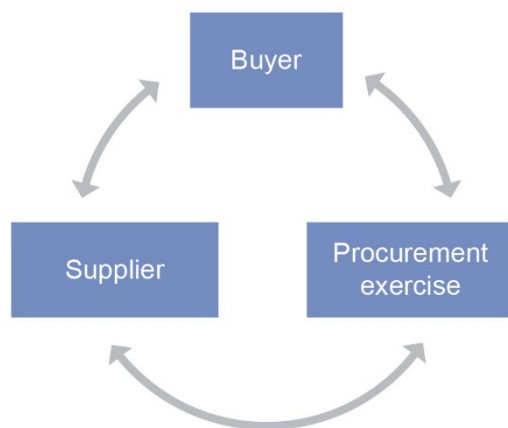


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## Risk control

### Procurement Risk Management Guide



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# Procurement Risk Management Guide

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# Purpose of the Guide

## **This procurement guide is for the benefit of risk and insurance managers**

It aims to:

**Raise awareness** of the changes in public procurement law following the UK's withdrawal from the European Union and the potential exposure to a large claim in the event a procurement exercise is successfully challenged

**Identify** those areas where mistakes are most frequently made;

**Provide** a ready access reference guide summarizing the key principles and requirements of public sector procurement rules and regulations;

**Support and encourage** risk and insurance managers to enter into a dialogue with procurement specialists; and

**Ensure** procurement risks are well-managed and timely notification given of any potential claims, in order to protect the authority's position.

## **Find out more**

If you would like to discuss any of the issues raised in this guide, please contact:

### **Ashley Easen**

Director Risk Control  
Gallagher Bassett  
[ashley\\_easen@gbtpa.com](mailto:ashley_easen@gbtpa.com)

## **Legal support**

RMP/QBE's panel legal advisors for customers facing a public procurement claim is Clyde & Co LLP. A 24/7 emergency service is available for RMP customers and more details can be found at <https://www.clydeco.com/en/emergency>

*All RMP/QBE insured are encouraged to take use the advice line for queries and advice as procurement exercises can prompt many queries post the release of the results. If legal assistance is sought then early engagement of a panel firm can mean their legal costs are captured as part of the claim from day one and avoids the duplication of time and expense when a non-panel firm is initially appointed.*

## **You are invited to join the RMP Local Government LinkedIn group**

Raise any issue you may have with a panel of local government practitioners and risk management specialists.

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# Introduction

## **Public sector procurement is a complex, evolving area**

There is a growing need to apply the techniques of good risk management. Large procurement exercises are increasing in volume as authorities seek to become more efficient and cut costs by outsourcing and commissioning more services. The trend towards larger, longer term and joint procurement arrangements has reduced the number of new opportunities in the market and so competition is often fierce. Coupled with this, suppliers have generally increased awareness of their rights under the public procurement legislation to challenge and seek to stop the tender award and other remedies.

It is right to say that there has been a very significant increase in public procurement disputes in recent years. More and more of these disputes are being referred to us for support in defending the legal claims and pre-litigation 'skirmishes'.

The main legal framework in England, Wales and Northern Ireland is the Public Contracts Regulations 2015 ("**Regulations**"). There are mirroring regulations in Scotland, and separate regimes for procurement by regulated utilities, for concession contracts and for defence contracts. It is also possible for procurement activity to be challenged by way of judicial review.

The UK has now left the European Union. Although the Regulations derive from EU law, there have been few changes to the public procurement regime as at the time of this document. Future reform is promised, and the UK Government expects new regulations to be in force any time from 2023.

## **Service providers are challenging outcomes**

Due to increasing financial stakes (whether in terms of the contract value or costs of bidding), service providers are now increasingly challenging the outcome of tender exercises. The consequences of such challenges and failures in the procurement exercise can be far reaching.

**At the lower end of the scale** they nearly all require officer time to investigate and address. They can delay plans to deliver services and may require additional funding if the tender process has to be repeated. Bad press and scrutiny of procurement activity more broadly are also possible consequences.

**At the top end of the scale** a significant procurement failure can result in severe disruption to service delivery, headline hitting reputational damage to the organisation and large financial penalties. Remedies open to suppliers include automatic suspension of the contract award, damages and cancellation of the contract in some cases. In recent years we have seen a number of claims valued at over £10 million, resulting from errors made during a procurement exercise.

# Why Procurement Exercises Fail

## Case history 1: everything is relative

A procurement exercise for the provision of services valued in the region of £30m was run efficiently and in full compliance with the Regulations. At the very last minute, for reasons beyond the control of the purchaser, the firm who won the contract withdrew from the contest. The outcome had already been communicated to all bidders, along with all relevant information, and the scores that had been awarded to the winning contractor.

The decision was taken to award the contract to the second placed firm. However, those involved failed to realise that points had been awarded on a relative basis. The withdrawal of the original winning bidder fundamentally altered the evaluation, and had the scores been recalculated it was the third placed contractor (and not the second placed contractor) who should have been awarded the contract.

The third placed bidder then raised a legal challenge, and because the contract had already been awarded the aggrieved contractor was awarded over £0.5 million in compensation.

## Key learning points

- There is procurement risk in automatically awarding to the second placed bidder.
- Ensure that those involved in the procurement process have a good understanding of the underlying basis of the evaluation and scoring system being used.
- When a relative points system is employed (which itself needs to be considered for compliance with the Regulations), the withdrawal of a bidder can fundamentally alter the calculations.

## Case history 2: say no to need-to-know

An unsuccessful bidder challenged the outcome of a procurement exercise run by a local council, claiming several million pounds in compensation. The council defended its position. However, nobody in the council informed their insurance manager of the case, perhaps failing to understand the significance of insurance to this type of event, and the policy requirements to provide timely notification to the insurance carrier.

In the months between the challenge and the insurance manager being notified, the council re-let its insurance contract and a new insurance company was appointed. As the insurance manager was unaware of this claim and its potential, when the new insurance contract had been let it had not been declared as part of the process, and had not been taken into account when the insurance companies had priced their bids for the new term of insurance cover.

In such circumstances where a policyholder fails to declare a material fact, it is within the insurance company's rights to refuse to cover any potential liabilities.

## Key learning points

- Public procurement claims may well be covered by your insurance policy. Contact us as soon as possible to identify any potential coverage.
- The insurance manager will know all about the insurance policy and the requirement to make early notification to the insurance carrier of a significant potential claim, however, other managers within an authority may not realise that insurance protection is available, or that contractual requirements need to be met for policy to respond.
- Awareness and communication are key. There is a need to raise awareness between service areas and lines of communication must be clear and maintained.

### **Case study 3: emails and informal meetings can be disclosed**

After a winning bid was selected for a health service provider, a challenge was mounted that stated unfair bias by one of the evaluation team had played a part in the decision process. The failed bidder also claimed that the panel lacked the experience to evaluate the bids and that the scoring applied was therefore irrational. The bidder asked that the tender process be re-run. When this was rejected, they lodged a claim that amounted to £1.5 million.

The council disagreed. However, an investigation revealed a number of factors that harmed their defence. Internal emails were found that expressed concern over the experience of the evaluation team, and they also raised questions regarding conflict of interest. These concerns were not formally answered. The quality of records maintained in respect of the evaluation process was poor. It appeared that one of the four evaluators had been unable to attend any of the formal evaluation meetings, and as they had not kept any records, their views had not been included in the discussions held. A number of 'informal' meetings had been held between members of the evaluation team, but there were no records explained what was discussed. A lack of transparency was evident.

To defend the claim, the council would have to comply with the Court rules on disclosure both before and during the litigation, requiring a broad approach to disclosing everything relevant from concerned emails to incomplete records. The council offered to re-evaluate the existing bids using guidance from external legal experts to verify the process. This course of action avoided a lengthy legal battle, with the potential for a £1.5 million compensation payment, but still incurred legal expenses of over £50,000 – not to mention all the time wasted by senior council officers who had to address the issue.

#### **Key learning points**

- Careful consideration needs to be given to the selection and training of officers taking part in the evaluation of bids. There is case law which demonstrates the need for a properly expert evaluation team who understand the subject matter of the contract in question.
- If concerns are raised in email correspondence, then these must be formally answered and addressed.
- Evaluators should avoid making informal, personal or derogatory comments in email correspondence as these may be disclosed.
- No meeting where evaluators discuss the bid are 'informal' - records must be kept of discussions held.

### **Case study 4: know how the framework works**

A contracting authority decided to award a contract under a framework it was entitled to access.

However, a provider who was not party to that framework challenged the decision, claiming that the services being procured were not covered by the terms of the framework, and the opportunity should have been advertised under a standalone procurement – with the entire market able to bid.

Should proceedings be successful, a declaration of ineffectiveness can be made by the court, effectively voiding the contract.

#### **Key learning points**

- Framework call off contracts are just as likely to be challenged as new standalone procurements.
- Those involved in procurement have to be aware of the frameworks available to the organisation, in terms of the scope of those frameworks, and the rules of any mini-competition that should be carried out to ensure compliance.
- Be aware of the opportunity to utilise frameworks, rather than the organisation procuring the contract separately.

## Case study 5: manifest errors in the evaluation process

### Woods Building Services and Milton Keynes Council<sup>1</sup>

The 2015 High Court judgement arose from a dispute over the award of a contract for asbestos removal worth £8m over 4 years. The claimant (Woods) was the current supplier and submitted the cheapest price. However, they lost out to European Asbestos services (EAS) because the scoring was weighted 60/40 in favour of price over quality.

Woods challenged the results claiming that the evaluation process was unfair and lacked transparency. Detailed scrutiny was applied by the court to the entire process. Members of the evaluation panel were called to give evidence and the judge re-scored the bids using the council's published evaluation scheme.

The Outcome was a ruling in favour of the claimant Woods, and a judgement that was particularly critical of the council on the following points:

- The process produced 'no documentation or notes' to justify the scoring decisions.
- The council had failed to adhere to its own procurement handbook.
- The evaluation process failed to properly apply the scoring criteria.
- One of the evaluation panel was a former Woods' employee, who expressed unease at his inclusion in the process. The council failed to address this conflict of interest.
- The court ordered the council to set aside its contract award decision, and confirmed that damages was the appropriate remedy. Woods was therefore entitled to claim compensation for wasted time and expense.

### Key Learning Points

- Staff carrying out tender evaluations should be given adequate training, guidance and instruction to ensure that they understand their obligations and duties.
- Staff should be aware of the possibility that they may be required to explain their decisions to a court.
- Conflicts of interest must be addressed.
- The organisation should check that scoring criteria are properly designed, and not so rigid as to prevent recognition of good features within a bid.

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<sup>1</sup> [Woods Building Services v Milton Keynes Council \[2015\] EWHC 2011 \(TCC\)](#)



# Common Mistakes and Key Messages for Risk Management

As the case histories demonstrate, there are a number of ways in which a contracting authority may fall foul of the procurement rules. The above examples are by no means exhaustive and common areas relate to the supplier selection and contract award processes. Although the rules are highly technical, the most common reasons for failure can be attributed to fairly simple mistakes in the design or execution of the scoring system, or the ability to demonstrate that the evaluation process was conducted in a fair, unbiased and transparent manner.

The consequences of breaches to the rules can lead to legal action, and the Regulations allow for the application of significant costs and penalties.

**The following is a checklist of the main areas where mistakes can be made, particularly in relation to above threshold contracts. It also includes examples of how mistakes can occur:**

1. Letting a contract without publication of contract notice. If contract spend is over the current financial threshold set out in the Regulations, contracts legally need to be advertised on Find a Tender Service (“FTS”).
  - When the purchaser wrongly thinks the rules do not apply to the procurement concerned or when the rules relating to aggregation of requirements have not been applied correctly.
  - Incorrect categorisation of works/ supplies contracts.
  - Incorrectly using the negotiated procedure without prior publication of a contract notice.
  - Artificial splitting of works/services/supplies contracts.
  - When the advertised specification is significantly changed during the procurement process, with the result that the requirements finally contracted for have not been advertised. (This is a particular risk when using the competitive dialogue and negotiated procedures – when the final outcomes/solutions are substantially different from the requirements advertised in the original contract notice).
  - When substantial modifications to contracts are made during the lifetime of a contract which result in the contract specification being significantly different from that originally advertised.
  - Authorities using third party frameworks they are not permitted to use either because their participation was not clearly identified in the contract notice and or the goods, services or works they are purchasing were not included in the original tender.
  - The purchase of additional supplies works or services from the original supplier which exceed the limits laid down in the Regulations.
  - Non-compliance with the rules relating to the advertising of contracts including:
    - Time limits for receipt of tenders or time limits for receipt of requests to participate;
    - Inaccurate contract values, particularly where the contract term includes options to extend or the option to include additional services during the contract term;
    - Failure to declare where a project/ programme is financed by European funds.
2. Specifications
  - Using discriminatory technical specifications.
  - Not using nominated specifications when available.
  - Insufficient definition of the subject-matter of the contract.
3. Selection of suppliers to bid
  - Not complying with the rules relating to the mandatory exclusion of suppliers from the bidding process.

- Unlawfully excluding suppliers from the bidding process.
- Evaluation of candidates using unlawful or mistaken selection criteria.
- Use of unlawful and/or discriminatory selection criteria in the contract notice or tender documents.
- Use of selection criteria not related and proportionate to the subject matter of the contract.
- Modification of selection criteria after opening of applications resulting in incorrect selection of suppliers to bid.
- Lack of transparency and/or equal treatment during evaluation.

#### 4. Award of contracts

- Evaluation of tenders using unlawful mistaken or discriminatory award criteria.
- Failure to carry out evaluation and moderation lawfully including a failure to maintain adequate records of decisions made.
- Using award criteria not laid down in the contract notice or tender documents.
- Modification of award criteria after opening of tenders, resulting in incorrect acceptance of bids.
- Modification of tender specification after receipt of bids.
- Unlawful negotiation during the bid assessment/award process.
- Not complying with the rules relating to abnormally low offers.

#### 5. Conflict of interest

- Not complying with the rules relating to conflict of interest including a failure to consider conflicts that may be perceived to exist.
- Failure to retain adequate records of conflict checks made and to keep updated throughout the process.

#### **Key messages for managing the risk**

1. Those involved in the leading the procurement process must have a detailed up-to-date knowledge and understanding of the Regulations and national procurement policy and guidance.
2. The authority should have a well-defined and communicated policy relating to its procurement activities. This should set out the roles, responsibilities and required competencies of all involved.
3. All staff involved in procurement exercises and in particular those involved in selection and evaluation of bids must have an understanding of the underlying principles and rules and how these must be applied during the process. They should understand:
  - the principles of non-discrimination and equal treatment;
  - the need to declare any perceived conflicts of interest;
  - how the scoring system works and how it should be applied;
  - the importance of keeping clear records;
  - that in the event of a challenge all documents including emails relating to the bid will be disclosed;
  - that in the event of a case going to trial they may be required to give evidence to explain their decisions; and
  - the scale of the potential loss to the authority should a procurement exercise be successfully challenged

4. Exercise care when using framework arrangements and check to ensure that the products or services to be purchased fall within the scope of the framework and that the authority is entitled to make use of the framework.
5. Raise awareness within the authority of the insurance implications associated with successful challenges and ensure that the risk and insurance manager is informed of any significant potential challenges.

# Guide to Procurement Rules and Regulations

This guide provides an overview of the application of the Regulations for sub-central authorities only. For the purpose of the Regulations sub-central authorities include local authorities, educational authorities, Police and Fire Services and other public sector bodies which are not part of central government.

The over-riding procurement policy requirement in the UK is that all public procurement must be based on value for money, defined as “the best mix of quality and effectiveness for the least outlay over the period of use of the goods or services bought”. Public sector procurement is subject to a legal framework which encourages free and open competition and value for money, in line with internationally and nationally agreed obligations and regulations as detailed below:

## **The Public Contracts Regulations 2015 (the “Regulations”)<sup>2</sup>**

The Regulations came into force on the 26th February 2015. The rules in Scotland are contained within the Public Contracts (Scotland) Regulations 2015<sup>3</sup>.

### **Regulation 18 states:**

- Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.
- The design of the procurement shall not be made with the intention of excluding it from the scope of the Regulations or of artificially narrowing competition.
- For that purpose, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

## **Trade and Cooperation Agreement (the “TCA”)<sup>4</sup>**

The TCA was implemented in the domestic legislation under the European Union (Future Relationship) Act 2020. The TCA provides for a transparent and non-discriminatory framework of rules for trade in public procurement based on the WTO Government Procurement Agreement (the “GPA”).

- The TCA currently sets out that a procurement will be covered if it is caught by the parties GPA Annexes (or “Coverage Schedules”)<sup>5</sup>, or if it is listed in Annex PPROC-1 to the TCA (Article PPROC.2). Annex PPROC-1 provides several areas that are not covered by the GPA:
  - utilities procurements (covered by the Utilities Contracts Regulations 2016);
  - hotel and restaurant services;
  - food servicing services;
  - telecommunication related services;
  - real estate services on a fee or contract basis;
  - other business services; and
  - education services.
- The rules regarding public procurement are set out in Title VI of the TCA. Article PPROC.4 requires procurement documents for covered procurements to be directly accessible by electronic means, free of charge and through a single point of access on the internet.

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<sup>2</sup> [The Public Contracts Regulations 2015 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

<sup>3</sup> [The Public Contracts \(Scotland\) Regulations 2015 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

<sup>4</sup> [Trade and Cooperation Agreement between UK and EU – CP 426 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

<sup>5</sup> [WTO | Government procurement - The plurilateral Agreement on Government Procurement \(GPA\)](https://www.wto.org)

- In cases where a contracting authority requires applicants to demonstrate prior experience, Article PPROC.7 ensures that contracting authority do not require that such experience is obtained in the territory of the respective party.
- Article PPROC.10 states that contracting authorities should be able to take into account environmental, labour and social considerations throughout the procurement process.

**World Trade Organisation (WTO) Government Procurement Agreement. (GPA)**

The GPA is a separate set of legislation which applies to certain members of the WTO who have signed up to the agreement. The GPA requires parties to guarantee fair and transparent public procurements and to treat suppliers from GPA countries in the same manner as domestic suppliers for all covered procurements. Since Brexit, the UK is now party to the GPA in its own right. Consequently, GPA suppliers will continue to have access to most of the UK above-threshold public procurement contracts.

Current signatories to the agreement include Armenia, Australia, Canada, European Union(EU), Hong Kong China, Iceland, Israel, Japan, Republic of Korea, Liechtenstein, Republic of Moldova, Montenegro, Netherlands (Aruba),New Zealand, Norway, Singapore, Switzerland, Chinese Taipei, Ukraine, United Kingdom and United States (USA). It will be noted that contractors/suppliers from some of these states do not hesitate to challenge procurement decisions in court.

# Contracts Covered by the Rules

The TCA and the Regulations apply to all public contracts above the specified thresholds which have as their object the execution of works, the supply of products or the provision of services.

The Regulations also lay down rules for the advertising and letting of below threshold contracts.

There are separate rules for concession contracts. The main difference between a concession contract and the more usual types of contracts is that under a concession contract the risk is transferred from the buyer to the supplier. Under the Concession Contracts Regulations 2016<sup>6</sup> (and the Concession Contracts (Scotland) Regulations 2016 in Scotland)<sup>7</sup> the rules apply to both service and works contracts above the threshold.

## Current thresholds (1<sup>st</sup> January 2022) for sub-central authorities:

The thresholds in place from 1 January 2022 are, for the first time, inclusive of VAT.

- **£213,477** for supplies and services contracts.
- **£5,336,937** for works and concessions contracts.
- **£663,540** for Light Touch Regime service contracts.

## Light Touch Regime (“LTR”)

**For Service Contracts a Light Touch Regime** was introduced to replace the former “Part B” services. This regime applies to certain social and other specified services (**see Appendix 2**). The LTR came into effect from February 2015 except for certain clinical commissioning contracts for the NHS which came into effect from April 2016.

- Calls for competition may be made by publication of a contract notice or by a Prior Information Notice (“PIN”) which shall be published continuously until no further contracts will be placed under the notice. The PIN must refer to the types of services to be awarded and shall make clear that contracts will be awarded without a further call for competition. Purchasers must publish results by means of a contract award notice but may group such notices on a quarterly basis in which case they must be published within 30 days following the end of the quarter.
- Purchasers may use the competitive procedures under the Regulations (see 5.4 below) or design their own procedures. This allows for greater flexibility and purchasers may even change parameters whilst the process is underway. However, they must ensure compliance with Regulation 18 principles (see 1.1 above), conduct the procurement in conformance with the information provided in the FTS advert and apply reasonable timescales.
- A mandatory standstill period for these contracts should be applied.
- The Regulations allow purchasers to restrict the right to bid for health, social and cultural services contracts to mutually owned entities, employee mutuals and organisations whose objective is the pursuit of a public service mission linked to the delivery of those services; and whose profits are reinvested and/or are distributed on participatory considerations and ownership of the organisation is based on employee ownership/participatory principles or requires the active participation of employees, service users or stakeholders.
- For below threshold LTR contracts see 4.0 below.

<sup>6</sup> [The Concession Contracts Regulations 2016 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

<sup>7</sup> [The Concession Contracts \(Scotland\) Regulations 2016 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

### **Exemptions in the rules for Public to Public Contracts and Joint Cooperation**

Prior to the Regulations the decision as to whether or not a public to public contract or joint cooperation between authorities contract was exempt from the rules was based on an interpretation of the rules as determined by the Teckal and Hamburg court cases. The Regulations now cover these exceptions.

Regulation 12 states that a contract will be regarded as an exempt in-house contract where:

- the contracting authority/contracting authorities exercises over the contractor concerned a control which is similar to that which it exercises over its own departments. Control in this context means it can influence strategic/significant decisions;
- more than 80 % of the activities of the contractor are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other bodies that are themselves controlled by that contracting authority; and there is no private sector ownership of the contractor, with certain exceptions;
- the contractor places a contract with the contracting authority, or another body controlled by the contracting authority;
- contracts for services placed by the contractor with the controlling authority are also exempt from the rules.

The rules also provide an exemption for joint co-operation between contracting authorities where the contract establishes joint co-operation in the performance of public services with a view to achieving mutual objectives, the cooperation is governed only by the public interest; and the participating authorities perform "on the open market" less than 20% of activities concerned by the co-operation.

### **Below threshold contracts**

To help encourage participation by Small to Medium Enterprises (**SME's**) in public sector contracts the Regulations have included some additional requirements including:

- a) for below threshold contracts above £25,000 to be advertised in Contracts Finder. Contracts Finder is an online tool/web site displaying the details of public contract opportunities and contracts above £25,000;
- b) a new ban on use of a selection (SQ) stage for under threshold contracts but purchasers may ask relevant questions.

Note that maintained schools and Academies are exempt from the advertising requirements, as are contracts for health services covered by the NHS Regulations.

### **Going to the market – rules to be followed**

The Regulations lay down a detailed set of rules including how requirements should be specified, the contracting procedures that may be used for different types of procurement, how contracts should be advertised, how tenderers should be selected to participate in the contracting process, how bids should be assessed and how contracts should be awarded. They also define procedures to be followed after the selection of the preferred bidder and after contracts have been let.

The most significant requirement of all these rules is the need to ensure that all economic operators are treated equally and there is no discrimination on the grounds of nationality or in favour of against any individual economic operator.

### **Pre-procurement market consultations**

The Regulations lay down the parameters for these discussions and the treatment of potential suppliers that participate in these discussions. The discussions must not be anti-competitive or result in any breaches of the rules relating to transparency and discrimination.

A potential bidder that has participated in the pre procurement discussions must not be excluded from the resultant procurement process unless there is no other way to ensure equal treatment of bidders.

### Advertising requirements

The Regulations require authorities to advertise above threshold contracts on the Find a Tender Service ("FTS") and below threshold contracts above £25,000 on Contracts Finder.

- Prior Information Notices ("**PIN**"). A PIN which is not a call for competition is the means by which a purchaser may give the market advance information on the forthcoming issue of a contract notice. Providing this notice gives possible applicants sufficient information to clearly identify the potential requirement the purchaser may use shorter contracting timescales when they publish their contract notice for the requirements specified in the PIN.
- Sub-central authorities may also use a PIN as a call for competition when tendering using the restricted or competitive procedure with negotiation procedures. It can also be used under the LTR. When using a PIN for this purpose it must be made clear in the notice that there will not be a further call for competition.
- A Contract Notice is a call for competition placed in the FTS and Contracts Finder for above threshold contracts and in the Contracts Finder for below threshold contracts.
- A Contract Award Notices is a notice providing contract award details that must be placed in the FTS within 30 days of the award of a contract for an above threshold contract. An award notice must also be placed in Contracts Finder for above and below threshold contracts and contracts placed under framework agreement.
- Appendix 3 details the relevant timescales for notices relevant to the different types of contracts and procedures.

### Procurement methods

Purchases by the public sector include contracts for works, services and supplies and separate rules relate to each category of procurement. The types of contracts used by the public sector include the following which are discussed in more detail later in the guide:

- One off purchase
- Period contract
- Framework agreement (see page 16)
- Dynamic Purchasing System ("**DPS**"), (see page 16)
- Design contests (see page 16)

### Procurement Procedures

The Regulations provide for eight procedures as listed below. Public sector bodies have the freedom to use either the open or restricted procedures (1 or 2) without having to demonstrate why they are using these procedures for all other procedures there are qualifying criteria.

- a) **Open Procedure.** Under this procedure any interested supplier may respond to an advertisement on FTS by submitting a tender for the contract and the bids of all suppliers that meet the qualifying criteria will be assessed.
- b) **Restricted Procedure.** Under this procedure any interested supplier may submit an application to participate in the process. Following receipt of applications, the purchaser may shortlist to a minimum of 5 applicants to bid.



### **Competitive Procedure with Negotiation and Competitive Dialogue Procedures**

These procedures may only be used when:

- The needs of the purchaser cannot be met without adaptation of readily available solutions that is the solutions require design or innovation.
- The contract cannot be awarded without prior negotiations because of specific circumstances relating to the nature, the complexity or the legal and financial make up or because of the risks attaching to them.
- The technical specification cannot be established with sufficient precision with reference to a standard or common technical specification or technical reference.
- Unacceptable or irregular tenders have been received under the open and restricted procedures.
- The difference between the two procedures is that under the competitive negotiated procedure the negotiations cover the terms of a single solution whilst the competitive dialogue covers the development of different solutions.

- a) **Competitive Procedure with Negotiation:** Under this procedure following qualification a minimum of 3 selected suppliers are requested to submit initial bids which are used as a basis for negotiations which are undertaken in accordance with laid down procedures including confidentiality and equal treatment of bidders. At the end of the negotiation stages final offers are submitted and no further negotiation is allowed in relation to these final bids.
- b) **Competitive Dialogue Procedure:** Under this procedure following qualification a minimum of 3 selected applicants are requested to submit initial proposals/solutions which are used as a basis for dialogue which is undertaken in accordance with laid down procedures covering confidentiality and equal treatment of bidders. At the end of the dialogue/negotiated stages final offers are submitted but under this procedure fine tuning of the final offers is allowed.
- c) **Innovative Partnership Procedure.** This is a new procedure introduced by the Regulations which is intended to be used where there is a need to develop an innovative product, service or works not currently available on the market and the subsequent proportionate purchase of the developed product, service or work. The partnership may cover two stages, first the development / research stage followed by the second stage covering the supply of the goods, services or works concerned for a quantity / period proportionate to the value of the first stage.
- d) **Negotiated procedure without a call for competition / Urgency Procedure.** This procedure may only be used in exceptional circumstances and in accordance with specified rules laid down in the Regulations. The use of this procedure can involve a risk of a challenge and should only be used when there is clear compliance with the procedures.
- e) **Design Contests.** This is a procedure that may be used for a range of contracts including design of buildings, computer software development etc. There are two types of design contest:
  - Design contests organised as part of a procedure leading to the award of a public service contract. For these contests the threshold value is the value of the contract plus the value of any prizes or payments.
  - Design contests with prizes or payments to participants. For these contracts the threshold value is the total value of the payments and prizes.

Purchasers must advertise the contests by means of a “contest notice” and issue an award notice.

Note where a minimum number of applicants is quoted and the number of compliant applications is less, the purchaser may proceed with the lower number.

### **Techniques available when applying the procurement procedures**

Under the Regulations authorities are entitled to use a number of techniques/ methods when applying the procurement procedures. These include:

#### **Framework Agreements**

This is an agreement between one or more authorities and one or more suppliers which establishes the terms governing the award of contracts during a given period in particular with regard to price and where appropriate the quantity envisaged.

For some frameworks not all the terms covering supply are laid down in the framework. For example, consultancy contracts where day rates etc have been quoted but actual time to be spent and staff used on a specific contract will vary between contracts. For these frameworks, competition is re-opened amongst the parties to the framework by means of a "mini competition".

Authorities that use a framework agreement set up by a third party are responsible for ensuring that when advertised, the Contract Notice covered their participation in the Framework Agreement and that the goods services or works they are procuring were clearly in scope of the Contract Notice.

#### **Dynamic Purchasing Systems ("DPS")**

This is a completely electronic process/procedure for purchases generally available on the market.

The DPS must be advertised FTS using the restricted procedure notice. All suppliers that meet the qualification requirements (assessed by completion of an SQ) must be added to the DPS. The Contract Notice must remain open throughout the lifetime of the DPS during which period to any additional supplier that meets the qualification criteria may apply to be added to the DPS.

The requirements covered by the DPS may be divided into lots covering specific categories of products, works or services, size of contracts and specific geographic areas where the contracts will be performed.

Authorities must invite all admitted suppliers to submit a tender for each contract let under the DPS and the contracts must be awarded to the tenderer that submitted the best tender on the basis of the award criteria set out in the Contract Notice.

In practical terms it is similar to an approved list of suppliers that have been qualified in accordance with the rules.

#### **Electronic Auctions**

These may be used as part of the award procedure including the award of a contract under a framework agreement providing the option to use an auction was stated in the Contract Notice.

Under this procedure, unlike a normal auction, prices are revised downwards not increased and other aspects may be improved.

The auction is an electronic process which occurs after initial full evaluation and short listing which enables bids to be ranked automatically. There can be no further short listing after the auction starts.

#### **Electronic Catalogues**

Authorities may require tenders to be presented in the format of electronic catalogues or to include electronic catalogues and other documents.

### **Central Purchasing Bodies (“CPB”)**

A CPB is a contracting authority that conducts activities on a permanent basis in one of the following forms:

- acquisition of supplies and or services intended for contracting authorities (act as wholesalers); or
- awards public contracts or framework agreements for works, services or supplies intended for contracting authorities.

Contracting authorities that acquire goods directly from a CPB or purchase works, supplies or services under a contract a DPS or a framework concluded by a CPB are deemed to have complied with the requirements of the Regulations providing the initial advertisement covered for their usage and the goods, services or works they are purchasing. The rules lay down the responsibilities of public sector purchasers when using CPB arrangements and when conducting mini competitions under a CPB framework (refer to section 6.1).

### **Technical specifications and standards**

It is important that specifications must not discriminate in favour of or against any supplier from any other country subject to the GPA.

Technical specifications may be based on standards or output specifications. Only output specifications may be used when using the competitive negotiated or competitive dialogue procedures.

### **Selecting and short-listing tenderers to bid**

Purchasing authorities may lay down minimum qualifications for suppliers that wish to bid for a contract. These requirements must be proportionate to the contract concerned and must not be discriminatory. The qualifications may fall into three categories:

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

When applying to participate in the tender process bidders must be made aware of the criteria that will be used in the assessment process, the weighting of the criteria and any sub criteria. In simple terms bidders must be made aware in advance of how their application will be assessed and compared against other applications.

### **Grounds for Mandatory and Discretionary Exclusions**

The Regulations (regulation 57) lays down the rules relating to the mandatory and optional exclusion of suppliers. With regards to mandatory exclusions, the Regulations now include some offences relating to Terrorism, Serious Crime and where a supplier has failed to pay taxes or social security contributions and there has been a binding court judgment or decision in the case.

Grounds for discretionary exclusion now include where the supplier has:

- failed to pay taxes or social security contributions and the contracting authority can demonstrate this by ‘appropriate means’ even in the absence of a formal ruling;
- performed poorly on previous contracts, resulting in termination of the contract; – exerted undue influence on procurement decision making process;
- other circumstances which would distort competition including conflicts of interest, collusion and involvement in pre contract discussions where it would not be possible to ensure equal treatment by other means.

## **Awarding of contracts**

### **MEAT**

The award of public contracts must be based on the most economically advantageous tender assessed from the point of view of the contracting authority (“**MEAT**”).

The MEAT shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, such as qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.

Life cycle costing covers the total costs incurred as a result of the purchase of goods, services or works including the initial purchase price, startup costs, additional staff training, cost of spares maintenance costs, disposal costs and any other costs incurred during the lifetime of the goods, services or works concerned. Comparison of costs must be the basis of total lifetime costs and not the first-year costs. Bidders must be advised in advance if lifecycle costing is to be used.

### **Award Criteria**

Award criteria shall 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.

Award criteria may include:

- (a) quality including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
- (b) organisation including 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
- (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

The authority shall specify, in the procurement documents the main and sub criteria to be used in the assessment of the tenders, the assessment methodology and the relative weighting of each of the criteria and sub-criteria.

The weightings may be expressed by providing for a range with an appropriate maximum spread. Where weighting is not possible for objective reasons, the authority must indicate the criteria in decreasing order of importance.

In practice this means that when bidding for a contract, the bidder must know exactly how their bid will be assessed.

### **Post evaluation procedures**

Following the evaluation of bids and the selection of the preferred bidder, authorities must comply with the requirements of the Mandatory Standstill Period (“**MSP**”) before awarding the contract. The MSP requires purchasers to:

- (a) Advise the preferred bidder of their decision but to make it clear that the award will not take place until the expiry of the MSP. Where bidders are sent communication electronically, this is usually a period of 10 calendar days.
- (b) Provide the unsuccessful bidders with a precise statement of the exact standstill period and a summary of the relevant reasons for the award decision including:
  - The criteria for the award of contract.

- The reasons for the decision including the characteristics and relevant advantages of the successful tender, the score if any obtained by the supplier concerned.
- The name of the successful bidder.

The MSP requires that an award does not take place until after the expiry of the MSP. After the expiry of the MSP authorities may proceed to award the contract to the preferred bidder providing they have not received an official challenge to the award decision.

**Failure to comply with the requirements of the MSP can result in contracts being cancelled as well as significant fines and other costs.**

#### **Post award procedures.**

Following the award of the contract, authorities must publish the result on FTS by means of a Contract Award Notice.

#### **Remedies under Regulations:**

Purpose of the remedies

- If a court finds that the Regulations have been breached, it may declare the contract ineffective, shorten the contract, and fine the contracting authority. In addition, a bidder may claim damages for its losses resulting from the breach.
- A court is required to impose a fine (described in the legislation as a "civil financial penalty") in any circumstances where the court declares a contract ineffective.
- Parties to public procurement disputes will still be able to rely on past judgments of the Court of Justice of the EU (CJEU); although future CJEU judgments will not be binding on UK courts.

#### **Challenges & timescales for bringing claims under the Regulations:**

- Where a claimant is not seeking to cancel the contract (ineffectiveness) claims must be brought within 30 days of when the challenger first knew or ought to have known that the grounds for starting proceedings had arisen. This may be extended to up to 3 months by the court, where there is good reason to do so. Given that this date is based upon challenger knowledge, it can be difficult to ascertain when the risk period has expired. This is a key issue for those dealing with potential procurement challenges.
- Where a claim for ineffectiveness is made, the challenger has 6 months from the date that the contract is entered into. This timescale is not dependent upon challenger knowledge.
  - When an award is challenged in the courts there is an automatic suspension of a procurement procedure and the contract must not be entered into.
  - Where transparency provisions have not been observed allowing claims up to six months after the contract is concluded.

Remedies – national courts have a range of powers including:

- Order removal of discriminatory specifications.
- Set aside decisions taken unlawfully.
- Declare a contract ineffective. (in practical terms cancel the contract)
- Shorten contracts for breaches that do not lead to a declaration of ineffectiveness.
- Award damages for tender costs, foregone profits or lost opportunities.
- To impose significant mandatory fines.

- Shortening contracts for breaches that do not lead to a declaration of ineffectiveness.

Failure to comply with the rules can result in the loss of European grant funding.

Additional costs to authorities if contract declared ineffective or shortened by the courts include:

- Court costs,
- Costs of retendering.
- Payments to the supplier originally awarded the contract.
- Costs of other parties involved.

### **Remedies under Judicial Review**

Judicial review is a public law remedy available to individuals/entities with a legitimate interest (standing) to challenge the lawfulness of a decision or action taken by a public body in exercising a public function. It can be used to challenge procurement decisions.

A judicial review will usually be used instead of pursuing a remedy under the Regulations. The court has broad powers to grant relief including quashing of the decision taken by the authority, prohibiting the authority from acting unlawfully or compelling the authority to act in accordance with its statutory duties. Where a decision is subject to the Regulations, a judicial review must be issued within the same timescales as under the Regulations. i.e. within 30 days of the date on which the alleged breach was known or ought to have been known by the challenger.

# Appendix 1 – Key Changes

On 15 December 2020, the Government published a Green Paper on Transforming Public Procurement<sup>8</sup>. The Government's goal is to speed up and simplify procurement processes, place value for money at their heart, and unleash opportunities for small businesses, charities and social enterprises to innovate in public service delivery. Consultation closed on 10 March 2021 and the Government response to consultation was published on 6 December 2021.

## **Proposed key changes:**

- combining the current separate legislation for public, utilities and concession procurements into a single set of rules.
- keeping only three of the currently present procedures that can be used by an authority:
  - open procedure for “off the shelf” competitions where no negotiation is allowed.
  - limited tendering process where there is no advertisement of the contract.
  - flexible competitive procedure that gives authorities the freedom to negotiate and innovate.
- changes to the selection process to make grounds for exclusion simpler and clearer.
- the evaluation of bids will be based on the Most Advantageous Tender (MAT), not the Most Economically Advantageous Tender (MEAT).
- an increased emphasis on transparency and record keeping.
- creating a new type of dynamic purchasing system, the Dynamic Market, that can be used for all types of contract.
- changes to frameworks to introduce closed and open frameworks. Open frameworks will have a maximum term of 8 years and open frameworks lasting over three years, will allow for the reopening of the framework to new suppliers periodically.
- removal of mandatory debrief letter. An Award Notice will notify the market of the authority's intention to award a contract and the outcome of the procurement. Bidders will be provided with evaluation documents relating to the procurement, rather than a letter containing selective debrief information as is currently the case.

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<sup>8</sup> [Green Paper: Transforming public procurement - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement)

## Appendix 2 – Light Touch Regime

For service contracts a Light Touch Regime (“LTR”) was introduced to replace the former “Part B” services that existed under the 2006 procurement regime.

The LTR covers the purchase of social and educational services plus other specific services. Including.

- Health, Social, Compulsory Social and related services
- Administrative social, educational healthcare and cultural services
- Benefit and Religious services
- Other community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership
- Hotel and restaurant services
- Legal services not already excluded
- Other administrative services and government services
- Prison related services, public security services and rescue services not already excluded)
- Investigation and security services
- International services
- Postal services
- Miscellaneous – Tyre remoulding services and blacksmith services.



## Appendix 3 – Find a Tender Minimum Mandatory Timescales

Type of Procedure	Tenders submitted electronically (Min timescale)	Where PIN published no more than 12 months and no less than 35 days from dispatch of Contract Notice (Min Timescale)	Requirement is urgent and longer time limit is impractical as a result
Open Procedure (Dispatch of Contract Notice to receipt of responses)	30 days	15 days	15 days
Open Procedure (Standstill)	10 days	10 days	10 days
Restricted Procedure (Dispatch of contract notice to receipt of responses)	30 days	30 days	15 days
Restricted Procedure (ITT to receipt of bids)	25 days	10 days	10 days
Restricted Procedure (Standstill)	10 days	10 days	10 days
Competitive Procedure with Negotiation (Dispatch of Contract Notice to expressions of interest)	30 days	30 days	15 days
Competitive Procedure with Negotiation (ITN to receipt of initial tenders)	25 days	10 days	10days
Competitive Procedure with Negotiation (Standstill)	10 days	10 days	10 days
Competitive Dialogue Procedure (Dispatch of Contract Notice to expressions of interest)	30 days	30 days	30 days
Competitive Dialogue procedure (Standstill)	10 days	10 days	10 days
Innovation Partnership procedure (Dispatch of contract notice to expressions of interest)	30 days	30 days	30 days
Innovation Partnership procedure (Standstill)	10 days	10 days	10 days



## **Risk Management Partners**

The Walbrook Building  
25 Walbrook  
London EC4N 8AW

020 7204 1800  
[rmpartners.co.uk](http://rmpartners.co.uk)

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