



# User Guide to the Public Contracts Regulations 2015

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## 1 Introduction and scope

The Public Contracts Regulations 2015 (“PCR 2015”) implement in England and Wales the new EU Directive 2014/24/EU (the “Directive”) on public procurement. Separate regulations will implement that Directive in Scotland later this year.

The PCR 2015 are in force from **26<sup>th</sup> February 2015** and, subject to various transitional provisions and exceptions, they replace the Public Contracts Regulations 2006 (“PCR 2006”) from that date. A copy of the PCR 2015 is available [here](#).

This note provides a (non-exhaustive) overview of some of the key new provisions in the PCR 2015 and does not aim to cover every aspect of the new regulations. We do not generally discuss those areas of the law where there has been little or no material change from the position under the PCR 2006. Its main focus is on the implications for contracting authorities and the public sector although it will no doubt also be of interest to suppliers.

## 2 Practical Steps for Contracting Authorities To Take Now

The PCR 2015 have been introduced on a tight timetable and no doubt most practitioners are not as well prepared as they would wish to be. In our view, the key practical steps contracting authorities could undertake to ensure compliance in the immediate term are as follows:

- Understand the transitional provisions and whether the PCR 2006 or 2015 will apply to the contract you are dealing with (see paragraph 3.1 for further information on this)
- Ensure procurement documents are all available electronically from the date any contract notice is sent to the OJEU (see paragraph 6.2 for further information);
- If procuring services contracts, note that the old “Part B Service” regime has been replaced by the new “Light Touch” regime (see paragraph 3.5 for further information);
- Update precedent documents to refer to the PCR 2015 and new regulation numbers; this is especially important for standstill letters for procurements covered by the PCR 2015 but applies across the board;
- Prepare to comply with the new Lord Young requirements to publish details of contracts and contract awards to Contracts Finder (from 1 April 2015 for many contracting authorities) (see paragraph 16 for further information);
- Note the new regime for under-threshold contracts and in particular the prohibition on holding a selection stage (see paragraph 4 for further information);
- When issuing pre-qualification/selection stage criteria, ensure you have updated the mandatory/discretionary exclusion criteria to reflect the PCR 2015 (see paragraph 11 for further information);
- Liaise with your accounts department to check how you will demonstrate compliance with the new statutory requirements around payment of invoices (see paragraph 13.3 for further information); and

- When drafting contracts, do so with an eye to the new provisions around modification and mandatory termination of contracts in order to be as well prepared for future contract changes as possible (see paragraphs 13.2 and 13.4 for further information).

## 3 Application of the PCR 2015

### 3.1 Transitional Provisions

Regulation 118 states that the PCR 2015 will apply where a contract award procedure is commenced **on or after 26th February 2015**. “Commencement” for these purposes includes advertisement via OJEU notice or otherwise, or where a contracting authority approaches a supplier to seek expressions of interest in a contract, or where it responds to a supplier who has sent an unsolicited expression of interest or offer to it.

A Prior Information Notice (“PIN”) issued on or after 26 February 2015 will fall within scope of the PCR 2015 and so is capable of triggering the commencement of a procedure in certain circumstances (see paragraph 6.1 for more details). However, in our view, a PIN issued before that date is insufficient to amount to the commencement of a contract award procedure (unless it expressly seeks offers or expressions of interest).

The PCR 2015 will not apply to any health services contracts that are within the scope of the NHS (Procurement, Patient Choice and Competition)(No.2) Regulations 2013 (the “NHS Regulations”) until 18 April 2016.

### 3.2 Definitions of “Contracting Authority” and “Public Contract”

As with the PCR 2006, the PCR 2015 will only bite where an entity that is a “contracting authority” for the purposes of the PCR 2015 awards a contract which is a “public contract” in accordance with the definition set out in the PCR 2015. The definition of “contracting authority” has not materially changed although a sharper conceptual distinction has been introduced between central government authorities and sub-central authorities, with the list of central government authorities at Schedule 1 being updated and greater flexibilities afforded to sub-central bodies (see paragraphs 6.1 and 7.5 for more details of the implications of this new distinction). The definition of “public contract” has not materially changed.

### 3.3 Exclusions

As with the PCR 2006, certain types of contracts are excluded from the scope of the PCR 2015 altogether. These are set out at Regulations 7 to 12. There is little change here from the position under the PCR 2006, except for the new exclusion at Regulation 12 for in-house contracts and joint co-operation between contracting authorities. Please see paragraph 3.6 for more details of this.

### 3.4 Thresholds

As with the PCR 2006, the PCR 2015 will only apply where the contract being awarded is within the scope of the PCR 2015 and exceeds a value threshold (which is set out in Article 4(a) to (c) of the [Directive](#)). Regulation 6 of the PCR 2015 sets out the rules on how to calculate the value of a contract for the purposes of assessing whether the threshold is exceeded (broadly speaking, the position here is unchanged from that of the PCR 2006, in particular the rules around aggregation of requirements and contract values).

Where a contract value falls under the relevant threshold, the PCR 2015 may still have some application. Please see paragraph 4 for more details.

## 3.5 Service Contracts

Under the PCR 2006, contracts for so-called Part B Services were exempt from the full application of the rules (particularly, there was no requirement to advertise in the OJEU).

Under the PCR 2015, the distinction between Part A and Part B Services has been removed and replaced by what is becoming known as the “Light Touch” regime. Details of this regime are at Regulation 74 onwards of the PCR 2015. A services contract will fall within the scope of the Light Touch regime if it is for the certain types of health, social and other services listed at Schedule 3 of the PCR 2015. For these Light Touch regime contracts, a higher threshold than that for ordinary service contracts will apply, before the Light Touch regime is applicable. This threshold is set out at Article 4(d) of the [Directive](#) and at the time of writing is EUR 750,000.

Bear in mind that the services listed at Schedule 3 of the PCR 2015 do not exactly mirror what used to be categorised as Part B Services under the PCR 2006; if a service is not listed at Schedule 3 of the PCR 2015 it will be subject to the full regime rather than only the Light Touch regime.

While the Light Touch regime is not prescriptive as to how contracting authorities design their procurement process for Light Touch regime services contracts, it does for the first time require that services contracts that fall within the Light Touch regime are advertised.

Finally, a reminder that the Light Touch regime will **not** apply to any health services contracts that are within the scope of the NHS Regulations until 18 April 2016.

## 3.6 Exemptions for In-House Contracts and Joint Co-operation

Previously we relied on European case law (particularly, the *Teckal* and *Hamburg* cases) for authority on when an in-house contract or joint co-operation arrangement fell outside the scope of the PCR 2006. The PCR 2015 now sets out these exemptions in statute for the first time.

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

- the contracting authority exercises over the contractor concerned a control which is similar to that which it exercises over its own departments (“similar control” in this context means the contracting authority exercising “a decisive influence over both strategic objectives and significant decisions” of the contractor. It includes where this control is exercised by another body, provided that other body is itself controlled by the contracting authority); and
- 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.

Regulation 12(2) specifically permits an extension of the *Teckal* exemption to what can be called “horizontal in-house transactions”. Provided that three conditions listed above have been met, Regulation 12(2) states the exemption will also apply where (to paraphrase) “a controlled legal person, also being a

*contracting authority, awards a contract to its controlling contracting authority, or to another entity that is also controlled by that controlling contracting authority".*

Regulation 12 also provides an exemption for joint co-operation between contracting authorities where (to paraphrase):

- the contract establishes joint co-operation in the performance of public services with a view to achieving mutual objectives; and
- the implementation of the co-operation 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.

### **3.7 Reserved contracts for mutually-owned entities and sheltered workshops**

The PCR 2015 contain new opportunities for contracting authorities to further social and community policies by reserving contract opportunities to certain types of supplier.

Regulation 77 allows contracting authorities to reserve contracts for certain health, social and cultural services to employee mutuals without having to subject the contract to the application of the PCR 2015 in full. (Note that health services which fall under the NHS Regulations are not covered by Regulation 77). An organisation will qualify under regulation 77 if:

- its objective is the pursuit of a public service mission linked to the delivery of those services;
- profits are reinvested and/or are distributed on participatory considerations;
- ownership of the organisation is based on employee ownership/participatory principles or requires the active participation of employees, service users or stakeholders;
- the organisation has not had a contract for the services concerned reserved to it by this contracting authority in the previous three years;
- the contract term is no longer than three years; and
- the call for competition/advertisement makes reference to Article 77 of the Directive (from which the provisions of Regulation 77 are derived).

In addition, Regulation 20 of the PCR 2015 allows contracting authorities to reserve the right to compete in a procurement process to sheltered workshops, provided that the OJEU notice references Article 20 of the Directive and at least 30% of the employees of the workshop are disabled or disadvantaged.

## **4 Under-threshold contracts**

For the first time, Regulations 109 to 112 of the PCR 2015 regulate contracts that fall under the threshold; this is part of the so-called "Lord Young reforms" aimed at encouraging smaller suppliers.

Regulations 110 and 112 require that:

- o contracts as low in value as £10,000 (or £25,000 for 'sub-central' contracting authority procurements), if advertised at all, must be advertised on the government's "[Contracts Finder](#)" portal; and
- o unless one of the exemptions at Regulation 112(2) applies, details about contract award must also be sent to Contracts Finder.

Note that maintained schools and Academies are exempt from these requirements, as are contracts for health services covered by the NHS Regulations. We note that the that advertisement of any "contract opportunity" (and not merely "any contract") will be within the scope of these provisions. This is regardless of how "specific" the opportunity is. So advertisement of forward-looking requirements that have not yet crystallised, such as through a PIN, pipe line notice or similar, will trigger the obligation to also advertise on Contracts Finder.

In addition, Regulation 111 brings in a new ban on use of a selection (PQQ) stage for under threshold contracts and a statutory obligation to have regard to Cabinet Office guidance around this.

## 5 Pre-procurement engagement and conflicts of interest generally

For the first time, the PCR 2015 officially gives blessing to consultation of the market pre-procurement, provided this is within the parameters of Regulations 40 and 41. Regulation 40 expressly allows contracting authorities to use advice gained as part of a pre-market engagement process in the planning and conduct of the procurement, provided that this is not anti-competitive or a breach of transparency and non-discrimination principles.

Regulation 41 imposes express requirements where a supplier has had prior involvement in the preparation of the procurement; a contracting authority must ensure that the relevant information is disseminated amongst all bidders to ensure a level playing field and that sensible bid deadlines are set. There is a presumption that the bidder with prior involvement will only be excluded if there is no other way to ensure equality of treatment amongst bidders.

The PCR 2015 also regulate conflicts of interest more generally, at Regulation 24, imposing a requirement that contracting authorities take measures to prevent, identify and remedy such conflicts and ensure equal treatment and non-distortion of competition. In particular Regulation 24 highlights the potential for conflict where staff members of the contracting authority have a direct or indirect interest which could prejudice their impartiality in the running of the procurement. An unresolvable conflict of interest forms a new ground for discretionary exclusion at selection stage (see paragraph 11 below and Regulation 57(8)(e)).

## 6 Advertisement

### 6.1 Greater flexibility for sub-central contracting authorities

Sub-central contracting authorities are those contracting authorities which are not listed at Schedule 1, and include, for example, universities and local government. Regulation 26(9) permits sub-central contracting authorities to use a Prior Information Notice ("PIN") as a call for competition to commence a procurement under either the restricted or the competitive with negotiation procedures. To take advantage of this flexibility, the PIN **must** comply with the content requirements set out at Regulation 48(5).

## 6.2 Electronic availability of procurement documents

Regulation 53 requires all contracting authorities to offer full and unrestricted access to all the procurement documents from the date that a contract (OJEU) notice (or invitation to confirm interest following a PIN) is published in the OJEU. "Procurement documents" is a defined term in the PCR 2015 and will include, in addition to the call for competition itself, and non-exhaustively, technical specifications, descriptive documents, pre-qualification questionnaires, invitations to tender, and the terms and conditions of the contract.

## 7 Choice of procedure and timescales

### 7.1 New procedures available

Under the PCR 2015 five standard procurement procedures are available, as follows:

- o Open (Regulation 27);
- o Restricted (Regulation 28);
- o Competitive with negotiation (Regulation 29);
- o Competitive dialogue (Regulation 30); and
- o Innovation partnership (Regulation 31).

As under the PCR 2006, it also remains possible, albeit in very limited circumstances and ideally following robust legal advice only, to use a negotiated procedure without a notice (see Regulation 32).

For further guidance on which procedure is likely to be appropriate, please refer to our [Award Procedure Decision Tool](#) on our Procurement Portal.

### 7.2 Greater freedom to use competitive with negotiation and competitive dialogue procedures

Under the PCR 2015 these procedures can be now be used when:

- o needs can't be met without adapting readily available solutions; or
- o requirements involve design or innovative solutions; or
- o the contract cannot be awarded without negotiation due to nature, complexity, legal or financial make up or risks attached; or
- o the specifications can't be established with sufficient precision; or
- o following an open/restricted procedure, where only irregular or unacceptable tenders were submitted.

We note that in relation to the competitive with negotiation process, Regulation 29(15) allows contracting authorities to reserve the right **not** to negotiate, if they indicate this in the OJEU notice or other call for competition; it is worth reserving this right from the outset to preserve flexibility. Also, the competitive with negotiation process, perhaps counter-intuitively, does not permit any negotiation following receipt of final



bids (see Regulation 29(21)). If contracting authorities wish to negotiate with a preferred bidder they will need to use the competitive dialogue process, which now permits this, provided that certain safeguards are met (see Regulation 30(20) for further details of these).

## 7.3 Timescales

Timescales for all the procedures have been shortened; please refer to our [PCR 2015 Timescale Tracker](#) on our Procurement Portal for at-a-glance detail on these.

## 7.4 General rules on setting time limits

All contracting authorities should note here the general rules around the setting of time limits set out at Regulation 47 and, in particular, the requirement at Regulation 47(3) to extend time limits where information requested by bidders is not provided to them at least 6 days prior to the bid deadline or where significant changes are made to the procurement documents (for example, such changes could perhaps be needed because the contracting authority has had to rush the preparation of the procurement documents in order to make these available electronically from day one, in accordance with Regulation 53 (see paragraph 6.2 for further details)).

## 7.5 Procedural flexibility for sub-central contracting authorities and Light Touch Regime service contracts

Sub-central contracting authorities using the restricted or competitive with negotiation procedures may set their own time limit for receipt of bids, subject to agreement with all the bidders involved (see Regulations 28(7) and 29(7)). Where time limits are set by agreement, sub-central contracting authorities must also make sure they abide by the general rules on the setting of time limits (see paragraph 7.4 above).

Paragraph 3.5 above discusses the new “light touch regime” for certain types of services contracts. From a procedural point of view, although services contracts subject to this regime must now be advertised by means of an OJEU notice or PIN (see Regulation 75) there is still no obligation to follow one of the five processes listed in paragraph 7.1 above. In fact, there is considerable flexibility around the design of the process itself (see Regulations 76(2) and(3)) and flexibility to change the parameters of the procedure even while it is underway, provided this is done in a transparent manner (see Regulation 76(4)).

## 8 Framework agreements

There is little new law in relation to frameworks, save that Regulation 33(5) confirms what guidance and case law have previously required; i.e. only contracting authorities who are identified as customers in the call for competition are entitled to call off contracts from a framework agreement.

## 9 Specifications/Labelling

### 9.1 Technical Specifications

Regulation 42 governs the setting of the specification; of particular interest is the new ability to include factors linked to production process *at any stage of the life cycle* (provided they are linked to subject-matter of the contract and are proportionate to its value and objective) (see Regulation 42(6)). The prohibition on specifying a particular make or source of product or services continues, unless this is done on an exceptional basis with a qualification that “equivalents” will be accepted (Regulation 42(12)).

## 9.2 Labels

Regulation 43(1) allows a contracting authority to specify that a supplier must be entitled to use a specific label as a means of proof that the goods/works/services comply with environmental/social or other characteristics, provided that the safeguards set out in that regulation are met.

## 10 Division into Lots

Regulation 46(2), as part of the drive to encourage smaller suppliers, requires a contracting authority deciding not to divide a contract into lots to explain why this decision was taken in the Regulation 84 report (see paragraph 14 for more information on this). In order to encourage contracting authorities to “share out” lots amongst bidders, Regulation 46(4) allows a limit to be set on the number of lots that may be awarded to one particular supplier. However, Regulation 46(5) also requires contracting authorities setting such a maximum to provide details of the objective criteria they intend to use to decide how a lot should be awarded if the winner of that lot has already won the maximum number of lots permitted. This may prove to be difficult to do in practice. Finally, it is possible to reserve the right to combine lots if required, provided this is set out in the OJEU notice or invitation to confirm interest.

## 11 Selection stage

### 11.1 New grounds for mandatory exclusion

Contracting authorities will need to update mandatory exclusion criteria to reflect the updated list of offences set out at Regulation 57(1); new offences include those under the Counter Terrorism Act 2008 and the Serious Crime Act 2007. In addition, for example, where a supplier has failed to pay taxes or social security contributions and there has been a binding judgment or decision in the case, that supplier must be excluded (Regulation 57(3)).

### 11.2 Extension of grounds for discretionary exclusion

Regulation 57 includes new grounds for discretionary exclusion which contracting authorities will need to address, for example, 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; or
- performed poorly on previous contracts, resulting in termination or damages or the equivalent; or
- exerted undue influence on procurement decision making process; or
- various other circumstances which would distort competition e.g. conflicts of interest, collusion, prior involvement (where the impact of this is incapable of being neutralised by dissemination of information to other bidders).

### 11.3 Duration of exclusion and “self-cleaning”

Bidders may not be excluded forever. Regulation 57(11) states that for a mandatory exclusion offence a bidder shall be excluded for a period of five years, and for a discretionary exclusion, a period of three years. In addition, Regulation 57(13) sets out a “self-cleaning” mechanism where a supplier may provide evidence that, despite the existence of mandatory or discretionary grounds, it can demonstrate its reliability

and that it has taken compensatory measures to prevent the issue happening again (see Regulation 57(15)). There is an obligation on the contracting authority to evaluate the evidence in the light of the gravity and circumstances of the misconduct, and to provide reasons to the supplier if it considers the “self-cleaning” to be insufficient and it wishes to proceed to exclude in any event (Regulation 57(17)).

## **11.4 Financial standing**

Amongst other things, Regulation 58 limits the maximum turnover requirements that contracting authorities may set to a maximum of twice the contract value, unless due to the particular risks a greater turnover requirement is justified (Regulation 58(9)).

## **11.5 Technical capability**

Amongst other things, Regulation 58 confirms a contracting authority may require sufficient level of experience to perform contract to ‘an appropriate quality standard’ and this may be required to be demonstrated by references from previous contracts (Regulation 58(16)).

## **11.6 European Standard Procurement Document (ESPD) and e-Certis**

Regulation 59 requires contracting authorities to accept the ESPD, which is a standard EU form of self-certification available for use by a supplier, to demonstrate it is not within the exclusion criteria and that it meets financial standing and technical capability criteria. The contracting authority may request supporting documentation or evidence at any stage (Regulation 59(8)); however, if the evidence needed is directly obtainable (e.g. through central databases) then this route must be taken (Regulation 59(5)).

Eventually there will be an obligation (Regulation 59(7)) to accept ESPDs provided exclusively in electronic form, however this does not come into force until 18 April 2017 (see Regulation 1(4)).

Regulation 61 mandates the use of the European online certificates repository, e-Certis, however this provision does not come into force until 18 October 2018 (see Regulation 1(5)).

## **11.7 Lord Young Reforms on qualitative selection**

Regulation 107 was a last minute addition to the final version of the Regulations and imposes a statutory obligation on contracting authorities to have regard to government guidance issued around selection and exclusion of suppliers. Where a contracting authority decides to depart from the guidance, this will amount to a “reportable deviation” for the purposes of Regulation 107, requiring the contracting authority to make a report explaining the reasons for its decision. This Regulation does not apply to procurement of health services governed by the NHS Regulations.

## **12 Evaluation**

### **12.1 New rules on award criteria**

Regulation 67 confirms that all contract awards must now be made to the “most economically advantageous tender”, using a cost effectiveness approach such as life-cycle costing to assess this; this may include best ‘price-quality ratio’- as assessed on the basis of award criteria.

### **12.2 Life cycle costing**

If this method is used, then Regulation 68 must be complied with. Costs should include:

- costs over the entire life cycle borne by the contracting authority or other users (i.e. acquisition, cost of use and energy consumption, maintenance and end of life costs (e.g. collection and recycling); and
- costs related to related environmental issues, provided the value of these can be ascertained and verified.

The contracting authority must indicate in the procurement documents the data which bidders must provide in order for a life cycle costing approach be used, and how this will be assessed (following any calculation methods that may be specified at European level).

### 12.3 Abnormally low tenders

Regulation 69 requires contracting authorities to demand an explanation where a tender appears to abnormally low, and states that bids may only be rejected where this explanation is unsatisfactory. (Regulation 69(4)). However, where it is established that the tender is low due to breaches of environmental, social or labour law, the contracting authority is obliged to reject the tender (Regulation 69(5)). The regulation does not contain any real definition of what amounts to an “abnormally low” bid and as such does not move the position on significantly from what it was under the PCR 2006.

### 12.4 Evaluating experience at award stage

The Regulations have kept pace with the development of case law in this area and confirm at Regulation 67(3)(b) that it is possible to evaluate the experience of the staff assigned to performance of the contract, where staff quality is likely to have significant impact on performance levels (this is particularly likely to be true for, example, contracts for training and consultancy services). It remains the case that any evaluation of experience as an award criteria must be linked to the performance of the contract itself (otherwise, it will probably be more appropriate to evaluate general experience as part of the technical capability assessment at selection stage).

## 13 Operating the contract

### 13.1 Conditions

Regulation 70 includes an opportunity for contracting authorities to insert special performance conditions, provided these are included in the call for competition or procurement documents. Contracting authorities may wish to use this mechanism to further certain policy agendas, for example, to promote sustainability.

### 13.2 Modification of contracts during their term

Previously we relied on case law, particularly the *Presstext* case, as our authority on the extent to which a public contract could be modified without triggering a requirement to run a new procurement process. Regulation 72 now sets that test out in statute for the first time and clarifies it to a certain extent. It highlights the importance of drafting contract change provisions with a forward looking eye to whether your contract change provisions will fall within the requirements of Regulation 72 and so avoid triggering a new procurement.

Regulation 72(1) states that a modification which is provided for in the original contract in “clear, precise and unequivocal” terms will not trigger a new procurement process.

A substantial modification not originally provided for in the contract will trigger a new procurement process. This will arise where the modification materially changes the nature of the contract or if there is:

- o replacement of the contractual partner (usually); or
- o introduction of new conditions that would have allowed for other bidders to compete or changed outcome; or
- o considerable extension of contract scope; or
- o a change to the economic balance in favour of contractor in manner not provided for.

In addition to where the modification was provided for in the original contract, there are four situations where the PCR 2015 do not require a further procurement process to be run, as follows:

- o where the **change in value is relatively small** - under 10% (services & supplies) or under 15% (works) **and** is also under the applicable EU financial threshold (this is cumulative where there is a series of changes) (Regulation 72(5)); or
- o where there are **unforeseen circumstances** (provided the change does not alter the overall nature of contract and the price increase is not greater than 50%; note too that there is a requirement to publish an OJEU notice about the modification once it has taken place) (Regulation 72(1)(c)); or
- o where **additional works, services or supplies necessary and a change in contractor cannot be made** for economic or technical reasons e.g. interoperability with existing kit; or where to change suppliers would cause significant inconvenience or duplication of costs. To come within this category the price increase must not exceed 50% and there is a requirement to publish an OJEU notice about the modification once it has taken place (Regulation 72(1)(b)); or
- o there has been a **replacement of the supplier following a corporate restructuring, insolvency or merger**, and the new supplier still meets the original selection criteria. This exemption is only available where there is no other substantial modification to the contract (Regulation 72(1)(d)(ii)).

### 13.3 Payment of Invoices

Regulation 113 was another late addition to the final version of the PCR 2015 and applies to all public contracts other than those for health services under the NHS Regulations and those awarded by a maintained school or Academy.

It puts onto a statutory footing what previously had been the subject of guidance only; an obligation on contracting authorities to pay valid and undisputed invoices within a 30 day period (Regulation 113(2)(a)). There is also a requirement to ensure that invoices are considered and verified in a timely fashion – undue delay will not be a justification for failing to treat an invoice as valid and undisputed (Regulation 113(b)). Finally, there is an obligation on contracting authorities to ensure that suppliers abide by these conditions in relation to their own sub-contractors, such that the 30 day payment term is passed down the supply chain (Regulation 113(2)(c)).

Where a public contract fails to include these provisions, Regulation 113(6) will “deem” them to be included in any event, meaning there is no possibility of opting out of these obligations.

Finally, there are now statutory obligations to have regard to guidance issued in this area and a requirement at Regulation 113(7) to publish on the internet a report on compliance with Regulation 113 obligations during the preceding financial year. The report must include, in relation to the previous financial year (to paraphrase):

- details of the percentage of invoices that were paid on time;
- details of liabilities the contracting authority has incurred as a result of breaching its obligations to make timely payment (contracting authorities whose financial year ends before 1 April 2016 should however note here the flexibility set out at Regulation 122); and
- details of the amount of additional interest was actually paid in discharge of that liability.

## 13.4 Termination

Regulation 73 requires public contracts to contain the right for a contracting authority to terminate the contract where:

- there has been a substantial modification to the contract within the meaning of Regulation 72 (see paragraph 13.2 above); or
- the contractor should have been excluded under Regulation 57(1) or (2) – grounds for mandatory exclusion; or
- the contract should not have been awarded in view of a serious infringement under European law which has been declared as such by the Court of Justice under Article 258 of TFEU (infraction proceedings).

Where these rights are not included, Regulation 73(3) will deem them to be included in the contract. However, there will be better risk management and greater legal certainty where contracting authorities have dealt with termination in the contract itself and included appropriate provisions on giving notice, consequences of termination and so on.

## 14 Regulation 84 Reports

Regulation 84 requires contracting authorities to draw up a report in relation to each contract or framework that is awarded, and ensure it includes all the information set out at Regulation 84(1). This requirement does not apply to contracts called off from a framework agreement, if (1) the framework agreement is with a single supplier and is awarded in accordance with Regulation 33(7), or (2) the framework agreement is with more than one supplier but the call-off contract is awarded without reopening competition in accordance with Regulation 33(8)(a) (see Regulation 84(2)). There is an ability to simply cross refer to the contract award notice, where this already contains all the information required. Note that by Regulation 84(5) the Cabinet Office has the right to request a copy of the report.

In particular, as well as general details of the winning bid, the suppliers involved, the value and subject matter of the contract, the Regulation 84 report on a particular contract must also include (non-exhaustively):

- where the competitive with negotiation, competitive dialogue, or negotiated without notice procedure was used, the justifications for this choice in accordance with Regulation 26(4) or Regulation 32;
- where a procurement procedure is abandoned, the reasons why the contracting authority decided not to proceed;
- details of any conflicts of interest identified and how these were resolved; and
- if any bids were found to be abnormally low, reasons for the rejection of these.

Note also Regulations 84(7) and (8) which require (although not necessarily within the Regulation 84(1) report) the documentation of the progress of all procurement procedures and the keeping of documentation to justify decisions taken at all stages of the process.

## 15 Remedies

There is little change here from the position under the PCR 2006; however contracting authorities should note that the numbering of the regulations has changed and therefore that standstill letters in particular will need to be updated accordingly when they are used for a procurement regulated by the PCR 2015. The obligations around award decision notices are now at Regulation 86, the obligation to hold a standstill period is at Regulation 87, and regulations 88 to 104 cover claims made before the courts.

## 16 Lord Young Reforms – Transparency

### 16.1 Publication of notices on Contracts Finder (Regulations 106 and 108)

These provisions (other than for a contracting authority that is a maintained school or Academy) require contracting authorities to also publish on Contracts Finder any Contract Notice or Contract Award Notice which published in the OJEU (note there is an exemption if publication impedes law enforcement, is not in the public interest, or would prejudice commercial interests or competition). This puts onto a statutory footing the obligation to publish on Contracts Finder, which has previously been addressed only via Procurement Policy Notes and guidance.

There is also a statutory obligation to have regard to Cabinet Office guidance about how and when the information needs to be published.

There is a suggestion (see Regulations 106(4) and (5) and 108(7) and (8)) that the Cabinet Office is considering a system where information is automatically extracted from the OJEU and copied across to Contracts Finder without further action being required by contracting authorities. This has perhaps been introduced as a result of concerns expressed in the consultation on the PCR 2015, and in an effort to reduce the additional burden on contracting authorities in complying with these additional provisions.

Regulations 106 and 108 only come into force on 26 February 2015 for contracting authorities which “perform their functions on behalf of the Crown”. There is a short one month reprieve, until 1 April 2015, for all other contracting authorities. This is perhaps to allow the Cabinet Office time to issue further guidance on these Regulations.

Note also that contracts for health services covered by the NHS Regulations fall outside the scope of Regulations 106 and 108 of the PCR 2015.



Jenny Beresford-Jones  
Professional Support Lawyer  
for Mills & Reeve LLP  
+44(0)161 235 5420  
Jenny.Beresford-Jones@mills-reeve.com

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[www.mills-reeve.com](http://www.mills-reeve.com) T +44(0)844 561 0011

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