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Guide to the EU public procurement rules in the UK

Contract award procedures for public sector bodies in England, Wales and Northern Ireland

May 2015

Introduction

This Guide provides an overview of the EU public procurement rules and their application in the United Kingdom. It is intended as an introductory guide for lawyers, procurement officials and policy makers.

Readers should note that this Guide focuses on the implementing rules in England, Wales and Northern Ireland: *The Public Contracts Regulations 2015* (PCR 2015). The PCR 2015 implement *EU Directive 2014/24* (the Public Sector Directive) in England, Wales and Northern Ireland. We have produced a separate guide covering the public procurement rules as they are applied in Scotland and will update this once the implementing legislation is adopted by the Scottish Parliament (expected later this year).

Readers should also note that there is a separate set of new EU public procurement rules governing utilities procurement and concessions contracts. Draft regulations implementing the new utilities and concessions contracts directives are expected to be published later this year.

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



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The rules

The principal EU public procurement rules are contained in two separate EU directives¹:

- *Directive 2014/24* (the Public Sector Directive) on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.
- *Directive 2007/66* (the Remedies Directive) on improving the effectiveness of review procedures concerning the award of public contracts.

The implementing regulations

The Public Sector Directive is implemented in England, Wales and Northern Ireland by The Public Contracts Regulations 2015 (SI 2015/102) (the PCR 2015). The PCR 2015 also incorporate the provisions of the Remedies Directive.

Procurement is a devolved matter in Scotland. The current rules are contained in The Public Contracts (Scotland) Regulations 2012. Those Regulations are due to be replaced later this year when the Scottish Parliament implements the Public Sector Directive in Scotland. We will produce an updated guide on the to the EU public procurement rules in Scotland when those new implementing regulations are adopted.

Relationship between the Public Sector Directive and the PCR 2015

The PCR 2015 must be interpreted in a manner that is consistent with the Public Sector Directive. Moreover, as instruments of EU law both the Public Sector Directive and the PCR 2015 are to be applied 'purposively'. This means 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.

General principles of EU law

Public bodies must always act in accordance with general principles of EU law. Over the years the Court of Justice of the European Union (CJEU) has applied the general principles of EU law to procurements not subject to the full requirements of the Public Sector Directive. These include the principles of non-discrimination, equal treatment, transparency and proportionality. So, for example, any requirement limiting contracts to local contractors is likely to breach the EU Treaty prohibition on discrimination on grounds of nationality (regardless as to whether or not the contract is subject to the Public Sector Directive and the PCR 2015).

¹Please note: this Guide does not cover: (1) the separate EU Directive governing utilities procurement (Directive 2014/25 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors), whose predecessor has been implemented in England, Wales and Northern Ireland by The Utilities Contracts Regulations 2006; (2) the separate EU Directive governing the award of concessions contracts (Directive 2014/23); or (3) the separate EU Directive on defence and sensitive security procurement (Directive 2009/81 coordinating procedures for the award of certain works contracts, supply contracts and service contracts in the fields of defence and security), which is implemented in the UK by The Defence and Security Public Contracts Regulations 2011.

Case-law

Given the PCR 2015 must be interpreted and applied in a manner that is consistent with the Public Sector Directive, the case-law of the CJEU on the application of both the Public Sector Directive and its predecessor directives is directly relevant to similar questions in respect of the application of the PCR 2015. There is now a substantial body of EU and UK case-law on the application of the directives and regulations which preceded the Public Sector Directive and the PCR 2015. There is also an increasing amount of case-law in each of the UK's three legal jurisdictions (England & Wales, Northern Ireland and Scotland) as well as in other EU Member States.

Guidance

Guidance on a wide range of issues relating to the application of the EU public procurement rules is available from the following sources:

- *European Commission*
- *HM Cabinet Office*
- *Value Wales/Sell2Wales*
- *Northern Ireland Central Procurement Directorate*



Contracts subject to the PCR 2015

In simple terms, the PCR 2015 apply to the award of a contract where the following three conditions are met:

- the contract is being awarded by a public body falling within the definition of a 'contracting authority';
- the contract to be awarded is a 'public contract' for the procurement of works, services or supplies; and
- the estimated value of the contract exceeds the relevant EU threshold.

The following sections consider each of these three conditions.

Contracting authorities

'Contracting authorities' are defined as:

- the State (i.e. government departments);
- regional or local authorities; and
- bodies governed by public law or associations formed by one or several of such authorities.

'Bodies governed by public law' are defined as bodies that have all of the following characteristics:

- they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- they have legal personality; and
- they have any of the following characteristics:
 - they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law;
 - they are subject to management supervision by those authorities or bodies; or
 - they have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law (the financing test should be considered each year, for example in the case of universities).

Public contracts

The PCR 2015 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.

Public works contracts

Public works contracts are contracts which have as their object any of the following:

- the execution, or design and execution, of works relating to one of the activities listed in Schedule 2 of the PCR 2015;

- the execution, or both the design and execution, of a work; or
- the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work;

and 'a work' means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function.

Public supply contracts

Public supply contracts are defined as public contracts which have as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products, whether or not the contract also includes, as an incidental matter, siting and installation operations.

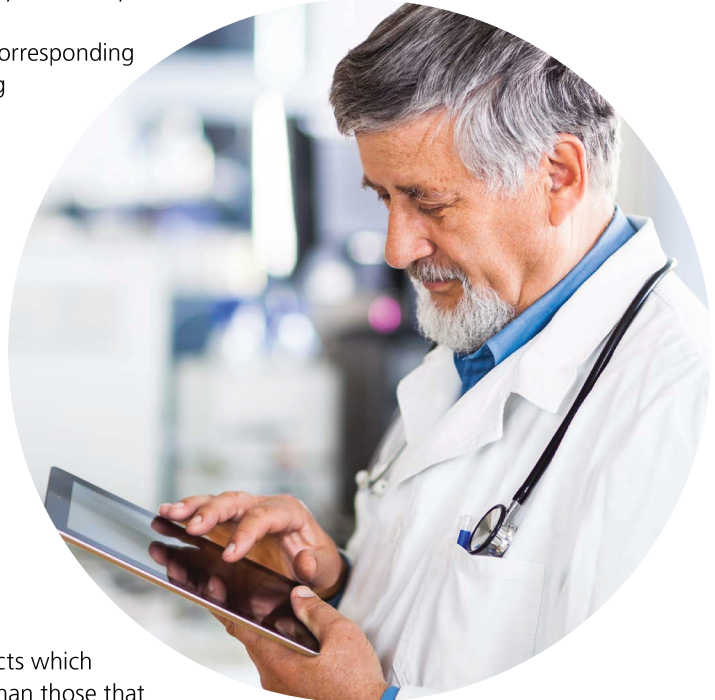
Public service contracts

Public service contracts are defined as public contracts which have as their object the provision of services other than those that qualify as public works contracts. Importantly, the distinction made in the previous regulations between Part A services and Part B services no longer applies. This means that all public service contracts will be subject to the full application of the procurement rules, unless they either form part of the 'light-touch regime' (see below) or are included in the list of excluded services (see below).

The 'light-touch regime' for certain social and other services

A new 'light touch' regime applies to contracts for the provision of certain social and other services, which by their nature have limited cross-border dimension. These are listed in Schedule 3 of the PCR 2015 and include specified social, health and educational services.

Schedule 3 of the PCR 2015 - Social and other specific services



- Health, social and related services
- Administrative social, educational, healthcare and cultural services
- Compulsory social security services
- Benefit services
- Other community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services

- Religious services
- Hotel and restaurant services
- Legal services, to the extent not excluded by Regulation 10(1)(d)
- Other administrative services and government services
- Provision of services to the community
- Prison-related services, public security and rescue services to the extent not excluded by Regulation 10(1)(d)
- Investigation and security services

- International services
- Postal services
- Tyre-moulding services and blacksmith services, as under the umbrella term 'miscellaneous services'

Current thresholds

	Supplies	Services	Works
Authorities listed in Schedule 1	£113,057 (€130,000)	£113,057 (€130,000)	£4,348,350 (€5,000,000)
Other authorities	£173,934 (€200,000)	£173,934 (€200,000)	£4,348,350 (€5,000,000)
Prior Information Notices	£652,253 (€750,000)	£652,253 (€750,000)	£4,348,350 (€5,000,000)

Where the estimated value of contracts for these services exceeds €750,000, the PCR 2015 require that the contracting authority publish an OJEU contract notice and follow a procedure that ensures compliance with the principles of transparency and equal treatment. In simple terms, this means that time limits imposed on tenderers must be reasonable and proportionate, and that the contracts be awarded in accordance with the procedure the authority has set out in the tender documentation issued to tenderers.

EU thresholds

The current EU thresholds are set out in the table below. It is important to note that the thresholds are revised once every two years, and that therefore new thresholds will apply from 1 January 2016.

The rules on calculating the contract value are complex, but the overriding principle is that the valuation method may not be used with the intention of avoiding the rules. There are also specific provisions to prevent the artificial splitting of contracts to avoid triggering the thresholds.

Contracts are valued on the basis of their full duration (net of VAT), including any options to extend.

The PCR 2015 make specific provision for estimating the value of contracts having an indefinite duration, and contracts that include a mix of works, supplies and services.

Below EU thresholds

Where the value of a public contract is below the EU thresholds, the contract may still have to be advertised in *Contracts Finder* under a set of new provisions contained in Regulations 109 to 112 of the PCR 2015. This is subject to a de minimis threshold of £10,000 for central government bodies and £25,000 for sub-central government bodies (including NHS Trusts).

Framework agreements

A 'framework agreement' is defined as 'an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged' (Regulation 33(2)).

Framework agreements are increasingly set up by central purchasing bodies on behalf of multiple authorities.

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

Provided authorities do not use framework agreements improperly or in such a way as to prevent, restrict or distort competition, call-off contracts procured under them do not have to go through any separate OJEU tender process.

Dynamic purchasing systems

A “dynamic purchasing system” (DPS) is an entirely electronic system designed to facilitate the repeat procurement of commodity products such as office supplies and stationery. It is similar to an electronic framework agreement, but new suppliers can join at any time.

Once a DPS is set up an authority entitled to use it may award specific contracts under it by inviting all suppliers admitted to the relevant category to bid.

Design contests

The PCR 2015 contain specific rules on the running of design contests, where authorities put out to competition requests to produce a design, particularly in the fields of planning, architecture, civil engineering and data processing. There are special valuation rules and thresholds for these contests.

Excluded contracts

Finally, there are a series of general and specific exclusions provided for in the PCR 2015. Any reliance on these exclusions needs to be considered carefully as they are construed narrowly.

The principal exclusions are:

- utilities contracts (where these are covered by the separate rules governing procurement by utilities operating in the water, energy, transport and postal sectors);
- contracts for the provision or exploitation of public communications networks or to provide one or more electronic communications services;
- contracts governed by separate international procurement-related rules;

- certain specified services contracts (relating to the acquisition or rental of land; for the acquisition, development and production of broadcasting programmes and broadcasting time; for arbitration and conciliation services; for legal services in the ambit of litigation, arbitration or judicial proceedings, as well as document certification and authentication services provided by notaries and legal services provided by trustees or appointed guardians; for financial services in connection with the issue, purchase, sale or transfer of securities or other financial instruments; employment contracts; for public passenger transport services by rail or metro; and political campaign services;

- service contracts awarded on the basis of an exclusive right;
- certain forms of contracting between the public sector bodies (forms of ‘public-public cooperation’ recognised by the CJEU as not involving the award of a public contract); and
- research and development contracts (now defined by reference to CPV codes), but these are only excluded where (i) the benefits under the contract do not accrue exclusively to the authority for its use in the conduct of its own affairs and (ii) the service provided is not being wholly remunerated by the authority (i.e. own research by authorities, not collaborative R&D).



Advertising requirements

The PCR 2015 require authorities to advertise public contracts in an open and transparent manner so as to ensure equal access to contract opportunities across the EU. This requires contracts to be advertised in prescribed forms on the Official Journal of the European Union (OJEU).

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 authority intends to put out to competitive tender over the next 12 months. Authorities are required to publish a PIN at the start of a financial year setting out the goods or supply contracts it intends to award that year, if the total value of similar contracts exceeds the relevant threshold.

PIN as a call for competition

Sub-central authorities (such as local or regional authorities) can also use a PIN as a call for competition, avoiding the need to issue an individual Contract Notice (see below). However, sub-central authorities can only rely on a PIN as a call for competition when using either the restricted procedure or the competitive procedure with negotiation (see below) and only when it has included details of the contract in the PIN in the prescribed form. The invitations to tender or to negotiate must be issued not earlier than 35 days and not later than 12 months from the date the PIN is submitted to the OJEU for publication.

A PIN may also be used in the place of a Contract Notice by authorities who intend to award a contract for any of the services listed in Schedule 3 of the PCR 2015 ('Social and other specific services').

Contract Notice

The Contract Notice is the standard form OJEU notice to be used for the advertising of contracts. It informs bidders 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 tendering for a contract. The Contract Notice must be in the form prescribed in the Public Sector Directive and must contain certain basic information. Standard forms are provided on the European Commission's [SIMAP website](#).

Additional publication on Contracts Finder

Authorities must also publish details of the Contract Notice on Contracts Finder within 24 hours of when the authority becomes entitled to publish it at national level (this timing is further detailed in Regulation 52(3) and (4)).

As a minimum, the information to be included on Contracts Finder must include:

- 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.



Technical specifications

The PCR 2015 require that technical specifications used in tender documents must afford equal access to tenderers 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.

Non-discriminatory performance and functional requirements

This requires authorities to draw up the technical specifications in terms of functional performance and requirements or otherwise by reference to a particular European or international standard or, if there is none, to a national standard. Unless justified by the subject-matter of the contract, technical specifications must not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific supplier, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain suppliers or certain products. So, for example in relation to IT procurement, 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 propriety brands (e.g. Intel, AMD), manufacturer-specific processor architectures, trademarks, technology types or other potentially discriminatory descriptors.

'or equivalent'

Where an authority uses the option of referring to the technical standards, it shall not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the standard without giving the supplier the opportunity to demonstrate that its product/solutions satisfies in an equivalent manner the requirements defined by the technical specifications. Any reference to a technical standard should therefore include the words 'or equivalent'.

Labels

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 eco-labels, such as the European Eco-label, (multi-) national eco-labels or any other eco-label. This is 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.

Contract award procedures

The PCR 2015 provide for six contract award procedures:

- open procedure;
- restricted procedure;
- competitive procedure with negotiation;
- competitive dialogue procedure;
- innovation partnership; and
- negotiated procedure without a call for competition.

Authorities can choose freely between either the open, restricted, or innovation partnership procedures but in order to use the competitive procedure with negotiation or the competitive dialogue procedure, they must justify use of those procedures on one of the following grounds:

- the needs of the authority cannot be met without adaptation of readily available solutions;
- the works, supplies, or services include design or innovative solutions;
- the contract cannot be awarded without prior negotiation because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of risks attached to them; or
- only irregular or unacceptable tenders have been submitted in response to an open or restricted procedure.

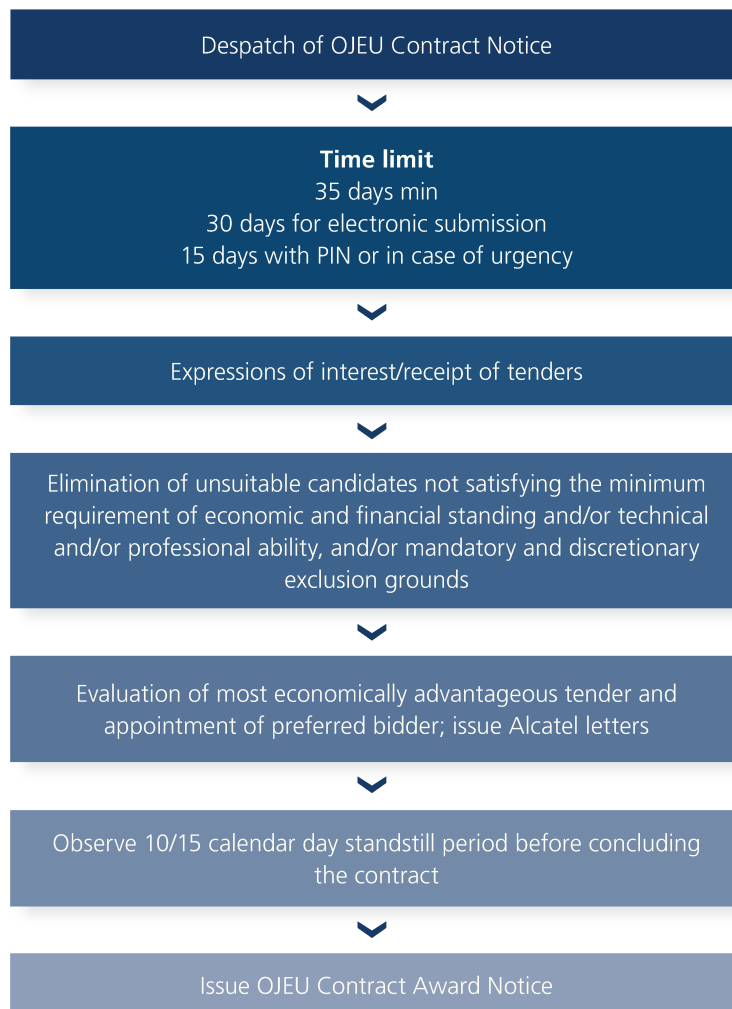
The negotiated procedure without prior publication can only be used in the very specific circumstances set out in Regulation 32.

The key differences between the procedures are summarised overleaf.



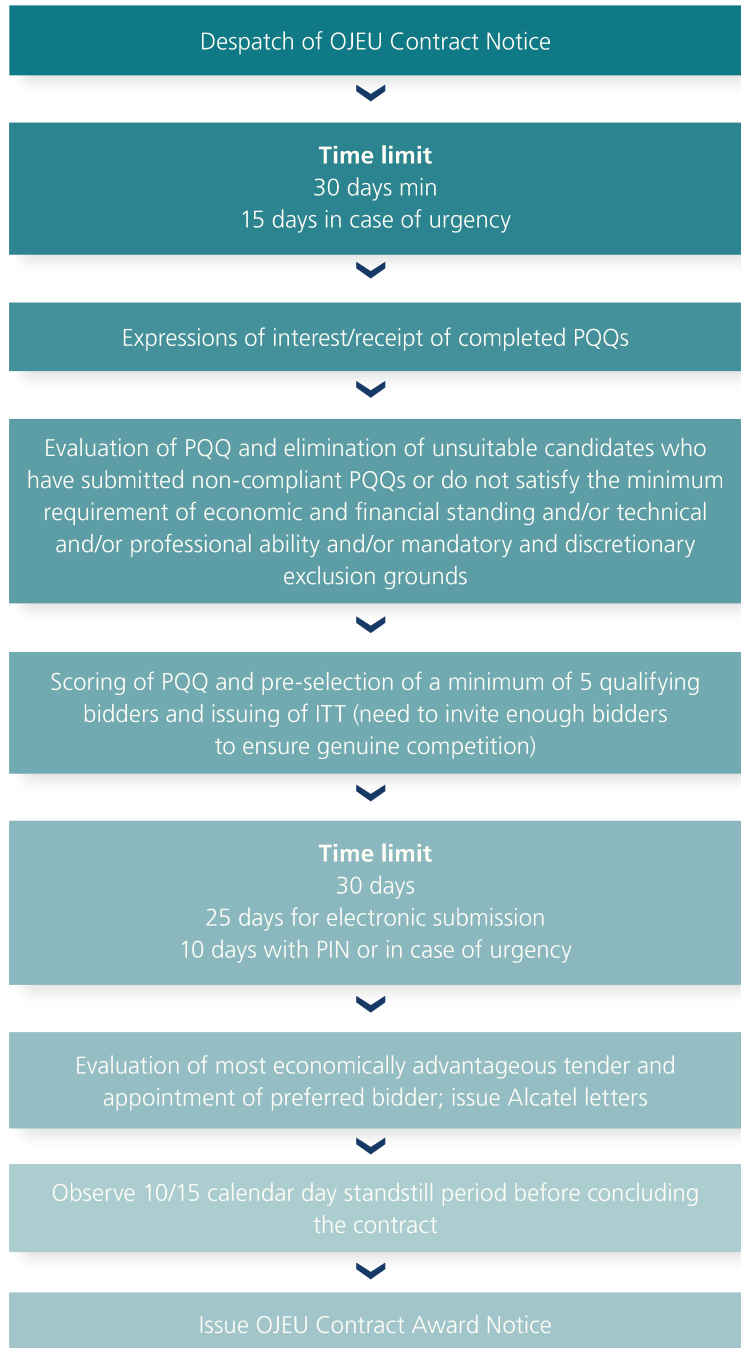
Open procedure

Under the open procedure all those candidates that respond to the Contract Notice are entitled to submit a tender for the contract. There is no initial selection stage limiting the number of tenderers who can submit tenders. 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.



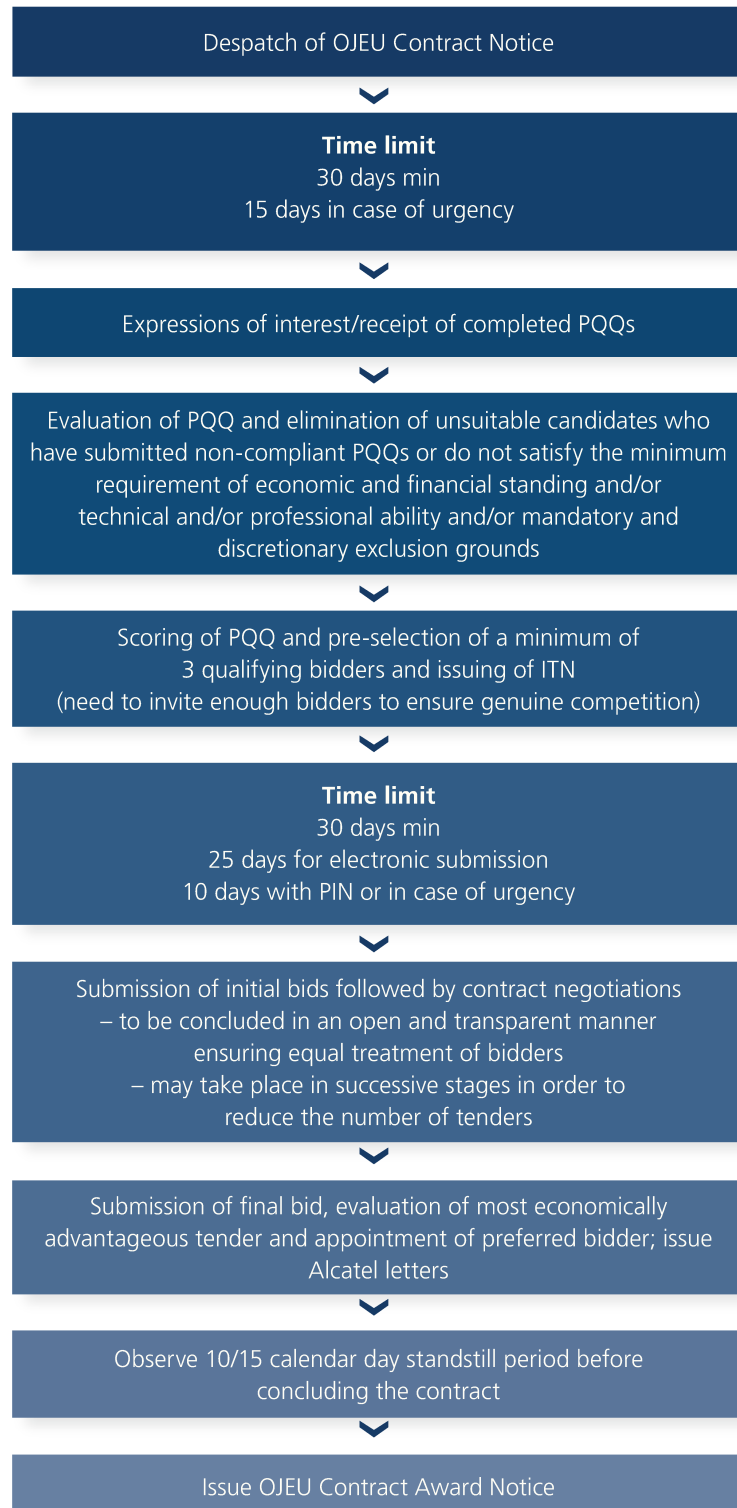
Restricted procedure

Under the restricted procedure the authority may limit the number of candidates using an initial selection stage to shortlist a limited number of tenderers. The selection is generally performed by means of a Pre-Qualification Questionnaire (PQQ), which candidates complete and submit. The restricted procedure requires that a minimum of five qualifying candidates be invited to tender (ITT). It is nevertheless recognised that an authority may proceed under the restricted procedure with less than five tenderers if fewer than five have passed the PQQ stage, provided that there is no suggestion that the PQQ requirements or selection process were unnecessarily onerous or otherwise disproportionate or discriminatory.



Competitive procedure with negotiation

Under this procedure the authority may limit the number of candidates using an initial selection stage to shortlist a limited number of tenderers, generally using a PQQ. At least three qualifying tenderers must be invited by the authority to negotiate the contract on the basis of an Invitation to Tender (ITN), although the minimum requirements and the award criteria cannot be subject to negotiation. Tenderers may be invited to submit an initial tender, which then forms the basis for subsequent negotiations.



Competitive dialogue procedure

This procedure is designed to be used for the award of 'particularly complex contracts', where it is objectively impossible for the authority to define in advance the means of satisfying its needs or to specify the most appropriate financial and/or legal solution. Common examples are PPP/PFI contracts, integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing.

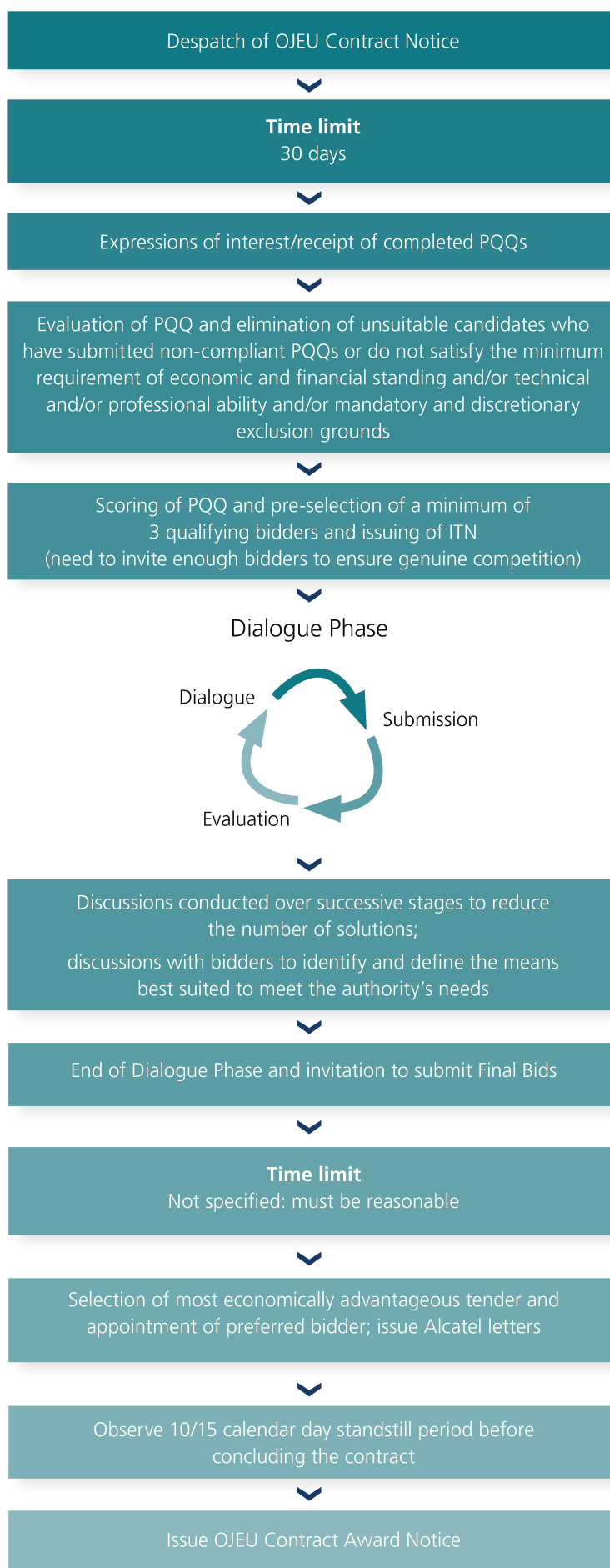
Under the competitive dialogue procedure, the authority invites at least three candidates to participate in a dialogue with the aim of developing one or more solutions capable of meeting the authority's 'needs and requirements'. The selection is generally performed by means of a PQQ.

The dialogue is conducted on the basis of a 'descriptive document' in which the authority sets out its 'needs and requirements' as to what it ultimately wants the contractor to deliver. In practice, the descriptive document often forms part of the Invitation to Participate in Dialogue (ITPD) issued to the selected participants (though it may be issued earlier with the PQQ). During the dialogue phase, the authority conducts parallel discussions with each of the participants. The discussions will be used to develop the solution(s) proposed by each of the participants. The procedure allows the authority to run the dialogue phase in successive stages to reduce, on the basis of the previously indicated contract award criteria, the number of proposed solutions.

The first dialogue phase generally involves an Invitation to Submit Outline Solutions (ISOS), which may be followed by a down-selection (i.e. the exclusion of one or more participants). This is generally followed by an Invitation to Submit Detailed Solutions (ISDS), possibly followed by further down-selection and dialogue. Once the authority is satisfied that it has identified one or more proposed solutions that contain all the elements required and necessary for the performance of the project, it is required to announce the closure of the dialogue phase and invite the remaining participants to submit final tenders (Call for Final Tenders (CFT)/ Invitation to Submit Final Tenders (ISFT)).

Importantly, once the dialogue phase is concluded, there is only limited scope for post-tender negotiations with tenderers, which must not go further than clarifying, specifying or fine-tuning their final tenders.

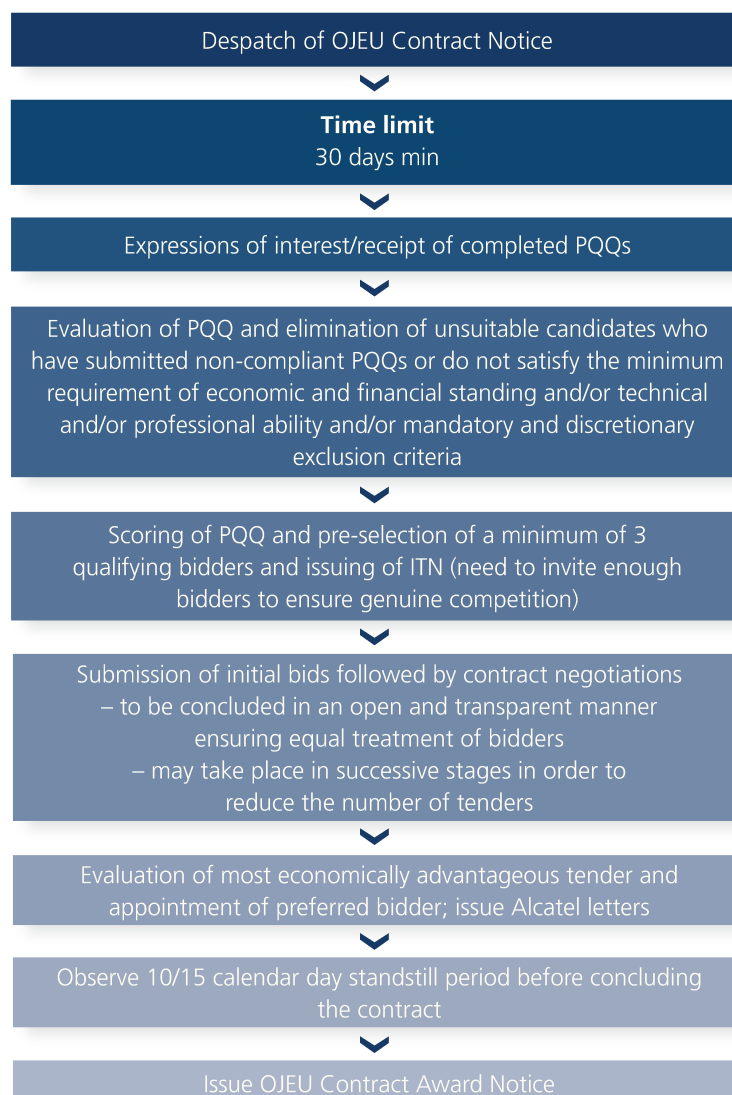
Competitive dialogue procedure



Innovation partnership procedure

This procedure is intended to be used where there is a need to develop an innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works cannot be met by solutions already available on the market.

Where this procedure is used at least three tenderers must be invited by the authority to participate in the procedure. The contract will be awarded under the same rules as for the competitive procedure with negotiation. This involves successive phases following the sequence of steps in the research and innovation process, with intermediate targets to be attained by the partners. Based on the targets, the authority may decide after each phase to either terminate the partnership or reduce the number of partners, but only if the authority had indicated in the procurement documents these possibilities and the conditions for their use. The authority must always ensure that the structure of the partnership and, in particular, the duration and value of the different phases reflect (i) the degree of innovation of the proposed solution, and (ii) the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market.



Selection stage

The PCR 2015 set out an exhaustive list of the types of information that authorities can request from candidates for the purposes of setting minimum (pass/fail) requirements and any scored evaluation. The prescribed types of information fall within three broad categories:

- personal standing (with mandatory and discretionary exclusion grounds);
- economic and financial standing; and
- technical and/or professional ability.

The PCR 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), unless the authority is using the open procedure. 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.

Minimum requirements

The PCR 2015 state that any minimum requirements must relate to the candidate's personal standing, its economic and financial standing and/or its technical and/or professional ability. For example, authorities may wish to set minimum requirements in relation to annual turnover, credit rating, insurance, quality assurance or environmental management standards. Any such minimum requirements must be related and proportionate to the contract to be awarded and must be disclosed in the Contract Notice (or PIN).

Ranking – scored evaluation

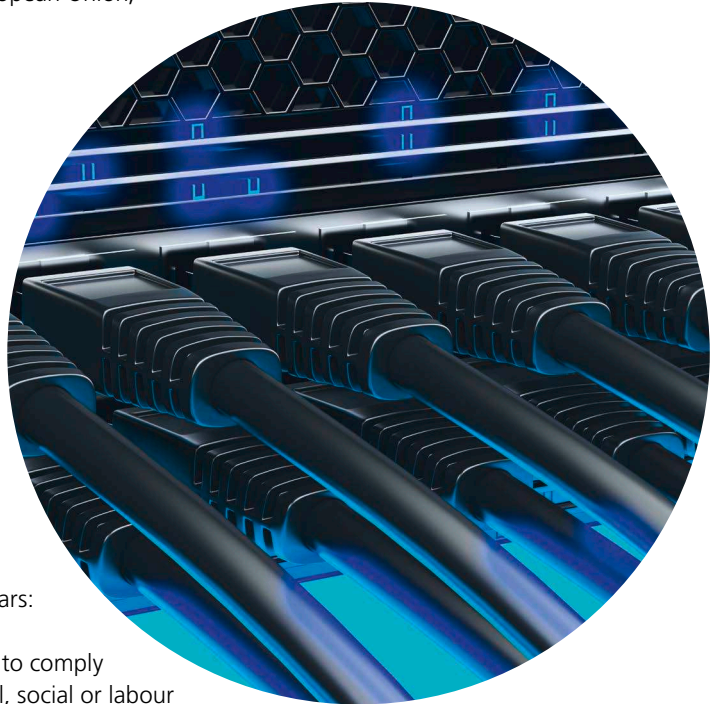
In addition to applying minimum requirements, authorities using the restricted, competitive dialogue or competitive procedure with negotiation procedures may wish to further reduce the number of qualifying candidates to be invited to tender or participate in dialogue or negotiations. This is generally referred to as ranking and must be conducted on the basis of objective and non-discriminatory criteria, which must be specified in the Contract Notice (or PIN).

Personal standing: Exclusion grounds

Regulation 57(1) requires that candidates must be excluded 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 within the last five years of an offence relating to:

- participation in a criminal organisation;
- corruption;
- bribery (including convictions under the Bribery Act 2010);

- fraud affecting the financial interests of the European Union;
- conspiracy to defraud;
- terrorism;
- sexual offences;
- drug trafficking;
- people trafficking;
- money laundering; or
- any other offence within the meaning of Art.57(1) of the Public Sector Directive as defined by the law of any jurisdiction outside England and Wales and Northern Ireland, or created after the making of the PCR 2015 in the law of England and Wales or Northern Ireland.



Regulation 57(8) requires that candidates may be excluded from the process if within the last three years:

- the authority can demonstrate that it has failed to comply with EU, national or international environmental, social or labour laws;
- it has been declared bankrupt, been wound up or has made an arrangement with creditors or is in any similar situation;
- it has committed an act of grave misconduct in the course of its business or profession;
- the authority has sufficiently plausible indications to conclude it has entered into agreements with other economic operators aimed at distorting competition (e.g. cartels);
- where a conflict of interest that might compromise the procurement process cannot be effectively remedied by other, less intrusive, measures;
- where a distortion of competition from the prior involvement of the tenderer in the preparation of the procurement procedure cannot be remedied by other, less intrusive, measures;
- it has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract which led to the termination of that contract, damages, or other comparable sanctions;
- it is guilty of serious misrepresentation in supplying the information required under the PCR 2015 (i.e. in terms of satisfying the mandatory and discretionary exclusion grounds); or
- it has undertaken to unduly influence the decision-making process of the authority or obtain confidential information that may confer upon it undue advantages, or it negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award.

Personal standing: Failure to pay tax or social security contributions

Specific provisions apply to the payment of taxes or social security contributions. Regulation 57(3) requires that a candidate must be excluded 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, Regulation 57(4) provides that the authority may exclude the tenderer where it can demonstrate by any appropriate means that the tenderer is in breach of those obligations.

Personal standing: 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. If the authority considers such evidence to be sufficient the candidate must not be excluded from the process. For that purpose the tenderer will have to prove that 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.

Economic and financial standing

The PCR 2015 provide that authorities may require that candidates:

- have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract;
- provide information on their annual accounts showing the ratios, for example, between assets and liabilities; and
- have an appropriate level of professional risk indemnity insurance.

Alternatively, a candidate may be allowed to demonstrate, for example, through parent company guarantees, that it has the necessary resources at its disposal from another company.

As a new rule, however, under the PCR 2015, an authority cannot require candidates to have a minimum turnover exceeding two times the estimated contract value. If an authority wishes to apply higher requirements, it must justify its decision by reference to, for example, special risks attached to the nature of the works, services, or supplies.

Technical and/or professional ability

The PCR 2015 provide that the technical and/or professional capabilities of candidates may be demonstrated by one or more of the following means, according to the nature, quantity or importance, and use of the works, supplies or services being procured (as appropriate):

- a list of the works contracts performed over the past five years, accompanied by certificates of completion for the most important works (as are relevant to the contract to be awarded);
- a list of the services contracts performed over the last three years (again relevant to the performance of the contract to be awarded), accompanied by certificates or references from the customers;
- an indication of the technicians and technical bodies available to the candidate;
- a description of the technical facilities and measures used to ensure quality and the candidate's study and research facilities;
- an indication of the supply chain management and tracking systems that the economic operator will be able to apply when performing the contract;

- in complex or special purpose procurements, evidence of an independent check or review of specific production capacity or technical capability;
- the educational and professional qualifications of the candidate, and its relevant managerial staff/project managers;
- an indication of the environmental management measures to be used by the candidate in performing the contract (where relevant for works and services contracts);
- a statement of the average annual manpower (labour resources) of the candidate and the number of managerial staff in the last three years;
- a statement of the tools, plant or equipment available to the candidate for performing the contract;
- an indication of the proportion of the contract that the candidate intends to subcontract; or
- for supplies contracts, samples, descriptions and/or photographs of the products to be supplied and any relevant quality assurance certificates.

In addition, authorities must ensure that the information they request and evaluate at the PQQ stage is relevant and proportionate to the performance of the contract they are seeking to award.



Tender stage

Depending on the contract award procedure being used, the tender stage will generally commence with the authority issuing an Invitation to Tender (ITT), an Invitation to Participate in Dialogue (ITPD) or an Invitation to Negotiate (ITN) to the shortlisted tenderers. When using the single-stage open procedure the selection and award stages are combined and the ITT effectively incorporates any minimum eligibility requirements.

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.

Subject to the rules on technical specifications, the PCR 2015 afford authorities a fairly wide degree of discretion as to the specification and the proposed terms and conditions of a contract. An outline of the requirements around contract award criteria is set out below.

Choice of contract award criteria

The PCR 2015 provide that the contract award criteria must be objective and must be applied in compliance with the principles of transparency, non-discrimination and equal treatment, ensuring that tenders are assessed in conditions of effective competition.

MEAT – sole award criterion

To achieve this, the PCR 2015 require that authorities base the award of public contracts on the 'most economically advantageous tender' (MEAT), as assessed from the point of view of the authority.

Cost effectiveness approach – life-cycle costing (LCC)

MEAT is to be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing. Life-cycle is defined in the PCR 2015 as meaning all stages which are consecutive or interlinked, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of the product or the works or the provision of the service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilisation.

Regulation 68 provides that, 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:

- costs, borne by the authority 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 authorities 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 authority 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.

Best Price-Quality Ratio (BPQR)

The new (cost effectiveness) approach to MEAT incorporates 'old MEAT', which is now referred to as the 'best price-quality ratio' (BPQR). As explained by the Crown Commercial Service, BPQR is in essence price or cost plus other criteria and equates to value for money (consistent with UK Government policy of securing value for money as set out in Annex 4.6 of HM Treasury's Managing Public Money).

The PCR 2015 offer authorities more flexibility as to the other (quality) criteria in their chosen BPQR, in particular around social and environmental aspects. However, this is always provided the criteria are linked to the subject-matter of the contract being procured (i.e. in terms of the nature of the project and what is involved in the performance of the contract).

Regulation 67(3) includes criteria comprising:

- 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; and
- after-sales services and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

Disclosure of contract award criteria

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

It is the responsibility of authorities 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. Authorities may derogate from indicating the weighting of the criteria for the award where objectively, and justified by reasons, the weighting cannot be established in advance. In such cases, they must indicate the descending order of importance of the criteria.

There is now a large and growing body of case-law on the extent of obligations on disclosure of award criteria and full discussion of the judgments is beyond the scope of this guide. It is nevertheless important to note the decision taken by the Supreme Court in the *Healthcare At Home Ltd v The Common Services Agency* case from July 2014. The Supreme Court confirmed that the 'reasonably well-informed and normally diligent' (RWIND) tenderer test is an objective legal standard, and that what matters is that the award criteria are sufficiently clear in the tender documents so as to permit uniform interpretation by a RWIND.



Debriefing and standstill

The PCR 2015 provide that an authority must send to each candidate and tenderer a notice communicating its decision to award the contract or conclude the framework agreement. The notice is generally referred to as an 'Alcatel Letter' (or 'Standstill Letter').

As soon as the Alcatel letter is issued, the standstill period commences. The authority must not enter into the contract or conclude the framework agreement before the end of the standstill period.

The requirement to issue an Alcatel letter only applies to contract award procedures that are subject to the full procedural requirements of the PCR 2015 (procurements requiring a call for competition). They are not required for below EU threshold contracts or for call-off contracts under framework agreements or under dynamic purchasing systems. In practice though, many authorities do observe a standstill period as a matter of good practice (even though it is not required under the PCR 2015).

It is critically important that authorities fulfil their debrief obligations (see below on Remedies).

Outside the specific Alcatel letter provisions there is a general right in the PCR 2015 for unsuccessful tenderers to request reasons in writing for their exclusion from the tender process if they have not already been informed (Regulation 55(2)). Again though, this does not apply to the award of below EU threshold contracts or the award of call-off contracts under framework agreements or under dynamic purchasing systems.

Content of the Alcatel letter

Regulation 86(2) sets out the required contents, which include:

- the criteria for the award of the contract;
- the reasons for the decision (including the characteristics and relative advantages of the successful tender and the score (if any) obtained by both the recipient of the notice and the winning tenderer);
- the name of the winning tenderer; and
- a statement of when the standstill period is expected to end.

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

- would impede law enforcement or 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.

To whom?

If a candidate that was not shortlisted following the selection (PQQ) stage of the process has already been informed that they were unsuccessful, the authority does not need to issue an Alcatel letter to them (Regulation 86(7)).

Equally, the authority 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 (Regulation 86(7)).

Timings

If the authority sends the Alcatel letter to all relevant candidates and tenderers by facsimile or electronic means, the standstill period will end at midnight at the end of the tenth day after the relevant sending date.

If the authority sends the Alcatel letter only by other means, the standstill period will end at the first of:

- midnight at the end of the fifteenth day after the relevant sending date; or
- midnight at the end of the tenth day after the date on which the last of the relevant candidate or tenderer receives the letter.

If the authority sends the letter by facsimile/electronic means to some of the relevant candidates or tenderers, and by other means to other candidates or tenderers, then the standstill period will end on the latest of the three options above.

Contract Award Notice

The PCR 2015 state that not later than 30 days after the award of the contract or the conclusion of a framework agreement, authorities must send for publication a Contract Award Notice on the results of the procurement procedure.

The Contract Award Notice must contain the information listed in Part D of Annex 5 of the Public Sector Directive (including, for example, identification and contact details of the authority, a description of the procurement, the type of award procedure, the number of tenders received with respect of each separate award, and so on), and it must be sent by electronic means to the EU Publications office for publication. This will result in the Contract Award Notice being published at EU level in the OJEU.

Authorities may also choose to publish the Contract Award Notice at national level on a buyer profile, where they may include (in addition to the Part D information referred to above) additional details such as information on ongoing invitations to tender, scheduled purchases, contracts concluded, and so on. However, publication at national level must not take place before publication in the OJEU, unless the authorities still have not been notified of the OJEU publication by the EU Publications office within 48 hours after confirmation of receipt of the notice.

Remedies

The PCR 2015 provide that breach of a duty owed to economic operators is actionable by any aggrieved third party who, in consequence, suffers, or risks suffering, loss and/or damage.

The remedies provided for under the PCR 2015 fall into two broad categories:

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

The time-bar

Before looking at these two broad categories of remedies it is important to emphasise the issue of time-barring. This is important as procurement challenges will fail if they have not been initiated within the period required under the PCR 2015, meaning that they will be time-barred.

The PCR 2015 provide that proceedings must be brought within 30 days of the 'date of knowledge', defined as the point at which the claimant knew or ought to have known of the infringement. The High Court retains judicial discretion to extend the period within which proceedings must be brought, up to a maximum of three months.

Separate limitation periods apply for proceedings for a declaration of ineffectiveness.

Pre-contractual remedies

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

Automatic suspension

Significantly, the PCR 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 claimant to apply to the courts for an interim order (injunction) 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 (Regulation 95(2)). 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.

Post-contractual remedies

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

- damages; and/or
- a declaration of ineffectiveness.

Damages

The claimant is entitled to claim its bid-costs and a proportion of lost profit on the contract depending on its chances of being awarded the contract but for the breach (loss of chance).

There are a number of procedural and technical obstacles facing any claimant but damages have been pursued by claimants resulting in undisclosed sums being paid as part of a settlement. There are also a handful of cases where damages awards have been made by the High Court.

Ineffectiveness

The ineffectiveness remedy is an exceptional remedy that gives the High Court the power (and a duty) to set aside concluded contracts by making an order rendering unenforceable all future rights and obligations under the contract and imposing fines on the authority.

The ineffectiveness remedy is not discretionary; if the High Court is satisfied that any of the three grounds for ineffectiveness apply, it must make a declaration of ineffectiveness unless satisfied there are overriding general (public) interest reasons. In addition, the High Court is required when making a declaration of ineffectiveness to impose a fine on the authority.

The three grounds for ineffectiveness are, in essence:

- failing to advertise a contract when it should have been put out to an OJEU tender process ('illegal direct award');
- failing to conduct a compliant OJEU tender process and failing to properly observe the debrief and standstill requirements ('aggravated breach'); or
- failing properly to award an above threshold call-off contract under a framework agreement or dynamic purchasing system ('illegal call-off contracts').

Where a declaration of ineffectiveness is made, the contract is to be considered to be prospectively, rather than retrospectively, ineffective from the time when the declaration is made and, accordingly, those obligations under the contract which at that time have yet to be performed are not to be performed.

Special time limits apply where a claimant is seeking a declaration of ineffectiveness. In general, where a Contract Award Notice has been published in the OJEU, proceedings must be brought within 30 days beginning with the day after the date of publication of the notice.

In other cases, where no notice has been published and no information has otherwise been given to potential claimants, proceedings must be started within six months of the day after the date on which the contract is entered into.

European Commission investigations

Finally, 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 is increasingly taking infringement proceedings against individual EU Member States for specific failures by 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 (CJEU). Although it is a long and cumbersome procedure, the CJEU 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 (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 OJEU-compliant tender processes.



Modification of contracts

The PCR 2015 include a specific set of rules governing the modification of existing public contracts as to when such modifications will be considered sufficiently substantial to require a new OJEU tender process.

Modifications

Regulation 72 sets out six situations outlined below where modifications can be made to a public contract without triggering a requirement for a new procurement procedure.

Clear, precise and unequivocal review clauses

Where the change, irrespective of its monetary value, has been provided for 'in the initial procurement documents in clear, precise and unequivocal review clauses', but provided that 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.

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 but which presumably means the tender documents issued to bidders 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 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 contracting authority could not have foreseen', (ii) the change does not alter the overall nature of the contract and (iii) any increase in price does not exceed 50% of the original contract value. Again, to rely on this ground, the authority must publish a modification notice in the OJEU.

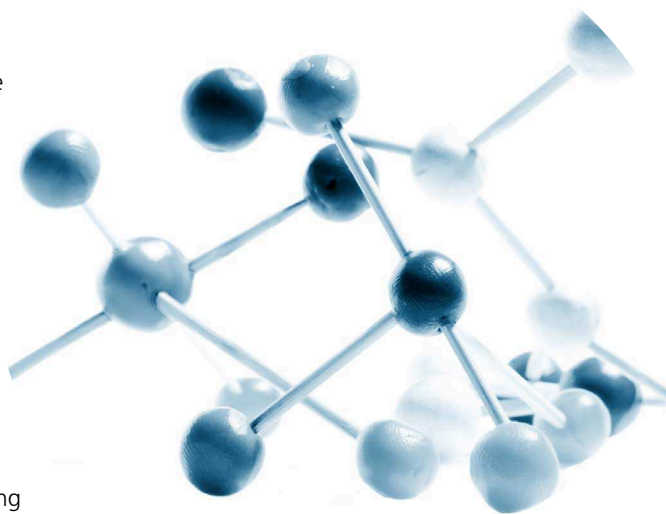
New contractor

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.

New Presetext

The test developed by the CJEU in the *Presetext* case (the main case dealing with contract modifications) has now been codified into the Public Sector Directive. As now stated in Regulation 72, it provides 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 extending 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

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 or 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. All of the above provisions will apply to any modifications to existing public contracts being made by authorities in England, Wales and Northern Ireland after 26 February this year (i.e. the relevant date is the date on which the modification is agreed, not the date of the original contract).

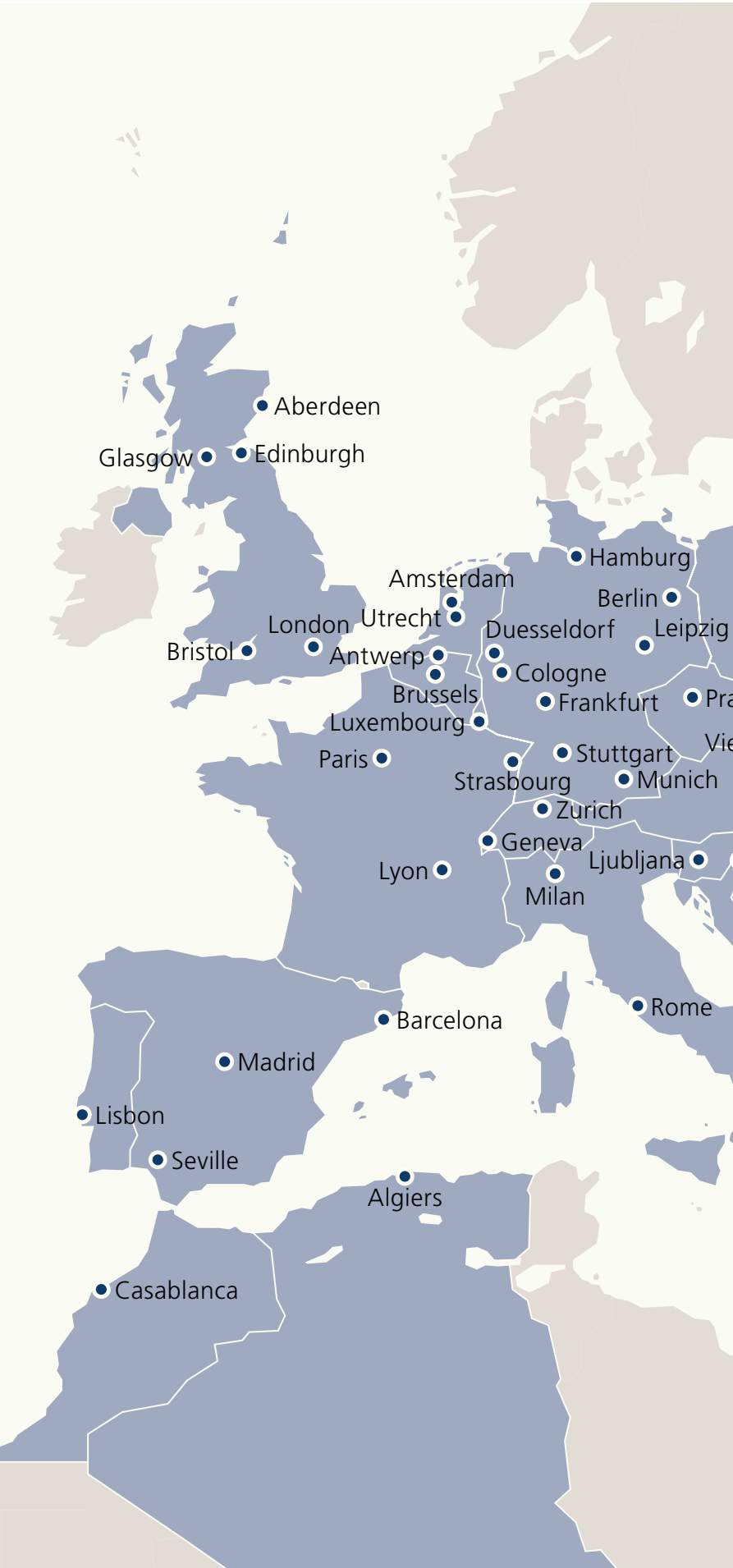
Termination rights

Regulation 73 provides that authorities must ensure every public contract they award contains provisions enabling the authority to terminate the contract where:

- the contract has been subject to a 'substantial modification' (i.e. a modification not permitted by Regulation 72);
- where post-award it is discovered the contractor should have been excluded from the procurement process on certain mandatory exclusion grounds (including bribery or corruption offences); or
- the CJEU has declared the contract was awarded in 'serious infringement' of the authority's obligations under EU law and the Public Sector Directive in infringement proceedings brought by the European Commission against the Member State concerned under Article 258 TFEU.

If the authority fails to insert such a provision into the contract, Regulation 73(3) provides authorities with an implied right to terminate contracts on those grounds (and on giving 'reasonable notice to the contractor').

The requirement on authorities to include termination provisions will apply to any new contracts awarded after 26 February. However, the Crown Commercial Service issued guidance in March taking the view that an implied term will nevertheless apply to all existing contracts, which may be a concern for contractors.





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