

Guide to the public procurement rules in Scotland

Contract award procedures for public sector bodies in Scotland



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Introduction

This Guide provides an overview of the public procurement rules in Scotland. It is intended as an introductory guide for lawyers, procurement officials and policy makers. It is not intended to be relied upon as legal advice.

If you would like any further information or have any queries in relation to the application of the EU public procurement rules in Scotland please contact:



Graeme Young

Partner

T +44 131 200 7515

M +44 7814 752 508

E graeme.young@cms-cmno.com



Ailsa Ritchie

Partner

T +44 141 304 6104

E ailsa.ritchie@cms-cmno.com



Eleanor Lane

Partner

T +44 141 304 6058

E eleanor.lane@cms-cmno.com

The rules

The EU Directives

The EU public procurement rules are contained in a set of EU Directives. They aim to ensure a level playing field for businesses across Europe, opening up public procurement to competition on the basis of a common set of contract advertising and award procedures. The principal EU Directives are:

- Directive 2014/24/EU on public procurement;
- Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors; and
- Directive 2014/23/EU on the award of concession contracts.

Transposing the EU Directives into Scots law

The key pieces of legislation are:

- Procurement Reform (Scotland) Act 2014 (the Act);
- Public Contracts (Scotland) Regulations 2015, which transpose Directive 2014/24/EU;
- The Procurement (Scotland) Regulations 2016, which are made under the Act;
- Utilities Contracts (Scotland) Regulations 2016, which transpose Directive 2014/25/EU; and
- Concession Contracts (Scotland) Regulations 2016, which transpose Directive 2014/23/EU.

The scope of this Guide

This Guide focuses on EU-regulated procurement under The Public Contracts (Scotland) Regulations 2015 (PC(S)R 2015). The PC(S)R 2015 require competitive processes to be followed for contracts with estimated values exceeding the EU thresholds, unless any relevant exclusions or exceptions apply. These procurements are generally referred to as 'EU-regulated procurement'.

The current EU thresholds for services and supplies are GBP 122,976 (central government bodies) and GBP 189,330 for other public bodies. For works contracts, the current threshold is GBP 4,733,252. The thresholds are reset in domestic currencies every two years, and were last set on 1 January 2020.

Separate legislation applies to below EU threshold regulated procurements under the Procurement Reform (Scotland) Act 2014. The Act supplements the provisions which apply under the PC(S)R 2015, with the thresholds under the Act currently GBP 50,000 for supplies and services and GBP 2,000,000 for public works contracts. Contracts with estimated values above these thresholds, but below the EU threshold, are subject to competitive tendering rules set out in the Act and secondary Scottish legislation, the Procurement (Scotland) Regulations 2016. These procurements are generally referred to as 'other regulated procurement'.

We have produced a separate Guide to Utilities Procurement in the UK – please get in touch if you would like us to send you a copy. In addition, there are separate rules for defence and security procurement, which are beyond the scope of this Guide.

This Guide does not cover concession contracts, which are subject to the Concession Contracts (Scotland) Regulations 2016.

Relationship between the Directives and the Scottish legal framework

Under EU law, the Scottish legislation in this area must be interpreted in a manner that is consistent with the Directives, and must be implemented purposively – that is, having regard to the underlying purpose of the EU public procurement rules, namely the opening up of public procurement markets to cross-border competition within the EU.

Key principles

All procurement in the public sector is subject to the EU principles including those of proportionality, non-discrimination, equal treatment and transparency.

Guidance

The Scottish Government has published statutory guidance under the Act. Guidance on a wide range of issues relating to the application of EU public procurement rules is also available on the Scottish Government website and from the European Commission. This includes a "Procurement Journey" website, provided by the Scottish Government, giving practical guidance for both public sector bodies and suppliers.

Position Post-Brexit

The UK left the European Union on 31 January 2020. Under the terms of the EU-UK Withdrawal Agreement, the current EU public procurement rules have continued in force in the UK during an 11 month transition period. That transition period expires on 31 December 2020.

The end of the transition period

All contract award procedures commenced before the end of the transition period will continue to be subject to EU law even after the end of the transition period. EU law will also continue to apply after the end of the transition period to the award of call-off contracts from framework agreements which were either established before the end of the transition period, or which were established following a procedure which started before the end of the transition period. This means that EU law will potentially continue to apply in respect of call-off contracts for several years.

Changes proposed by the Scottish Government

The Scottish Government has proposed legislation to make technical amendments to the current Scottish public procurement rules. That legislation is made under powers set out in the European Union (Withdrawal) Act 2018. These allow Scottish Ministers to address technical inconsistencies resulting from the UK's exit from the EU. At this stage, the Scottish Government has indicated that it does not intend to make any fundamental changes to the contract award procedures.

As a result, the provisions on financial thresholds, the basic requirements to advertise contracts, observe minimum timescales, and follow rules on technical specifications and award criteria are unlikely to change. The European Single Procurement Document (ESPD) will also remain but will be re-named the "Single Procurement Document".

The Scottish Government has also proposed legislation to continue to require public bodies to ensure equal treatment for a further period of 18 months to bidders from countries (including the EU-27) party to the WTO's Government Procurement Agreement (GPA).

The future of procurement notices

From 1 January 2021, the requirement to publish notices in the OJEU will be replaced by a requirement to publish notices on a new UK e-notification system, which the UK Government has called "Find a Tender". This is to meet the requirements of the GPA.

The requirement to publish notices on Public Contracts Scotland (PCS), which comes from the Procurement Reform (Scotland) Act 2014, is not affected. In practice, many authorities currently use PCS to send notices to the OJEU and the Scottish Government is working to ensure that they would be able to continue to use PCS to send notices to the new "Find a Tender" UK e-notification system.

The requirement to have recourse to e-Certis, the EU's online database of documentary evidence required in each Member State, is to be removed, as are references to the EU's State aid regime.

Contracts subject to the regulations

The PC(S)R 2015 apply where the following conditions are met:

- the procuring body is a contracting authority;
- the contract is a public works, supplies or services contract; and
- the estimated value of the contract exceeds the relevant financial thresholds.

Each of these is considered in turn below.

Contracting authorities

The definition of a 'contracting authority' includes:

- central government
- regional and local authorities;
- bodies governed by public law (e.g. housing associations); and
- associations formed by one or more such authority or body.

Bodies governed by public law

The PC(S)R 2015 sets out a three-part test to determine whether an entity is a 'body governed by public law'.

It must:

- have legal personality;
- be established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; and
- be financed for the most part by the State, regional or local authorities, or by any other body governed by public law; is subject to supervision by any such authority; or has an administrative managerial or supervisory board more than half the members of which were appointed by an authority.

Where a body is financed by a combination of public and private money (for example, in the case of universities), the financing test should be considered annually.

Types of contract

The PC(S)R 2015 apply to public contracts. These are contracts which have a pecuniary interest, are concluded in writing and have as their object the:

- execution of works;
- supply of products; or
- the provision of services

unless excluded or where they do not meet the threshold requirements.

There are specific rules on the handling of mixed contracts involving combinations of works, supplies and services.

Public contracts can be awarded on the basis of framework agreements, dynamic purchasing systems and by using electronic auctions.

Framework agreements

The PC(S)R 2015 define a 'framework agreement' as *"an agreement between one or more contracting authorities and one or more economic operators which establishes the terms governing contracts to be awarded during a given period, in particular price, and where appropriate, quantity."*

The PC(S)R 2015 set out specific provisions governing the setting up and use of framework agreements, including rules governing 'call off' contracts awarded under them.

Dynamic purchasing systems

These are entirely electronic purchasing systems intended for commonly used items such as office supplies. A DPS has some similarities to a framework, but is open to any supplier satisfying the selection criteria – unlike frameworks which, once concluded, are closed to new suppliers.

Electronic auctions

Regulation 36 of the PC(S)R 2015 allows a contracting authority to introduce a phase in a public procurement procedure after full evaluation of tenders, whereby tenderers are invited to revise their prices downwards or to change quality elements that can be measured objectively across all participants.

Thresholds

As set out above, only those contracts that exceed the financial thresholds set by the EU are subject to the full regime under PC(S) R 2015. The contracting authority must calculate the estimated value of a contract by reference to the total value payable under it, not including VAT. Contracts are valued on the basis of their full duration, including any options to extend.

The current EU thresholds are:

	Services	Supplies	Works
Central government bodies (Schedule 1 PC(S)R 2015)	GBP 122,976	GBP 122,976	GBP 4,733,252
Other public bodies	GBP 189.330	GBP 189.330	GBP 4,733,252

There is an exception for certain social and other specified services in falling within the 'Light Touch Regime' (Schedule 3 PC(S)R 2015), which have a threshold of GBP 663,540. These include:

- health, social and related services;
- benefit services;
- investigation and security services; and
- certain legal services.

The thresholds are reset in domestic currencies every two years, and were last set on 1 January 2020.

Separate legislation applies to regulated procurements below the EU threshold under the Procurement Reform (Scotland) Act 2014, with the thresholds currently GBP 50,000 for supplies and services and GBP 2,000,000 for public works contracts. Contracts with estimated values above these thresholds, but below the EU threshold, are subject to competitive tendering rules set out in the Act and secondary Scottish legislation, The Procurement (Scotland) Regulations 2016. These procurements are generally referred to as '*other regulated procurement*'.

The rules on calculating contract value are complex, but the overriding principle is that the valuation method may not be used to avoid the application of the rules. The PC(S)R 2015 also contain provisions to prevent artificial splitting of contracts to avoid triggering the thresholds.

Excluded contracts

Certain contracts are excluded from the PC(S)R 2015. Any reliance on these exclusions should be considered carefully.

The exclusions include:

- contracts for the acquisition or rental of land;
- contracts for financial services in connection with the issue, sale, purchase, or transfer of securities or other financial instruments;
- certain contracts or design contests awarded under the UCR 2016;
- certain contracts or design contests for public communications networks or provision of public electronic communications services;
- public contracts awarded, and design contests organised, pursuant to international rules;
- employment contracts;
- certain public contracts awarded between public sector bodies, or subsidised by contracting authorities; and
- research and development contracts (subject to certain conditions).

The procurement of concession contracts is governed, in Scotland, by the Concession Contracts (Scotland) Regulations 2016.

Contract award procedures

Where the PC(S)R 2015 apply, and assuming no pre-procured framework or DPS can be used, the contracting authority will need to select the appropriate procurement procedure. The procedures are:

- Open procedure;
- Restricted procedure;
- Competitive Procedure with Negotiation (CPN) Procedure;
- Competitive Dialogue (CD) Procedure;
- Innovation Partnership Procedure; and
- Negotiated procedure without prior publication.

Open Procedure – Regulation 28

Any interested party can submit a tender. There is no separate selection or pre-qualification stage; information to assess supplier suitability is provided with the tender. The tenders are evaluated and an award decision reached. It may be quicker than the other award procedures but may also be more onerous in terms of the number of tenders to be evaluated. Generally, the procedure is suitable only for the most straightforward procurements where the contract specification is clear and can be priced, with no need to negotiate with bidders.

Restricted Procedure – Regulation 29

This is a two stage process. Interested parties submit an expression of interest (EOI) in response to a call for competition (OJEU contract notice) or an invitation to confirm interest where a PIN is used as the call for competition. Only those meeting the pre-qualification or selection criteria will be invited to submit a tender. The initial selection stage must be conducted using the ESPD (Scotland) document (a modified form of the ESPD). This two-stage procedure allows authorities to limit the number of candidates that will be invited to tender to a minimum of five, assuming that five or more candidates satisfy the minimum pre-qualification requirements. No negotiations with bidders are permitted at ITT stage.

Competitive Procedure with Negotiation (CPN) Procedure – Regulation 30

Reserved for more complex contracts, this procedure involves an initial selection or pre-qualification stage using the ESPD (Scotland), after which a minimum of three eligible candidates are invited to negotiate the contract. Authorities are required to negotiate the contract on the basis of an initial tender (unless they have reserved the right in the contract notice to award the contract on the basis of the initial tenders). No negotiations are permitted on the minimum requirements or the award criteria. The negotiation phase may be conducted in successive stages to reduce the number of tenders (provided this was provided for in the OJEU contract notice). The authority must not conduct any further negotiations with bidders following submission of final tenders.

Competitive Dialogue (CD) Procedure – Regulation 31

This procedure is also reserved for more complex contracts and involves an initial selection or pre-qualification stage using the ESPD (Scotland), after which a minimum of three eligible candidates are invited to participate in dialogue. Dialogue generally takes place over successive stages and involves a reduction in the proposed solutions. Once the authority is satisfied it has at least one solution capable of meeting its needs and requirements, it can close the dialogue phase and invite final tenders from the remaining bidders. Any negotiation and finalisation of the terms of the contract must not involve changes to the essential aspects of the tender or the procurement, including the authority's needs and requirements, where such changes are likely to distort competition or cause discrimination.



Under Regulation 27(4) of the PC(S)R 2015, the use of both the CPN and CD procedure is only available to authorities where:

- the needs of the authority cannot be met without adaptation of readily available solutions;
- the works, supplies or services required include design or innovative solutions;
- the contract cannot be awarded without prior negotiations because of specified circumstances related to the nature or complexity of the works, supplies or services or the legal and financial make-up or because of the risks attaching to any of them;
- the technical specifications of the works, supplies or services cannot be established with sufficient precision by the authority with reference to a standard, European technical assessment, common technical specification or technical reference; or
- in response to an open or restricted procedure only irregular or unacceptable tenders are submitted.

The above exceptions are likely to be narrowly construed.

Innovation Partnership Procedure – Regulation 32

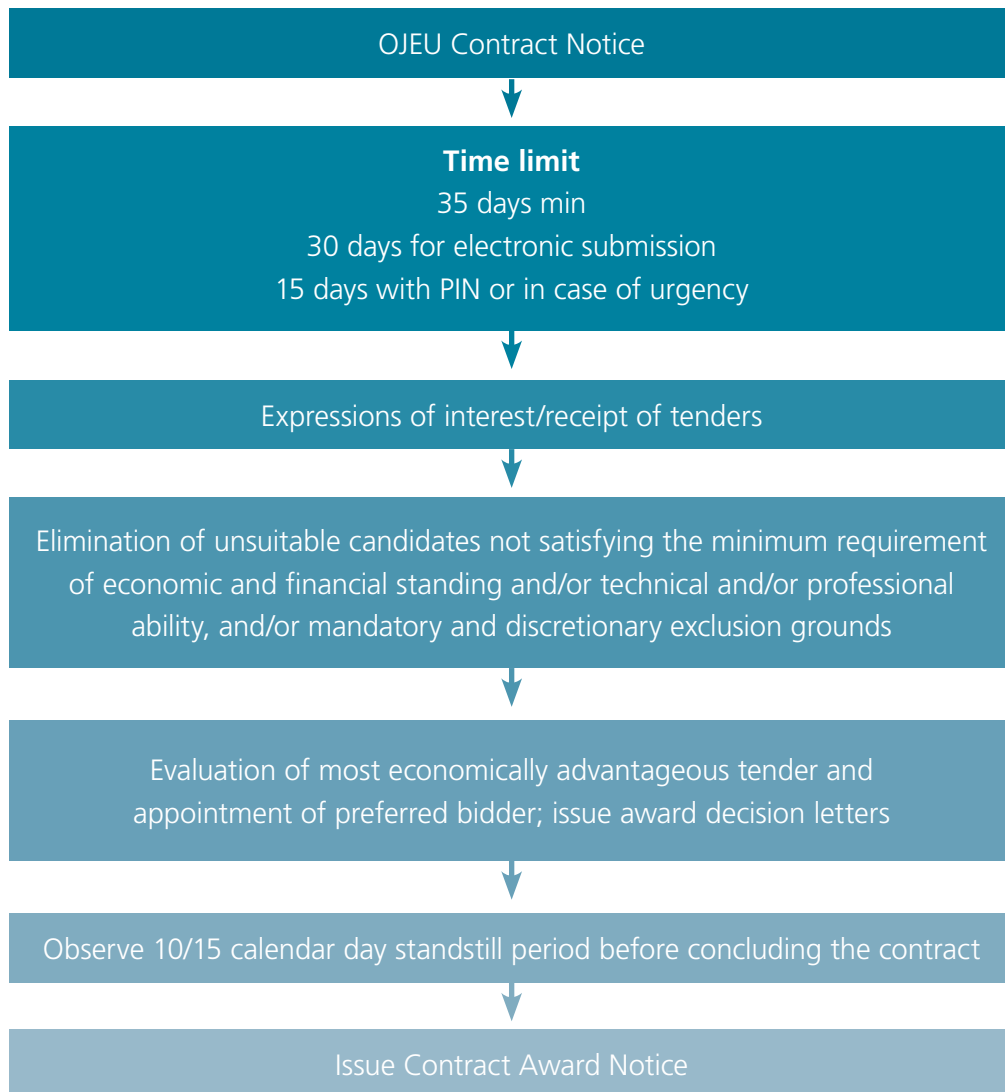
This procedure is intended for the situation where there is a need for the development of an innovative product or service or innovative works not already available on the market. It allows authorities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works without the need for a separate procurement procedure once the product, service or work has been developed.

Negotiated procedure without prior publication – Regulation 33

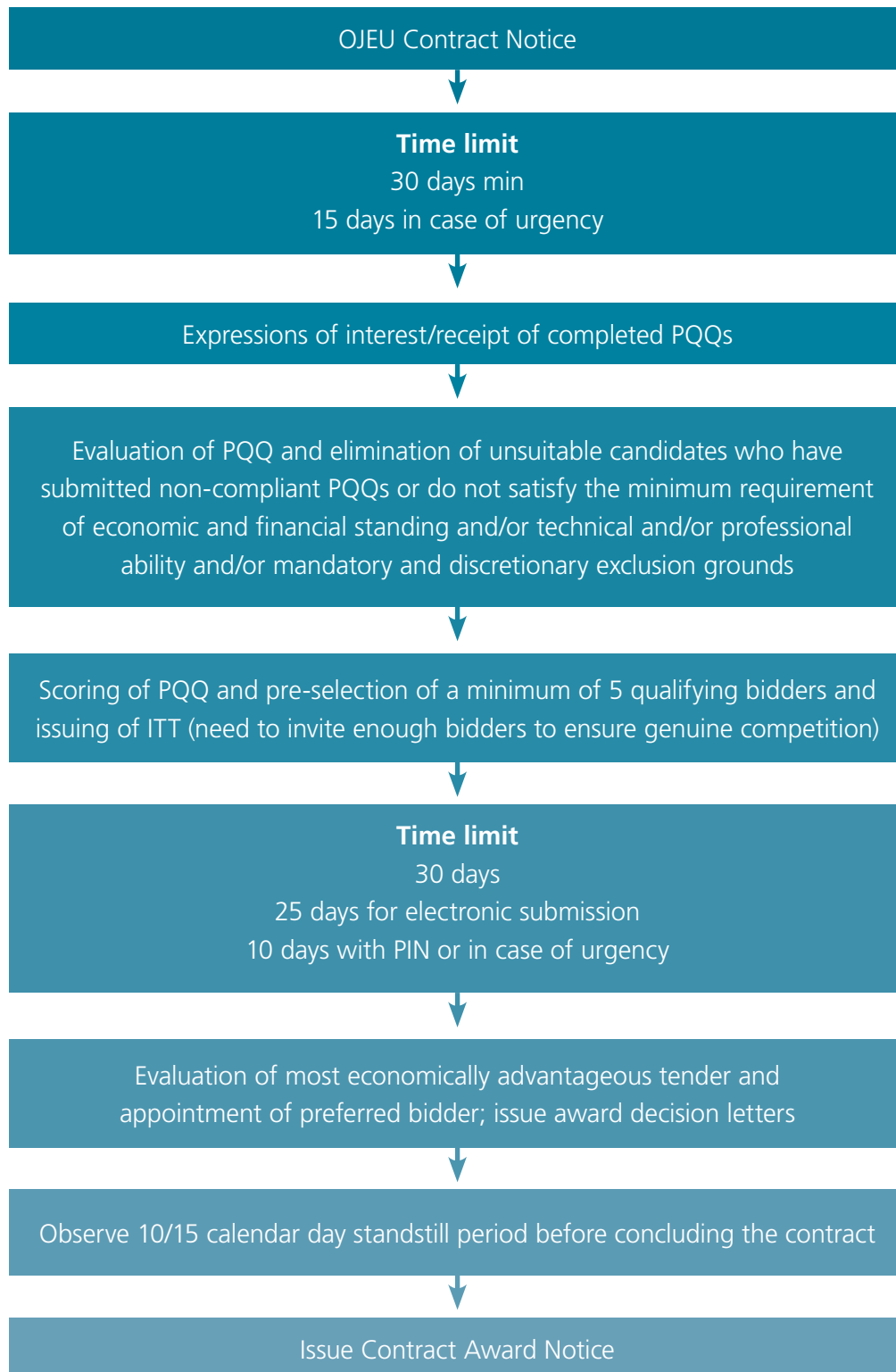
In limited circumstances, authorities may award contracts without the need to advertise them to the market, where no tenders or suitable tenders have been submitted, where only a particular operator can meet the authority's demands or where there is extreme urgency.

Further information on each procedure can be found on the following pages.

Open procedure



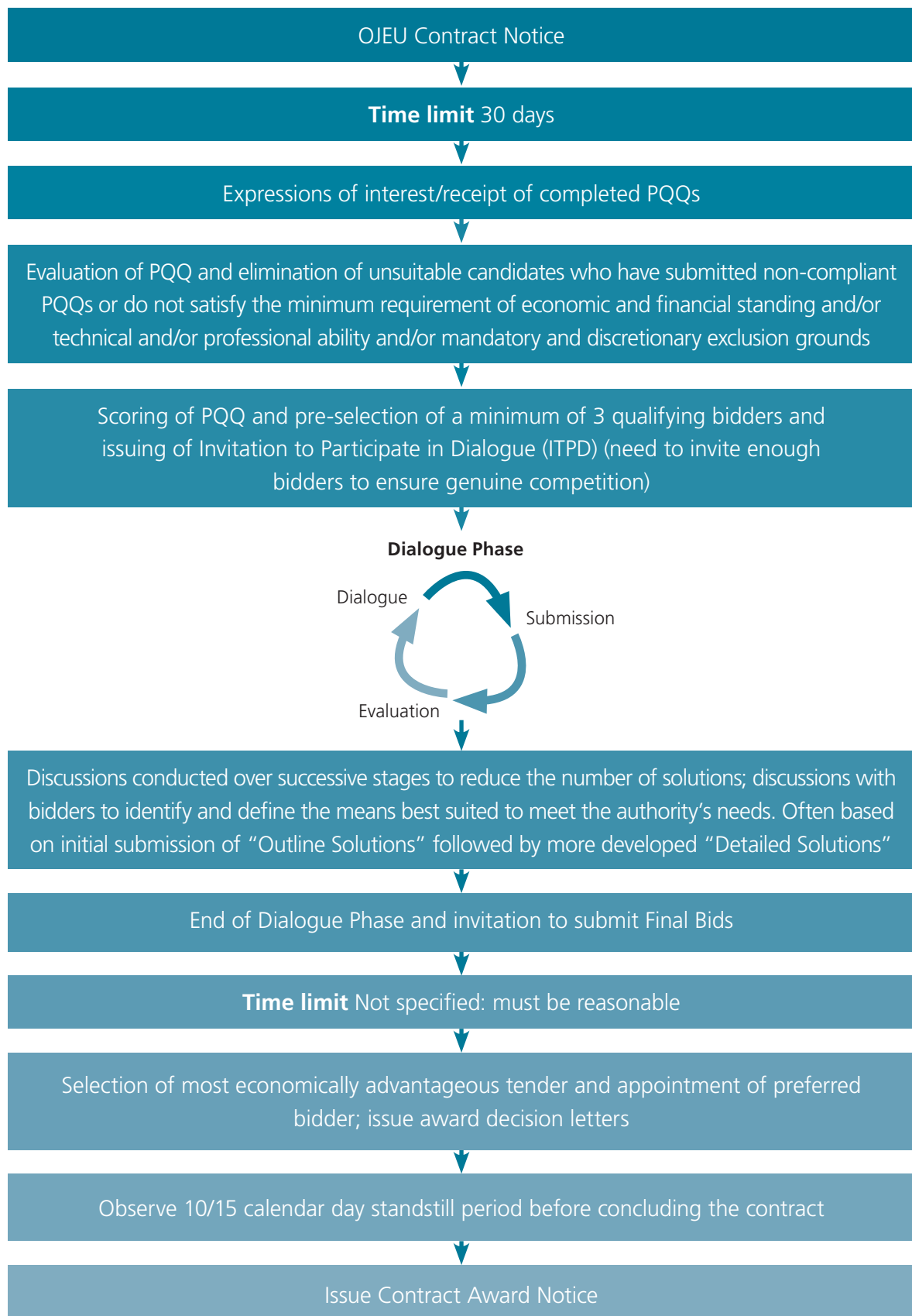
Restricted procedure



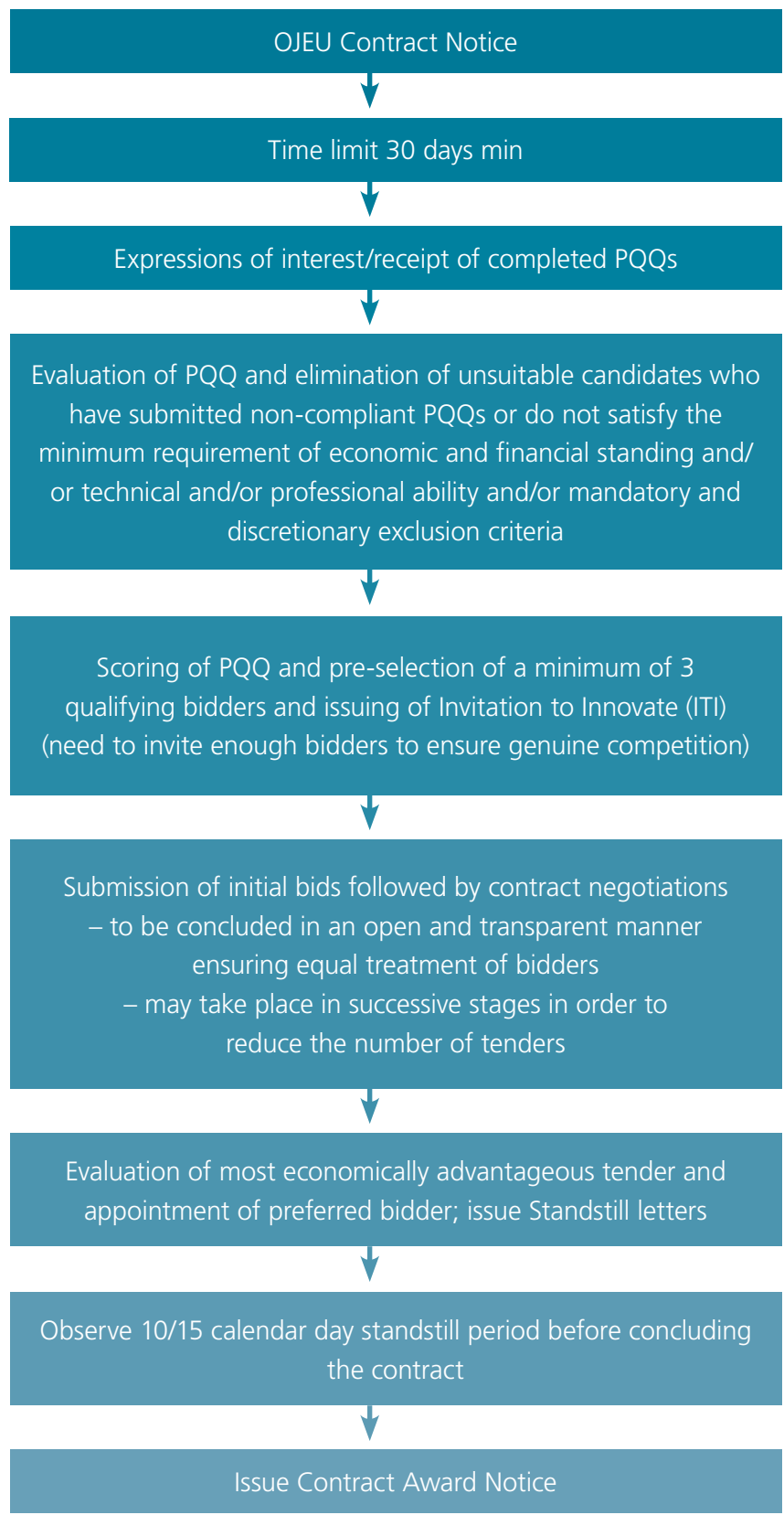
Competitive procedure with negotiation



Competitive dialogue procedure



Innovation partnership procedure



Advertising requirements

Contracting authorities must advertise public contracts in an open and transparent manner to ensure equal access to contract opportunities across the EU. This requires contracts to be advertised in prescribed forms in the Official Journal of the EU/EEA (OJEU).

Even if a public contract is below the relevant EU threshold contracting authorities must still comply with the below EU threshold rules, which require advertising of contracts on PCS.

Procurement notices

OJEU notice

An OJEU contract notice is an advertisement for contracts that are subject to PC(S)R 2015. It is sent electronically for publication in the Official Journal of the European Union (OJEU), which takes the form of an online database, Tenders Electronic Daily (TED). The OJEU notice provides potential bidders throughout the EU with information about the proposed contract. The notice must be in a standard form, which is available on the EU's SIMAP website.

The information required includes:

- details of the awarding authority;
- a short description of the subject matter of the contract and contract value;
- reference to Common Procurement Vocabulary (CPV) codes relative to the object of the contract (see European Commission Regulation (EC) No. 213 /2008, OJ L74/1 and/or SIMAP website);
- the contract award criteria which will be used to assess and award the contract (though the detailed award criteria and evaluation process can be provided later in the tender documentation); and
- contact details for interested parties to obtain further information.

Prior Information Notice

The purpose of the Prior Information Notice (PIN) is to give potentially interested bidders time to prepare for forthcoming tender opportunities, essentially giving the market advance warning of contracts that the contracting authority intends to issue an OJEU Contract Notice for over the next 12 months.

PINs are compulsory when the authority intends to rely on the shortened procedural timetable for expressions of interest. The PIN can be published either in the OJEU or on the authority's 'buyer profile' (essentially their internet procurement page). However, where it is published on the buyer profile rather than directly in the OJEU, the authority is required to issue a separate short-form notice to the European Commission.

In certain circumstances, a PIN can be used as a call for competition in its own right obviating the need for an OJEU contract notice for each contract. Sub-central contracting authorities using the restricted procedure or competitive procedure with negotiation may use a PIN in this way. A PIN can also be used in this way by any contracting authority conducting an LTR procedure. In both cases, an invitation to confirm interest must be sent to suppliers that express an interest.

Publication at national level

In addition to publication on TED, there are a number of e-procurement platforms in the UK where notices are published. These include Public Contracts Scotland (PCS), and, in the rest of the UK, Contracts Finder, Sell2Wales, and eTendersNI. After 29 March 2019, in the event of the UK leaving the EU without a transitional arrangement or other deal regarding future access to the OJEU/TED, the UK will need to make the necessary legislative and practical arrangements to ensure that the contracts are advertised on a UK based e-notification platform which will need to be set up to manage these services. In Scotland, most if not all open advertised procurement is conducted through PCS under the 2014 Act, for both above and below EU threshold contracts. This is likely to remain the position post the Brexit transition period, albeit with higher threshold procurement appearing on a new UK-wide "Find a Tender" portal instead of the OJEU.

Technical specifications

Technical specifications must afford equal access and not create unjustifiable obstacles to the opening up of public procurement to competition. The principle is that it must be possible to submit tenders incorporating any of a number of different technical solutions to satisfy the particular requirement. This requires authorities to draw up the technical specifications in terms of functional performance and requirements, with the option of making reference to a particular European standard or, if there is none, to a national standard. Tenders based on equivalent arrangements must also be considered. For example in relation to IT procurement, requiring the inclusion of “or equivalent” when specifying standards such as quality management systems authorities must wherever possible use common specifications when specifying microprocessors for desktops, laptops, servers or workstations. The requirements for microprocessors must exclude any references to brands, manufacturer-specific processor architectures, trademarks, technology types or other potentially discriminatory descriptors.

To demonstrate equivalence, tenderers should be permitted to use any form of evidence and authorities must be able to provide a reason for any decision that an alternative is not equivalent.

Authorities that wish to set environmental requirements may lay down the environmental characteristics, such as a given production method, and/or specific environmental effects of product groups or services. They can use, but are not obliged to use, appropriate ecolabels, such as the European Eco-label, (multi-)national eco-labels or any other eco-label provided the requirements for the label are drawn up and adopted on the basis of scientific information using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and provided the label is accessible and available to all interested parties.

Authorities should also, whenever possible, lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users.

Selection stage

The PC(S)R 2015 identify two distinct evaluation stages. The first is the evaluation of the candidates who have expressed an interest in tendering for the contract (selection stage or pre-qualification). The second is the evaluation of the tenders then submitted by those tenderers invited to tender (tender stage).

The selection stage is generally conducted using a Pre-Qualification Questionnaire (PQQ). The PQQ will usually prescribe minimum requirements that candidates must satisfy (evaluated on a pass/fail basis) and then score the candidates on the basis of selection criteria relating to their financial and economic standing and their experience and technical ability.

When using the Open procedure there is no separate selection stage shortlisting candidates to be invited to tender. Tenderers will however be required to satisfy minimum requirements as part of the tender evaluation process, before their actual tender proposals on quality and price are assessed. In all the other procedures, there are separate and distinct pre-qualification and tender stages, with only shortlisted tenderers invite to tender stage.

The difference between selection and award criteria is critical. It is important to maintain a clear distinction between them throughout the procurement process. Selection criteria are focused on 'the bidder' and award criteria are focused on 'the bid'. This means that issues/questions which are appropriate to the selection criteria must be addressed at the selection stage and cannot form part of the award stage (even if they were omitted from the selection stage in error) and vice versa. Selection criteria should be proportionate to the value of the purchase, its sensitivity, estimated risks, and the complexity of the requirement.

The PC(S)R 2015 set out four groups of criteria that contracting authorities must or may take into account when selecting potential suppliers to tender for public contracts:

- **Mandatory exclusion grounds**
Contracting authorities must exclude a potential supplier that has been convicted of a number of offences set out in the PC(S)R 2015. These include conspiracy, corruption, bribery and fraud.
- **Discretionary exclusion grounds**
Contracting authorities may exclude a potential supplier if one of the discretionary grounds applies.

These include: violations of environmental, social and labour laws and commitments arising under certain international treaties (such as those dealing with forced or child labour), non-payment of taxes or social security contributions, conflicts of interest, situation where there are 'sufficiently plausible indications' to conclude that the bidder has entered into anti-competitive arrangements aimed at distorting competition and situation 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.

- **Economic and financial standing**

Contracting authorities may exclude potential suppliers that do not have the necessary economic and financial capacity to perform the contract. Any minimum yearly turnover requirement on potential bidders should not exceed twice the estimated contract value except in duly justified cases, such as by reference to the risks attached to the nature of the works, supplies or services. As with the technical and professional requirements, all requirement must be related and proportionate to the subject matter of the contract.

- **Technical and professional ability**

Contracting authorities may impose requirements relating to the experience of potential suppliers and the level of human and technical resources available to the potential supplier, and may request suitable references from past contracts to demonstrate experience.

The ESPD (Scotland) must be used for all selection stage questions.

European single procurement document (ESPD) Scotland

The ESPD is a standardised document which enables suppliers to provide information about their organisation and compliance with exclusion grounds and selection criteria requirements. It is intended to reduce the administrative burden on suppliers and remove some of the barriers to participation in public procurement, especially for SMEs. The ESPD allows suppliers to self-declare in relation to exclusion grounds and selection criteria, and a supplier can re-use an ESPD which it has previously submitted for another competition, so long as the information is still correct.



The ESPD (Scotland) contains the standard set of questions in line with the ESPD requirements. This means that questions in the ESPD (Scotland) cannot be amended and new questions cannot be added. However, contracting authorities may supplement the ESPD with additional project specific questions by making these available to potential suppliers in the procurement documents, provided that such questions comply with the requirements of Directive 2014/24/EU.

Typically, only the winning tenderer has to produce evidence of compliance. However, the contracting authority may ask any tenderer at any time during the procedure to submit all or part of the required certificates and supporting documents where this is necessary to ensure the proper conduct of the procedure.

To further reduce the administrative burden on suppliers, contracting authorities should not ask suppliers for supporting documents that are available on national databases or which the contracting authority already possesses. The ESPD enables suppliers to provide the necessary information such as internet addresses to enable contracting authorities to access this information.

There has been a move to harmonise supporting documentation as far as possible across the EU, and Directive 2014/24/EU requires contracting authorities to 'have recourse to eCertis'. The eCertis system is a Europe-wide database, which maps documents and certifications across different Member States to enable mutual recognition. In the UK, use of eCertis became mandatory from 18 October 2018.

There is a degree of discretion as to the extent to which authorities must obtain evidence of compliance with substantive qualification requirements, and in some cases self-declaration may be acceptable as the sole means of proving compliance, even by the winning tenderer. This is particularly relevant in the UK, where there are relatively few situations in which 'certificates' need to be submitted by tenderers. This is because the UK does not operate many of the kinds of official certificates operated in some other Member States.

Tender Stage

The tender documentation will always depend on the contract and the award procedure being used but, as a general rule, the authority needs to give the tenderers clear instructions as to:

- the detail of the contract requirements/specification;
- the proposed contract terms and conditions;
- how the tender process will be conducted; and
- the contract award criteria to be applied when evaluating tenders.

Contract award criteria

Under the PC(S)R 2015, contracting authorities must award contracts on the basis of the most economically advantageous tender (MEAT). They may not use price or cost as the sole award criteria. This is different to the position in the rest of the UK, where certain contracts may be awarded on the basis of price or cost, using a cost-effectiveness approach.

The contracting authority must identify the most economically advantageous tender on the basis of the best price-quality ratio. This must be assessed on the basis of criteria linked to the subject-matter of the contract, and must include the price or cost, using a cost-effectiveness approach.

A cost-effectiveness approach may include life-cycle costing, which factors in costs such as cost of use (such as energy consumption), maintenance costs and end of life costs (such as collection and recycling costs).

Other criteria that the contracting authority may take into account in assessing MEAT include:

- 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 and delivery period or period of completion.

Award criteria must be linked to the subject-matter of the contract, and must:

- not have the effect of conferring an unrestricted freedom of choice upon the contracting authority;
- ensure the possibility of effective competition; and
- be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria.

Disclosure of contract award criteria

To ensure compliance with the principles of equal treatment and transparency, authorities are required to disclose the contract award criteria in the tender document issued to tenderers.

Once published the award criteria cannot be changed (or not applied).

Where weighting is not possible for objective reasons, the contracting authority must indicate the criteria in decreasing order of importance.

Abnormally low tenders

When a tender appears to be abnormally low, the contracting authority must ask the tenderer to explain its proposed price or cost.

What makes a tender appear abnormally low?

The PC(S)R 2015 do not define the 'trigger point' at which the contracting authority should require the tenderer to explain its tender. In *Amey v The Scottish Ministers** the court held that the key issue is 'whether the bid is one that is likely to provide the contracting authority with the services which it seeks'.

It is not unusual for the tender documentation to specify that tenders priced below a certain threshold will be considered to be abnormally low and will require further investigation. If the tender documents do not set out an express test, the contracting authority has discretion as to how it assesses whether a tender appears to be abnormally low, subject to general principles of fairness, transparency and non-discrimination.

*1 [2012] CSOH 181



The contracting authority's duty to seek explanations

Once a contracting authority considers a tender to be potentially abnormally low, it must request details of the parts of the tender which it thinks are relevant to it being potentially abnormally low such as:

- (a) the economics of the manufacturing process, of the services provided or of the construction method;
- (b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the execution of the works or the supply of the products or services;
- (c) the originality of the works, supplies or services proposed by the tenderer;
- (d) compliance with environmental, labour and social obligations referred to in Regulation 57(2);
- (e) compliance with the sub-contracting obligations referred to in Regulation 71;
- (f) the possibility of the tenderer obtaining State aid.

The case-law in this area is complex and it is unclear whether an authority is only required to seek explanations where it is minded to reject a tender as being abnormally low, or whether it must seek explanations in any event whenever a tender appears to it to be abnormally low. The contracting authority may only reject the tender where the explanations given and any evidence supplied do not 'satisfactorily account' for the low level of price or costs proposed, taking into account the elements above (see Regulation 69(4)). However, a contracting authority is obliged to reject a tender where it establishes that the tender is abnormally low because it breaches environmental, social or labour obligations as set out under Regulation 57(2).

Standstill and award

Under the PC(S)R 2015, the contracting authority must notify all tenderers of its decision to award the contract. If it has not already notified a supplier who had submitted a PQQ/ESPD response that it has been unsuccessful and not invited to tender, the authority must also notify them prior to making an award decision.

The award decision notice is given in the form of a standstill letter which must include the following information:

- the criteria for the contract award;
- where practicable, the score of the party receiving the notice;
- the name and, where practicable, the score of the successful party;
- a summary of the reasons why the tenderer was unsuccessful, including any reasons for not meeting technical specifications; and
- the characteristics and relative advantages of the successful tender.

This notice triggers a standstill period that must be at least ten calendar days (where communication of the letter is by electronic means). This period must be extended by five days when the notification is not sent electronically. The standstill period begins on the day following dispatch of the notice and, if it finishes on a non-working day, must be extended to the end of the next working day. It is only after the standstill period has elapsed that the authority can enter into the contract with the successful tenderer.

Authorities may however withhold any information where the disclosure of such information:

- would impede law enforcement;
- would otherwise be contrary to the public interest;
- would prejudice the legitimate commercial interests of any economic operator; or might prejudice fair competition between economic operators.

There is also a general right in the PC(S)R 2015 for unsuccessful tenderers to request information in writing about the successful tender (if they have not already been informed). In addition, the Freedom of Information (Scotland) Act 2002 is increasingly being used to request important information from authorities on the conduct of contract award procedures, procurement policy and decisions.

Contract Award Notice

Authorities are required to publish a Contract Award Notice in the OJEU within 30 days of contract award. This details the contract that has been awarded and the successful tenderer.

Challenging an award

If a contract has not been procured or awarded in accordance with the PC(S)R 2015, an aggrieved party may seek redress in the Sheriff Court or the Court of Session (Regulation 88(2)). In practice, most procurement challenges are brought in the Court of Session, if the claim is for more than GBP 100,000.

Proceedings may not be brought unless the claimant has informed the authority of the breach and of its intention to bring proceedings in respect of that breach. In addition, those proceedings must be brought within the relevant time limit (see below).

As contracting authorities are public bodies acting in pursuit of a public function it may be possible to challenge decisions by way of judicial review. Judicial review actions will, however, not be competent where a right of action exists under the PC(S)R 2015 and any challenger will be required to show they have standing.

The remedies provided for under the PC(S)R 2015 fall into two broad categories:

- pre-contractual remedies; and
- post-contractual remedies.

Time limits

The time-limits for bringing a claim vary depending on the remedy sought. Most claims must be brought within 30 days beginning with the date when the tenderer 'first knew or ought to have known that grounds for starting the proceedings had arisen unless the court considers that there is a good reason for extending the period within which proceedings may be brought, in which case the court may extend that period up to a maximum of three months' (Regulation 88(4)(b)).

Different time limits apply when seeking to have a contract invalidated by an ineffectiveness order from the court. Proceedings should be started within 30 days beginning on the 'relevant date' which is:

- 30 days from the date of publication of a valid OJEU contract award notice or
- 30 days from the date the authority sends a contract award decision notice to all unsuccessful bidders.

In any other case proceedings must be started within six months from the date of the contract being entered into.

Pre-contractual remedies

If proceedings are brought during the tender process and before the contract has been concluded, an unsuccessful tenderer can request the court to:

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

Significantly, the PC(S)R 2015 provide for the automatic suspension of the procurement if legal proceedings are issued and served before the contract has been entered into with the successful tenderer. This removes the need for the aggrieved party to apply to the courts for an interim order (interdict) preventing the authority from awarding the contract.

If proceedings are issued, the automatic suspension will remain in force until such time as the proceedings are determined, discontinued or otherwise disposed of. If the authority wishes to insist on awarding the contract, it must make an application to the court for the automatic suspension to be lifted (Regulation 89).

Post-contractual remedies

After the contract has been entered into, there are two remedies available to an aggrieved party:

- damages; and/or
- an ineffectiveness order.

Damages

The challenger is entitled to claim its bid-costs and/or a proportion of lost profit on the contract depending on its chances of being awarded the contract but for the breach. There are a number of procedural and technical obstacles facing any challenger but damages awards have been made by the courts and many post-award challenges settle before reaching final judgment.

Ineffectiveness and alternative remedies

The court must make an *'ineffectiveness order'* if satisfied that one of three grounds applies:

- the authority has awarded a contract without following an OJEU advertised tender process, where one was required (i.e. makes an illegal direct award);
- the authority has failed to conduct a valid debrief and standstill process preventing the challenger from raising proceedings and has breached an actionable duty owed to the challenger when conducting the tender process (i.e. an aggravated breach when following an OJEU advertised tender process); or
- the authority has breached the rules on mini-competitions under a framework agreement or dynamic purchasing system and the value of the call-off contract is above the relevant EU threshold (i.e. an illegal call-off contract) (Regulation 91).

To protect against the risk of an ineffectiveness challenge to the lawful direct award of a contract, an authority can publish a Voluntary Ex-Ante Transparency (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 authority observes a 10-day standstill period before entering into the contract, the first ground for ineffectiveness does not apply.

The third ground of ineffectiveness (illegal call-off contract) does not apply where the authority has communicated the contract award decision to tenderers and observed a valid standstill period.

Otherwise, if one of the ineffectiveness grounds is satisfied, the court will make an ineffectiveness order, setting aside the contract and rendering unenforceable all rights and obligations under it from the date of the order. The court may however decline to make an ineffectiveness order where it is satisfied that overriding reasons relating to a general interest require that the enforceability of the rights and obligations arising from the contract should be maintained.

When a court declares a contract ineffective, the court must also impose a financial penalty on the authority (there is no upper limit) and deal with consequential matters, making such other orders as it considers necessary to address the consequences of the ineffectiveness order (Regulation 92).

European Commission investigations

It is important to remember that direct action in the courts is not the only remedy available to unsuccessful tenderers and other aggrieved third parties. The European Commission may take infringement proceedings against individual EU Member States for specific failure of authorities to comply with the EU public procurement rules. These investigations are conducted under specific EU Treaty rules and can result in formal proceedings being brought against the Member State before the Court of Justice of the European Union. Although it is a long and cumbersome procedure, the Court can fine the Member State if it refuses to remedy the identified breach by the relevant public body (which may include the termination of the offending contract).

In addition, the European Commission may block any EU funding that is related to the contract (eg. where a contract relates to an infrastructure project that is part-funded by EU funds) or initiate state aid proceedings (eg. where concessions are awarded without the private sector concessionaire having been appointed pursuant to an 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 OJEU-compliant tender processes.

Single point of enquiry (SPoE)

Finally, while it does not have any formal legal powers to intervene in public sector procurements, the Single Point of Enquiry was set up by the Scottish Government to provide an independent, impartial and confidential service for suppliers to the public sector in Scotland. It provides advice on the procurement rules which must be followed by public bodies in Scotland and information on how contracts are advertised and awarded. Where issues arise in specific procurement, it offers to work with tenderers and authorities to try to resolve concerns.



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CMS Cameron McKenna Nabarro Olswang LLP
Cannon Place
78 Cannon Street
London EC4N 6AF

T +44 (0)20 7367 3000
F +44 (0)20 7367 2000

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