systems; (iii) tramway; (iv) trolley bus; (v) bus; or (vi) cable.
 - **postal services** – activities relating to the provision of postal services and services other than postal services on condition that such services are provided by an entity which also provides postal services that are not directly exposed to competition.

The UCRs have also been interpreted to apply to contracts awarded by entities in anticipation of winning a licence or franchise to carry on a utility activity, i.e. at a stage when they are not yet utilities within the definitions set out in the UCRs (so-called ‘ghost utilities’).

The relevant utility activities in the UK are contained in the UCRs and can be summarised as covering:

- **regulated water and sewerage companies** (WaSCs) and **water only companies** (WOCs);
- **incumbent gas and electricity transmission and distribution network businesses** (e.g. TSOs, GDNs, DNOs);
- **district heating networks** – supplying of heat to fixed networks intended to provide a service to the public in connection with the production, transport or distribution of heat;



Specific exemptions

The UCRs provide for an exemption process. This enables the UK Government or individual utilities to apply to the European Commission for an exemption from the UCRs on the grounds that the activity is directly exposed to competition on markets to which access is not restricted.

The UK has been granted exemptions for contracts awarded in relation to power generation and energy supply and the exploration for and exploitation of oil and gas:

- Commission Decision of 8 March 2006 establishing an exemption for electricity generation in England, Scotland and Wales OJ [2006] L76/6;
- Commission Decision of 26 February 2007 establishing an exemption for the supply of electricity and gas in England, Scotland and Wales OJ [2007] L62/23; and
- Commission Decision of 29 March 2010 establishing an exemption for the exploration and exploitation of oil and gas in England, Scotland and Wales OJ [2010] 192/EU.





Contracts covered

General rules

The UCRs apply to contracts for pecuniary interest concluded in writing having as their object the execution of works, the supply of products or the provision of services.

Works contracts

Works contracts are contracts which have as their object one of the following: (a) execution, or both the design and execution, of works relating to one of the activities specified in the UCRs; (b) the execution, or both the design and execution, of a work; or (c) the realisation by whatever means of a work corresponding to the requirements specified by the utility exercising decisive influence on the type or design of the work.

Supply contracts

Supply contracts are defined as contracts other than works contracts having as their object the purchase, lease, rental or hire-purchase of products (with or without the option to buy). A contract that has as its object the supply of products and which also covers siting and installation operations is generally treated as a supply contract.

Services contracts

Services contracts are defined as contracts other than works contracts having as their object the provision of services.

Certain types of services, being those less suited to cross-border competition within the EU Single Market, are subject to a less onerous 'light touch regime'. The services subject to this regime are listed in the Utilities Directive and comprise of health, social and related services, educational and vocational health services, recreational, cultural and sporting services, and some legal services. These are generally of less relevance to utilities, being principally services procured by public sector bodies such as the NHS and local authorities.

Framework agreements

The UCRs define a 'framework agreement' as, 'an agreement between one or more utilities 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 quantities envisaged' (Regulation 51(2) of the UCRs).

Framework agreements can be let in the same manner as any other form of works, services or supply contract.

Where a framework agreement has been advertised and awarded in accordance with a full OJEU procedure, call-off contracts can be awarded under it without any of the participating utilities having to conduct a separate (OJEU compliant) tender process.

Dynamic purchasing systems

Dynamic purchasing systems are entirely electronic qualification systems designed to facilitate the repeat procurement of commodity products such as office supplies and stationery. The system must be open at all times to any provider meeting the stated selection criteria and allow them to submit an indicative tender that complies with the relevant specification.

Design contests

The UCRs contain specific rules on the running of design contests, where the contracting entity puts out to competition requests to produce a design, generally in architecture or civil engineering. There are special valuation rules and thresholds for these contests.

Excluded Contracts

There are a series of general and specific exclusions provided for in the UCRs. The general rule is that the exemptions must be interpreted strictly and that the burden of proof will always rest with the utility seeking to rely on it. This will generally require a contemporaneous record of any decision to rely on an exemption and not to put a contract out to tender.

There are express exclusions for contracts:

- relating to land (although related financial services contracts are caught);
- for broadcasting time or programme provision that are awarded to audiovisual or radio media service providers;
- for public passenger transport services by rail or metro;
- for arbitration and conciliation services;
- relating to defence or national security which are subject to different regulations or international rules;
- for employment; and
- for research and development (other than contracts for the exclusive benefit of the utility for its own use, on condition that the service is wholly funded by the utility).



Thresholds

Only contracts the estimated value of which exceeds the relevant thresholds must be advertised and awarded in accordance with the UCRs. The thresholds are set out in the table below. The thresholds are revised once every two years, and the current thresholds apply from 1 January 2018.

Supplies	£363,424 (€443,000)
Services/design contests	£363,424 (€443,000)
'Light touch' social and other specified services	£820,370 (€1,000,000)
Works	£4,551,413 (€5,548,000)
Works or services concessions	£4,551,413 (€5,548,000)

The rules on calculating estimated contract value are complex. The overriding principle is that the estimate must reflect the total likely value of the contract to the contractor / supplier (net of VAT) and the method of calculation must not be intended to avoid having to advertise.

Where a utility has a single requirement (e.g. an infrastructure project) with a value that exceeds the relevant threshold, each and every contract for the project is subject to the UCRs. This is referred to as '**aggregation**', requiring the aggregate value of all the contracts ('lots') for a single project to be put out to tender. The UCRs however provide that individual contracts ('**small lots**') do not have to be put out to tender if they are valued as being less than £820,370 (€1m), in the case of works, or less than £65,630 (€80,000), in the case of supplies or services, provided that the aggregate value of the individual exempted lots does not exceed 20% of the total value of all the lots (i.e. the total project value).

There are also special rules for valuing services and supplies contracts that have no fixed term duration or where it may otherwise be difficult to establish a total contract value. For example, when considering services contracts without a fixed term or with a term exceeding 48 months, the contract value is 48 x the estimated monthly payment. Another example is insurance where the calculation is to be done by reference to the estimated premiums payable and any other forms of remuneration.

In many cases a proposed contract will contain elements of works, supplies and services (so-called '**mixed contracts**'). Such contracts are governed by the rules relating to the main object of the contract. So if, for example, the main object is works, all ancillary services or supplies must be ignored for the purposes of deciding what kind of contract it is and the relevant threshold.





Key differences to the public sector rules

The contracts to which the UCRs apply are broadly similar to the public sector regulations (the Public Contracts Regulations 2015 (**PCR 2015**)) and the Public Contracts (Scotland) Regulations 2015 (**PC(S)R 2015**)). The UCRs, however, afford utilities greater flexibility reflecting the belief that utilities are generally more market-orientated and less likely to be influenced by 'buy national' circumstances when procuring works, supplies and services.

For that reason, the UCRs:

- only apply to the award of works, supplies and services contracts relating to the relevant utility activity;
- permit utilities to choose freely between all prescribed contract award procedures (under the PCR 2015, the competitive negotiated procedure, as well as the competitive dialogue procedure, may only be used if the relevant grounds are satisfied);
- do not contain an equivalent obligation on utilities (or at least those that are public sector owned or controlled) to accept the European Single Procurement Document (**ESPD**) as evidence that bidders fulfill the relevant exclusion and selection criteria;
- provide that only utilities that are contracting authorities are required to apply the mandatory exclusionary grounds set out in the PCR 2015;
- permit utilities to establish and operate a system of rules and procedures by which candidates may apply to be 'qualified' (see information on 'Qualification Systems' below), the best known in the UK being the Achilles UVDB;
- contain a specific provision exempting the award of contracts to 'affiliated undertakings' (including joint venture companies as well as parent and subsidiary companies); and
- give utilities greater freedom to use framework agreements (for example, the PCR 2015 stipulate a four-year maximum term for a framework agreement whereas the maximum is eight years under the UCRs).





Advertising requirements

Calls for competition

The fundamental purpose of the procurement rules is to ensure that contract opportunities are advertised in a way which promotes transparency in public procurement markets across the EU and, in particular, to ensure there is no discrimination on grounds of nationality when awarding contracts. For this reason, the UCRs require the publication of certain notices in the OJEU, the principal notice being a Contract Notice advertising the utility's intention to award a contract and inviting expressions of interest from potential bidders (a '**call for competition**').

Qualification Systems

The UCRs permit utilities to limit participation in contract award procedures to candidates that are registered on a 'qualification system' operated in accordance with Regulation 77 of the UCRs. The setting up of the qualification system must be advertised in the OJEU, and if it is to operate for more than three years an OJEU notice has to be published annually. There are specific rules governing the criteria to be used to qualify candidates onto the system and the candidates must be able to apply to be qualified onto the system at any time. Qualification systems can be set up and managed by a third party on behalf of one or more utilities. The best known example is Achilles' Utilities Vendor Database (**UVDB**) which is used by most regulated UK utility companies.

Periodic Indicative Notice

The purpose of the Periodic Indicative Notice (**PIN**) is to give potentially interested bidders time to prepare for an eventual tender by giving the market advance warning of the contracts that a utility intends to put out to tender over the next 12 months. By including details of a contract in a PIN, the utility is able to reduce time limits for receipt of tenders following issue of a Contract Notice.

The UCRs also allow utilities to rely on a PIN to advertise individual contracts when using the restricted or negotiated procedures provided that the detail of the contract is sufficiently described in the PIN. This effectively avoids the utility having to publish a separate Contract Notice for the specific contract in the OJEU.

Contract Notice

The Contract Notice is the standard form OJEU notice to be used for the advertising of individual contracts. It informs potential tenderers of the detail of the individual contract and is usually the basis on which a tenderer will decide whether or not to express an interest in the contract. The Contract Notice must be in the form prescribed in the UCRs and must contain certain information.





Award procedures

General rules

The UCRs provide for six main contract award procedures:

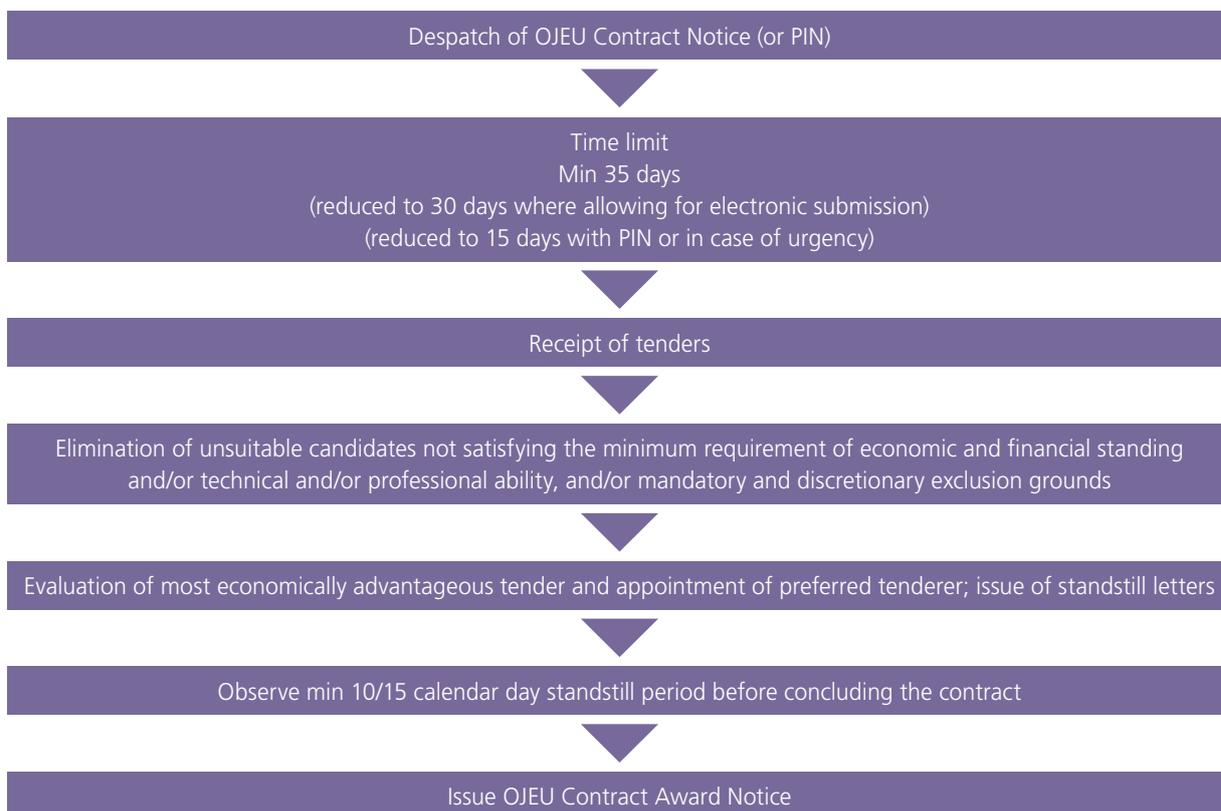
- Open procedure;
- Restricted procedure;
- Competitive procedure with negotiation;
- Competitive dialogue procedure;
- Innovation partnership; and
- Negotiated procedure without a call for competition.

The key differences between these procedures are summarised in the following pages.

Open Procedure

Under this procedure all those candidates that respond to the Contract Notice (or PIN) are entitled to submit a tender for the contract.

There is no initial selection stage limiting the number of candidates to be invited to tender. It may be quicker than the other award procedures but it may also be more onerous in terms of the number of tenders to be evaluated.



Restricted Procedure

This procedure allows the utility to limit the number of candidates to be invited to tender by using an initial selection stage.

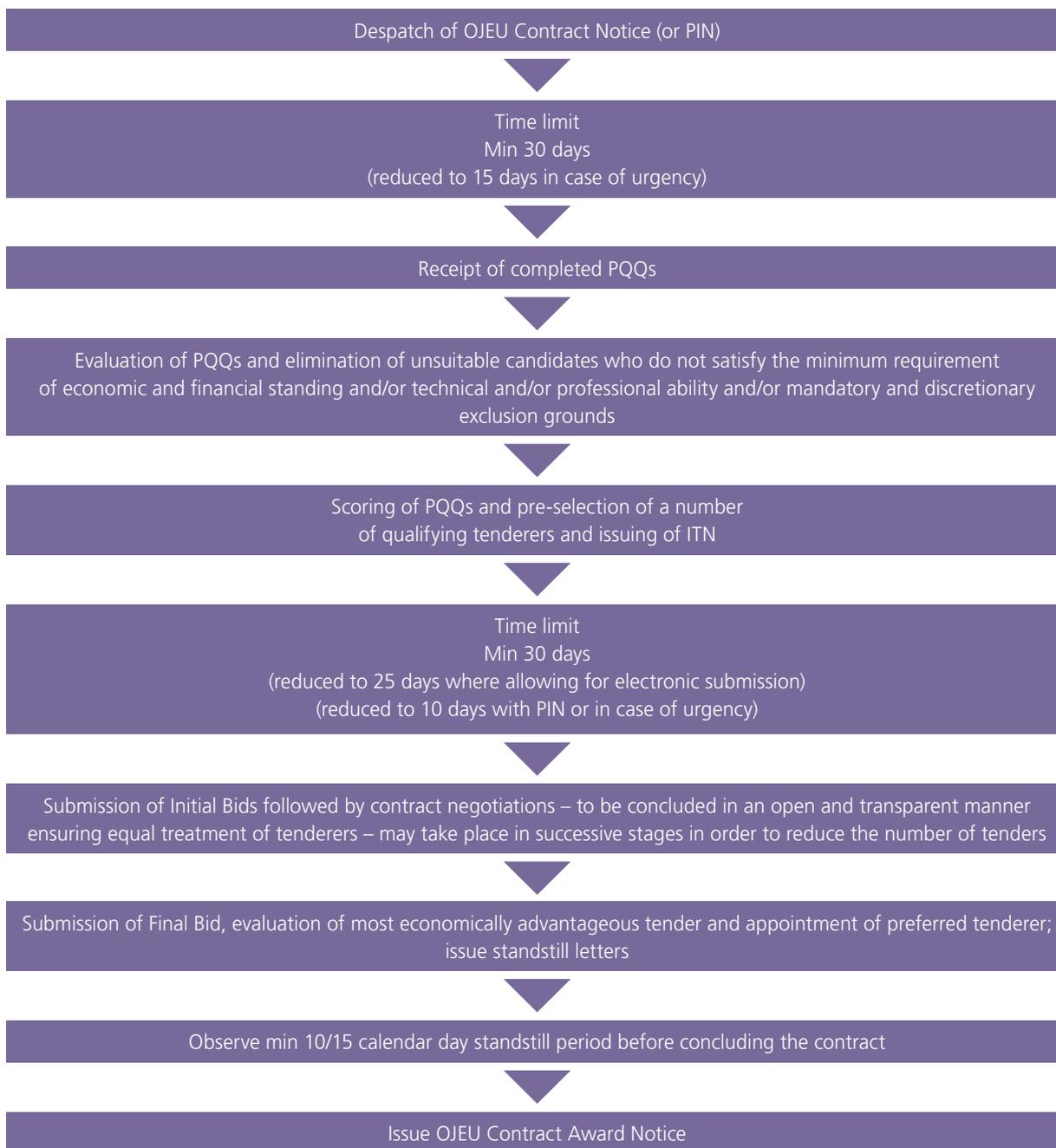
The selection is performed by means of PQQ document, which candidates complete and submit. The restricted procedure does not require a minimum number of candidates to be Invited to Tender (ITT).



Competitive Procedure with Negotiation (CPN)

This procedure allows the utility to limit the number of candidates to be invited to negotiate the terms of the contract using an initial selection stage.

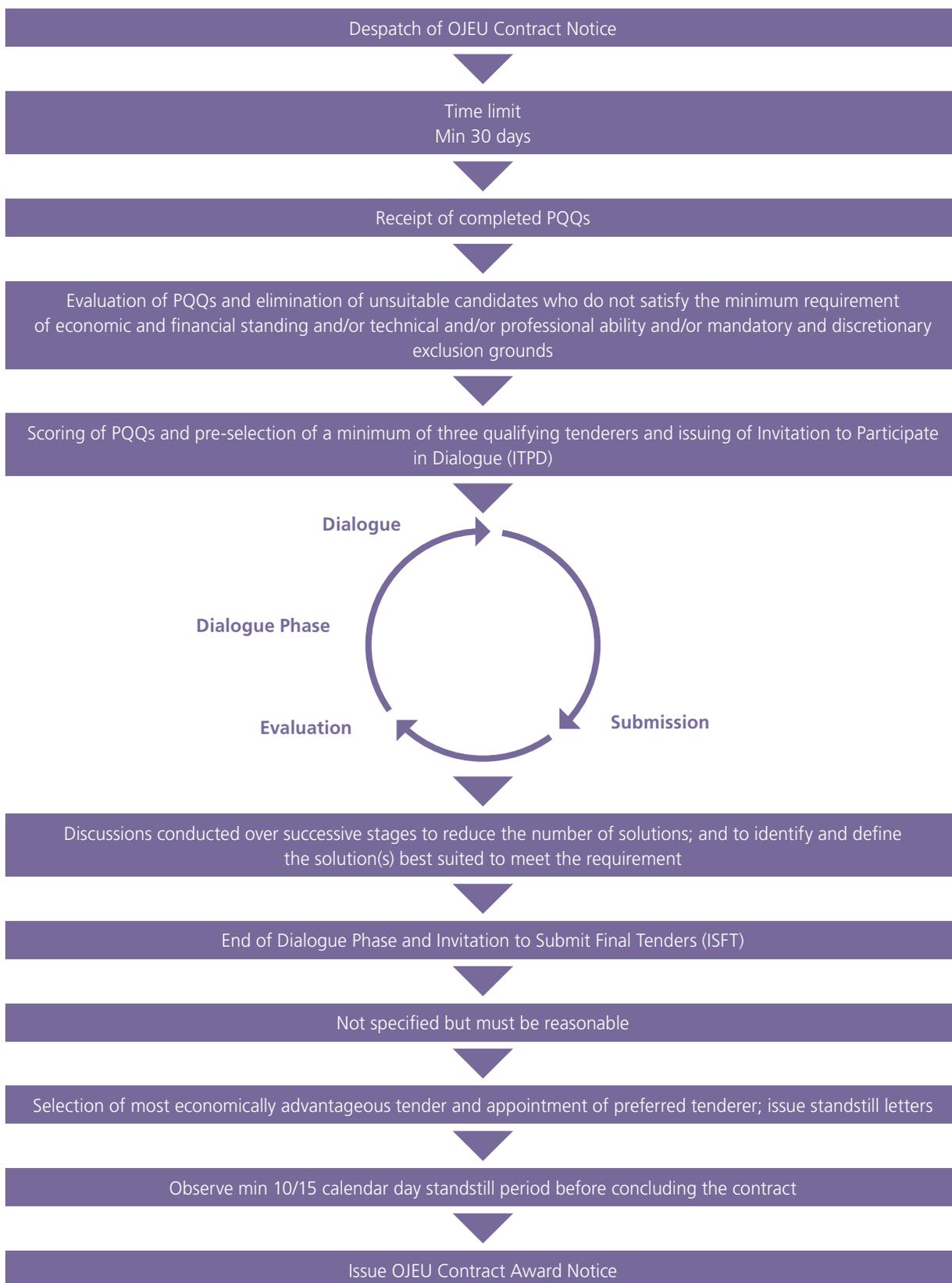
The selection is performed by means of PQQ. The CPN procedure does not require a minimum number of qualifying candidates be Invited to Negotiate (**ITN**). Contract negotiations are conducted following the submission of initial bids.



Competitive Dialogue Procedure (CD)

This procedure allows the utility to limit the number of candidates to be invited to dialogue with the utility as to a solution that would meet the utility's stated needs and requirements, and which it can invite final tenders on.

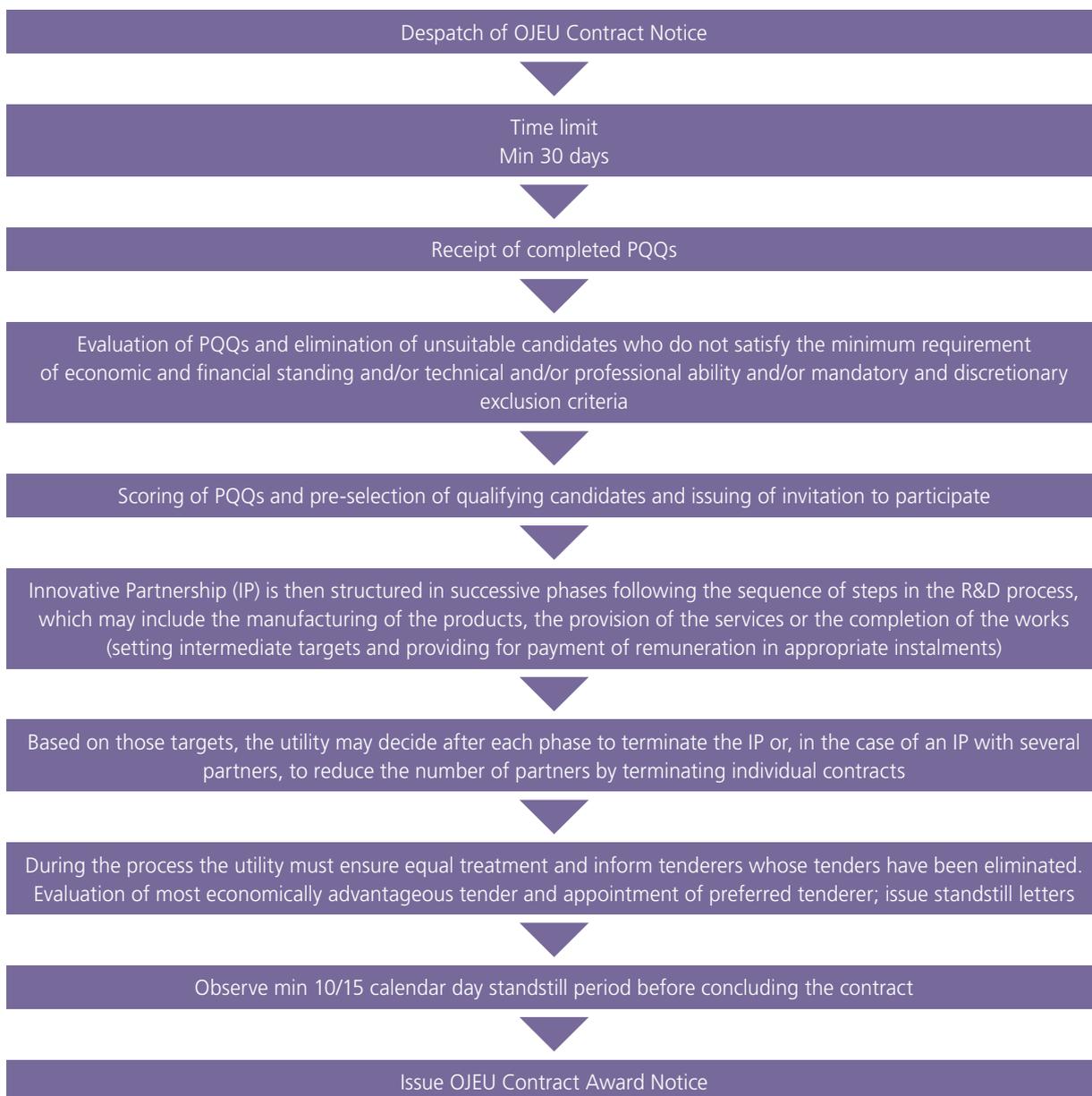
The CD procedure is generally used for establishing long-term Public Private Partnerships or other major infrastructure and IT contracts.



Innovation Partnership Procedure (IP)

The IP procedure is intended for the situation where there is a need for the development of an innovative product or service or innovative works not already available on the market.

It allows utilities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works without the need for a separate procurement procedure once the product, service or work has been developed.





Selection stage

General rules

Other than when using the Open Procedure (where the utility must consider bids from anyone responding to the Contract Notice), the UCRs identify two separate evaluation stages. The first is the evaluation of the tenderers (candidates / applicants) who have expressed an interest in the contract (**pre-selection or pre-qualification**). The second is the evaluation of the tenders then submitted (**tender evaluation**).

Where using Achilles (or another OJEU-established qualification system) the selection stage is generally a short-form process conducted via the Achilles UVDB, rather than a formal PQQ document issued with or shortly after the publication of an OJEU Contract Notice.

Minimum pass/fail requirements

Pre-selection of tenderers is generally conducted using a PQQ. This may prescribe minimum pass/fail requirements that candidates must satisfy before being considered as potential tenderers for the contract. Any pre-selection criteria must be objective and transparent.

Pursuant to the UCRs, where the utility is a contracting authority, the authority must exclude any candidate from the process if the authority has actual knowledge that the company or a director or other person having powers of representation, decision or control of the company has been convicted of certain serious offences (such as fraud, bribery including the Bribery Act 2010, terrorism and money laundering). For private sector utilities, these exclusions grounds are used on a discretionary basis.

In addition, the contracting authority must exclude a candidate if the authority is aware that: (i) the candidate is in breach of its obligations relating to the payment of tax or social security contributions; and (ii) the breach has been established by a judicial or administrative decision having a final and binding effect. Alternatively, the authority may exclude the candidate where it can demonstrate by any appropriate means that the candidate is in breach of those obligations.

All utilities have the discretion to exclude candidates on specified grounds such as bankruptcy, grave misconduct or where there is a conflict of interest that might compromise the procurement process (and cannot be effectively remedied by other less intrusive measures).

Self-cleaning

A candidate must be permitted to provide evidence to show it has taken measures sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion (whether a mandatory or discretionary ground). If the utility considers such evidence to be sufficient - acting reasonably - the candidate must not be excluded from the process. For that purpose the candidate will have to prove it has:

- paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
- clarified the facts and circumstances in a comprehensive manner by actively collaborating with investigating authorities; and
- taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

Shortlisting

In addition to applying minimum pass/fail requirements, utilities may wish to reduce further the number of qualifying candidates to be invited to tender. This is generally referred to as 'shortlisting'. The Contract Notices contain sections that request the criteria or rules to be applied for pre-selection and, where relevant, the minimum and maximum number of candidates they intend to invite to tender. When selecting the number of candidates to be invited, utilities are required to ensure that there are sufficient tenderers for adequate competition.



Tender stage

Other than when using the Open Procedure, where there is no separate initial shortlisting stage, the tender stage generally commences with the utility issuing to the shortlisted candidates an ITT (in Restricted procedures), an ITPD (in CD procedures) or an ITN (in CPN procedures) (though the use of terminology for these may vary).

Broadly speaking, the tender document(s) will include:

- **instructions to tenderers** that govern the process and the submission of tender responses;
- **contract requirements** setting out the detail of the works, goods or services being procured;
- **contract award criteria** against which the tenders will be evaluated (and a preferred tenderer appointed).

Subject to the rules on technical specifications, the rules afford utilities a fairly wide degree of discretion as to the specification and the proposed terms and conditions of a contract.

Instructions to tenderers

The instructions to tenderers sets out the rules of the procurement process. It should provide tenderers with clear instructions for the process. For example: how to prepare tender submissions; when, where and how to submit their tender; how to ask and respond to clarification questions; and how to ensure that confidential aspects of their tenders are protected. It should also include a number of provisions to protect the utility. For example, an express statement that the utility has no liability for tenderers' costs and that tenderers are not breaching rules in respect of non-collusion and non-canvassing.

Contract requirements

The tender documents should set also out the detail of the contract requirements and the proposed contract terms and conditions. The contract requirements should be consistent with the scope of the procurement as set out in the OJEU Contract Notice. Where the requirements include technical specifications, these should generally be made by reference to relevant European standards rather than national standards or specifications and should not be discriminatory. The purpose is to ensure that the choice of specification does not discriminate directly or indirectly against tenderers from other EU Member States, or tenderers that might wish to propose a different (functionally equivalent) specification or technical solution. Where national or other non-European standards are specified, they should be qualified by the words 'or equivalent'.

In addition, utilities are not entitled to specify a particular make or source of product, unless there is an objective technical justification for doing so. Wherever possible, technical requirements must be described in terms of functionality.

Choice of contract award criteria

While utilities are afforded a wide discretion as to contract award criteria, the UCRs provide that the criteria must be objective and must be applied in compliance with the general principles of transparency, non-discrimination and equal treatment, thereby ensuring that all tenders are assessed in conditions of effective competition.

To achieve this, the rules require that utilities base the award of contracts on the 'most economically advantageous tender' (**MEAT**), as determined from the point of view of the utility.

MEAT is to be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing (**LCC**).

To the extent relevant, life-cycle costing should cover part or all of the following costs over the life-cycle of a product, service or works, including:

- costs, borne by the utility or other users, such as (i) costs relating to acquisition, (ii) costs of use, such as consumption of energy and other resources, (iii) maintenance costs, (iv) end of life costs, such as collection and recycling costs; and
- costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified.

The method used for the assessment of costs imputed to environmental externalities must fulfil all of the following conditions:

- be based on objectively verifiable and non-discriminatory criteria and, in particular, where it has not been established for repeated or continuous application, it shall not unduly favour or disadvantage certain tenderers;
- be accessible to all interested parties; and
- the data required can be provided with reasonable effort by normally diligent tenderers, including those from third (non-EU) countries party to the GPA or other international agreements by which the EU is bound.

Where utilities assess costs using a life-cycle costing approach, they must indicate in the procurement documents (i) the data to be provided by the tenderers and (ii) the method which the utility will use to determine the life-cycle costs on the basis of that data.

Whenever a common method for the calculation of life-cycle costs has been made mandatory by the EU, that common method must be applied for the assessment of life-cycle costs.

The UCRs provide that the cost effectiveness approach to MEAT may include the 'best price-quality ratio' (**BPQR**). BPQR is in essence price or cost criteria balanced with quality-based criteria, equating to value for money. Such criteria may comprise:

- quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
- organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
- after-sales service and technical assistance, delivery conditions such as delivery date, delivery process, delivery period or period of completion, commitments with regard to parts and security of supply.

Disclosure of contract award criteria

In order to ensure compliance with the general principles of equal treatment and transparency, utilities are required to disclose the detail of the contract award criteria and any relative weighting in the procurement documentation issued to tenderers.

It is the responsibility of the utilities to indicate the award criteria and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. Where weightings are not possible for objective reasons, the utility must list the criteria in descending order of importance.

There is now a large and growing body of case-law on the extent of obligations on disclosure of award criteria - including requirements to disclosure of sub-criteria and scoring methodologies - and this is a key area that gives rise to procurement challenges.





Debriefing and standstill

The UCRs provide that the utility must formerly notify unsuccessful tenderers of the award decision. The utility must then wait a minimum (standstill) period before concluding the contract with the successful tenderer.

This notice is generally referred to as an 'Alcatel letter' or 'Standstill letter' ('Alcatel' after a judgment of the Court of Justice of the EU).

Content of the Alcatel letter

The Alcatel letter must include:

- the criteria for the award of the contract;
- the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by (i) the tenderer which is to receive the notice; and (ii) the tenderer to be awarded the contract or to become a party to a framework agreement;
- the name of the successful tenderer; and
- a precise statement of the exact standstill period applicable pursuant to the provisions of the relevant national implementing law.

To whom?

If a candidate that was not shortlisted following the selection stage of the process has already been informed that they were unsuccessful, the utility is not required to issue an Alcatel letter to them.

The utility generally does not need to issue an Alcatel letter to a tenderer who made it through to the tender stage but has already been definitively excluded (disqualified) or has otherwise withdrawn from the process prior to award stage.

Standstill period

A standstill period will begin the date after the Alcatel letter has been issued. During the standstill period, the utility must not enter into the contract as this time is designed to ensure that the tenderers concerned have sufficient time to examine the contract award decision and to assess whether it is appropriate to initiate a review procedure.

The relevant provisions require a period of at least 10 calendar days following the date on which the contract award decision is sent to the tenderers concerned via email, fax or other electronic means. Alternatively, if non-electronic means are used, the period is a minimum of 15 calendar days.

Failure to comply with the debriefing and standstill requirements may lead to the contract being declared ineffective (see below).

Contract Award Notice

Finally, utilities are required to publish a Contract Award Notice in the OJEU within 30 days of a contract being entered into with the successful tenderer.





Remedies

Sanctions for breaches of the UCRs are actionable by any aggrieved tenderer or other third party who, in consequence of that breach, suffers, or risks suffering, loss and/or damage.

The remedies available depend largely on whether a challenge is made before or after the contract (or framework agreement) has been entered into.

Pre-contractual remedies

As a general rule, if proceedings are brought during the tender process or otherwise before the contract (or framework agreement) has been entered into, an unsuccessful tenderer can request the court to:

- set aside any unlawful decision taken in the process;
- amend tender documentation (e.g. to correct a discriminatory specification or unlawful selection or award criteria); and/or
- make an award in damages for loss or damage suffered as a consequence of the breach.

Importantly, where an unsuccessful tenderer has formally challenged a contract award decision, the utility shall not enter into the contract until the court has made its decision. Any failure to comply with this **'automatic suspension'** rule risks the utility having its contract being declared ineffective and possibly being fined (see below).

Post-contractual remedies

If proceedings are brought after the contract (or framework agreement) has been entered into, the remedies are generally limited to:

- damages for loss or damage suffered as a consequence of the breach; and
- having the contract (or framework agreement) declared ineffective.

The ineffectiveness remedy

A contract (or framework agreement) must be rendered ineffective where it has been awarded in serious breach of the UCRs. In summary, there are three grounds on which the ineffectiveness remedy can be claimed:

- where a contract (or framework agreement) has been awarded without the prior publication of a notice in the OJEU where one was required (**'illegal direct awards'**);

- where a contract (or framework agreement) is entered into without the utility complying with the relevant debriefing and standstill rules (including the automatic suspension rule) and where it is established that there has been a substantive breach of the rules when conducting the tender process that affected the chances of the tenderer winning the contract (**'aggravated breach'**);
- where a call-off contract is entered into under a framework agreement or DPS in breach of the rules governing the framework agreement or DPS (**'illegal call-off contracts'**).

Where a contract has been declared ineffective, the contract becomes ineffective from the date on which the declaration is made, such that all of the obligations that are yet to be performed under the contract are unenforceable.

Where grounds exist, the ineffectiveness remedy is applied strictly. The UK's first declaration of ineffectiveness was handed down in the Scottish case of *Lightways (Contractors) Ltd v Inverclyde Council [2015] CSOH 169*. Whilst the case in question concerned a public contract, the principles apply equally to utilities procurement.

To protect against the risk of an ineffectiveness challenge to a lawful direct award of a contract, a utility can publish a Voluntary Ex-ante Transparency Notice (**a VEAT notice**) in the OJEU. The purpose of a VEAT notice is to notify the market of an intention and justification for a direct award. Provided the utility then waits for the ten-day standstill period to expire once the VEAT notice has been published (commencing with the date of publication of the VEAT notice) it may enter into the contract without the risk of an action for ineffectiveness.

Time limits

Whether considering a challenge pre- or post-contract award a key consideration for any challenger is whether any action may be time limited. A challenge must be brought within 30 days of the date when the tenderer first knew or ought to have known that grounds for starting the proceedings had arisen. This is commonly referred to as 'the date of knowledge'. This period may be extended at the court's discretion to 3 months where the court considers that there is good reason for doing so.

In respect of proceedings seeking a declaration of ineffectiveness, such proceedings must be brought within 30 calendar days of the Contract Award Notice being published in the OJEU or the unsuccessful tenderer being informed of the contract award decision, and in any case within 6 months of the contract being entered into.

European Commission investigations

Finally, it is important to remember that direct action in national courts is not the only remedy available to unsuccessful tenderers and other aggrieved third parties. The European Commission is able to take infringement proceedings against individual EU Member States for specific failures by authorities to comply with the EU procurement rules.

Such investigations are conducted under specific TFEU rules and can result in formal proceedings being brought against the Member State before the Court of Justice of the European Union (**CJEU**). Although it is a lengthy procedure, the European Commission can seek interim measures and the CJEU can ultimately fine the Member State if it refuses to remedy the breach.

In addition, the European Commission may block any EU funding that is related to the contract (e.g. where a contract relates to an infrastructure project that is part-funded by EU funds) or initiate state aid proceedings (e.g. where concessions are awarded without the private sector concessionaire having been appointed pursuant to open and transparent tender process). Where projects involve significant public funds there are often specific audit and 'gateway' review procedures that make it a condition of funding that private sector contractors/partners are appointed pursuant to an OJEU-compliant tender process.







Modifications to existing contracts during their term

The UCRs make provision for six situations where it can be assumed that modifications to existing contracts will not be regarded as sufficiently material to trigger a requirement to conduct a new OJEU-compliant tender process:

Clear, precise and unequivocal review clauses

Where the change, irrespective of its monetary value, has been provided for in the initial procurement documents and in 'clear, precise and unequivocal review clauses' in the contract. This is provided the review clauses (i) state the scope and nature of the possible changes or options as well as the conditions under which they may be used, and (ii) do not permit changes that would alter the overall nature of the contract. Importantly, the requirement is not for the review clause to be in the actual contract. It must be in the initial procurement documents, a term not defined in the UCRs but which presumably means the tender documents issued to tenderers as part of the original procurement process.

Additional works, services or supplies

Where these have become necessary and were not included in the initial procurement and where a change of contractor (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations, and (ii) would cause significant inconvenience or substantial duplication of costs.

However, any increase in price must not exceed 50% of the original contract value and the authority or utility relying on this ground must publish a modification notice in the OJEU.

Unforeseen circumstances

Where the need for the change (i) has been brought about by circumstances which a diligent utility could not have foreseen, and (ii) the change does not alter the overall nature of the contract.

However, any increase in price must not exceed 50% of the original contract value and the utility must publish a modification notice in the OJEU.

New contractor

Where a new contractor replaces the one that was initially awarded the contract, but only where as a consequence of (i) an unequivocal review clause or option meeting the requirements of the first situation above or (ii) universal or partial succession into the position of the initial contractor (including corporate restructuring, merger or acquisition or insolvency) provided that the new contractor meets the original pre-qualification criteria and the appointment does not result in other substantial changes to the contract and is not aimed at circumventing the procurement rules.

'Codified Presetext'

The test developed by the CJEU in the Presetext case (the main CJEU judgment dealing with contract modifications) has now been codified into the UCRs. The new codified rules provide that a modification will not be substantial where – irrespective of its value – it does not result in one or more of (i) the contract being materially different in character from the one initially concluded, (ii) the change introducing conditions which, if they had been included in the original procurement, would have allowed admission of other candidates or the acceptance of another tender or attracted additional participants in the procedure, (iii) the change impacting the economic balance of the contract in favour of the contractor in a way that was not provided for in the contract, (iv) the change considerably extends the scope of the contract, or (v) a new contractor replaces the contractor originally awarded the contract in circumstances not permissible under the fourth situation above.

De minimis thresholds

And finally, where the change does not exceed both of (i) the relevant works, services or supplies threshold and (ii) either 15% of the original contract value for works

contracts or 10% of the original contract value for service and supply contracts, but provided always that the change does not alter the overall nature of the contract. However, unlike changes made relying on the second or third situations above, these thresholds must be applied cumulatively to successive modifications.

Termination rights

In a separate provision in the UCRs, utilities are required to ensure that every contract they award contains provisions enabling the utility to terminate the contract where:

- the contract has been subject to a ‘substantial modification’ (i.e. a modification not permitted by the UCRs);
- where post-award it is discovered the contractor should have been excluded from the procurement process on certain mandatory exclusion grounds (including fraud or corruption offences); or

- the CJEU has declared the contract was awarded in ‘serious infringement’ of the utilities obligations under EU law in infringement proceedings brought by the European Commission against the Member State concerned under Article 258 TFEU.



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