

Public Contract Regulations 2015 Overview Training

May 2019



Agenda

- Treaty of Rome / EU Principles
- Pre-procurement market engagement (Reg 40)
- EU Procedures
- Regulation 32
- VEAT Notice
- Technical Specifications Reg 42
- Modification of contracts Reg 72



The Basis of European Procurement Regulation



The Treaty of Rome
25th March 1957

The Four Freedoms:

- Free movement of:
- Goods
 - Capital
 - Services
 - People



EU Principles

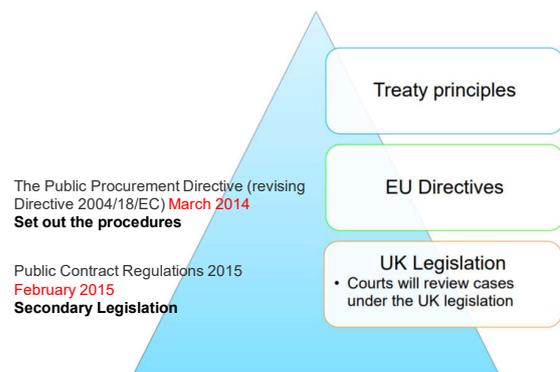
- 5 Treaty Principles
 - Equal treatment
 - Non-discrimination
 - Mutual recognition
 - Proportionality
 - Transparency
- Three categories of procurement
 - Supplies, services, works
- Current EU Thresholds
 - Supplies & Services - £181,302
 - Works - £4,551,413
 - Light Touch Regime - £615,278



← Why are these important?



Legislation Hierarchy



Pre-Procurement Engagement Regulation 40

Preliminary market consultations with suppliers

- Reg 40 allows for prior discussions with suppliers and expert bodies prior to starting a procurement
 - Inform suppliers and to allow Council to seek advice in the planning and conduct of the procurement
- Must ensure any such contact does not distort competition or violate the transparency and non-discrimination principles



Benefits

- Helps to inform the market of forthcoming activity
- Helps to define the requirement
- Helps to provide a better understanding of the feasibility of the requirement, the best approach, the capacity of the market to deliver and possible risks involved
- Begins dialogue with suppliers before formal process is started
- Encourages a more responsive market and allows suppliers to ask questions/raise queries at an early stage.



Question

What kind of Pre-Market engagement have we undertaken?



EU Procedures - applicable to Contracts and Frameworks

- Five main procedures involving competition:
 - The open procedure
 - The restricted procedure
 - The competitive procedure with negotiation
 - The competitive dialogue procedure
 - The innovation partnerships procedure
- Regulations 27 - 31



Light Touch Regime – What we need to do

Regs 74-76

- The directive requires that authorities award contracts for these services in the following way:
 - Publication in OJEU of a **call for competition** (either a contract notice or prior information notice - PIN)
 - Publication in OJEU of a **contract award notice** (or quarterly submission of batches of contract award notices)
- Services defined under Schedule 3 of PCR 2015
- Can vary existing procedures – **Described in tender docs.**



EU Procurement Timescales

Minimum timescales:

Choice of procedure and stage	Standard timescales	Options for sub-central contracting authorities	Tenders submitted electronically	Requirement is urgent and longer time limit is impractical as a result	PIN published no more than 12 months and no less than 35 days from despatch of contract notice
OPEN					
Despatch of contract notice to receipt of responses	35 days		5 day reduction	Period reduced to 15 days	Period reduced to 15 days
Standstill	10 days				
RESTRICTED					
Despatch of contract notice to receipt of responses	30 days			Period reduced to 15 days	
ITT to receipt of bids	30 days	May agree time-limit with tenderers – in absence of agreement minimum period is 10 days	5 day reduction	Period reduced to 10 days	Period reduced to 10 days
Standstill	10 days				



Choice of procedure and stage	Standard timescales	Options for sub-central contracting authorities	Tenders submitted electronically	Requirement is urgent and longer time limit is impractical as a result	PIN published no more than 12 months and no less than 28 days from despatch of contract notice
COMPETITIVE WITH NEGOTIATION					
Despatch of contract notice to expressions of interest	30 days			Period reduced to 15 days	
ITN to receipt of initial tenders	30 days	May agree time-limit with tenders – in absence of agreement minimum period is 10 days	5 day reduction	Period reduced to 10 days	Period reduced to 10 days
Standstill	10 days				
COMPETITIVE DIALOGUE					
Despatch of contract notice to expressions of interest	30 days				
Standstill	10 days				
INNOVATION PARTNERSHIP					
Despatch of contract notice to expressions of interest	30 days				
Standstill	10 days				



Regulation 32

Negotiated procedure without prior publication

The regulation states:

- (1) *In the specific cases and circumstances laid down in this regulation, contracting authorities may award public contracts by a negotiated procedure without prior publication.*
- (2) *The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases: —*
 - (a) *where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests;*



Regulation 32

(b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:—

- (i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance,
 - (ii) competition is absent for technical reasons,
 - (iii) the protection of exclusive rights, including intellectual property rights, but only, in the case of paragraphs (ii) and (iii), where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;
- (c) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with.

VEAT NOTICE TO BE PUBLISHED IN OJEU



Voluntary Ex-Ante Transparency Notice

- This approach does only provide limited protection to the Council when making a direct award without following an OJEU process – there is case law around this.
- This notice could open us up to more challenge and risk. A VEAT is a notice placed in OJEU
- VEAT notice would need to contain the following information to the market:
 - (a) the name and contact details of the Council;
 - (b) a description of the object of the contract;
 - (c) a justification of the decision of the Council to award the contract without prior publication of a contract notice;
 - (d) the name and contact details of the Provider to be awarded the contract; and
 - (e) where appropriate, any other information which the Council considers it useful to include.
- Following the publication of the notice a 10 day standstill period is observed.

Technical Specifications (Reg 42)

Use of Brands

- Requirements must be specified **without** using brand names or other references which have the effect of favouring or eliminating particular suppliers, products or services.
 - If brands are stated **must** allow alternatives to be submitted that are of equivalent standard
- Where standards are specified you must allow equivalents also (ISO9001).



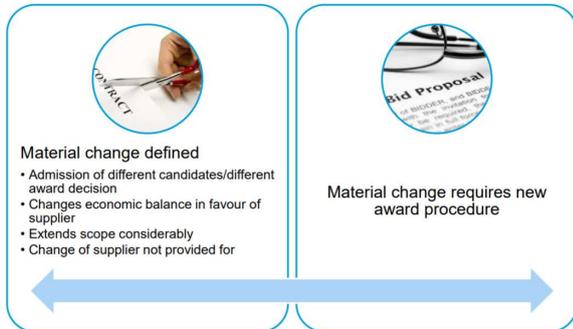
Modification of contracts during their term

Regulation 72

Reg allows for changes to be made to an existing contract without triggering a new procurement exercise if any one of the following six situations applies:

1. Change is provided for in clauses
2. Change of Contractor cannot be made for economic or technical reasons and could cause significant duplication of cost (50% cap)
3. Change is due to unforeseen circumstances (50% cap)
4. Replacement of new contractor provided for
5. Modifications that are not substantial
6. Low value modifications – less than 10% of the current threshold for supplies and services and 15% for works

Material Change



Reg 72 (a)

1. The change(s) is/are already provided for in the original contract (Regulation 72(1)(a))

- The original contract includes a “clear, precise and unequivocal review clause” allowing for a certain modification to be made
- Allowing extensions
- Any others?



Reg 72 (b)

2. The contractor cannot be changed and additional works, services or supplies are required (Regulation 72(1)(b))

- A change of contractor cannot be realistically made for economic or technical reasons and would cause significant inconvenience or substantial duplication of the contracting authority's costs, and new works, services or supplies need to be purchased from the contractor.
- any increase in price does not exceed 50% of the value of the original contract
- Must publish **modification notice** to be published in OJEU



Reg 72 (c) and (d)

3. Unforeseen circumstances (Regulation 72(1)(c))

- Circumstances have arisen that a contracting authority, acting diligently, could not have foreseen and that require an amendment to the existing contract.
- The contract's overall nature must not be altered
- Must publish **modification notice** to be published in OJEU
- any increase in price does not exceed 50% of the value of the original contract.

4. Specific circumstances where the original contractor is replaced (Regulation 72(1)(d))

- A new contractor is required to replace the contractor originally party to the contract, either because this is the result of “corporate restructuring, including takeover, merger, acquisition or insolvency” leading to a universal or partial succession of the original contractor
 - New economic operator must fulfil the criteria for qualitative selection initially established
- Or, because this change was envisaged in a review clause in the original contract. This provision cannot be relied on if the contractor is being replaced for a different reason.
- Use of this Reg does not entail other substantial modifications to the contract

Reg 72 (e)

5. The modifications, irrespective of value, are not substantial (Regulations 72(1)(e) and 72(8))

- A modification is considered to be substantial where one or more of the following conditions is met:
 - the modification renders the contract or the framework agreement materially different in character from the one initially concluded;
 - the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;
 - the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
 - the modification extends the scope of the contract or framework agreement considerably;
 - where a new contractor replaces the one to which the contracting authority had initially awarded the contract

Reg 72 (f)

Low value modifications

- The value of the modification is below both of the following:
 - Falls below the relevant EU threshold, and;
 - A value less than:
 - **10% of the initial contract value (goods or services)**
 - **15% of the initial contract value (works)**
- More than one change can be made under this provision provided the cumulative value of the modifications do not exceed the relevant procurement threshold.

- Where none of the six situations apply, then a new procurement procedure will be required for modifications of the contract

Any questions?