

Summary of Amendments to CPR's - November 2015

The Council's Contract Procedure Rules incorporate a set of core requirements which form a cornerstone for the arrangements used by the Council to ensure its contracting activity and engagement with third part providers are designed to provide value for money, ensure the use of fair and transparent procedures and allow for necessary management and member overview and control.

Increasingly the Governments agenda on openness and transparency requires that the authority's approach is modified and strengthened to reflect these changes, which are often prescribed within Statutory Regulations (such as the Public Contract Regulation 2015 (PCR2015)– and associated Statutory Guidance, issued by Crown Commercial Services, which regulate how the baulk of our third party engagement and contracting is required to be conducted. However, the guiding principles of their content are drafted to enable;

- The achievement of Best Value for public money spent;
- Enables a Value for Money Procurement decision based on Whole Life Costing and the consideration of Sustainable Procurement practice (encompassing Economic, Environmental and Social benefits for the locality);
- Be consistent with the highest standards of integrity;
- Ensure fairness and transparency in the allocation of public contracts;
- Comply with all legal requirements;
- Ensure that Non-Commercial Considerations do not influence any Contracting Decision;
- Support the Council's Corporate and Departmental aims and policies;
- Complies with the Council's Corporate Procurement Strategy.

(A marked up version of the proposed changes being recommended, together with an index of CPR Clauses, is attached for reference – **Blue** Additions /**Red** Deletions).

In general terms the combined effect of the Transparency requirements and contents of the PCR's 2015 opens the Council to an increased degree of external scrutiny and challenge at much lower values of contracting with a consequential need to reflect these risks in our business and tender processes.

Summary of Consequential Amendments

Introduction – reflects the statutory changes required by the PCR2015 and associated guidance – with a new lower limit for regulated procurement at £25k and transparency information on contracting arrangements £5k. The drafting also reflects the possible future use by Third Party Contractors, who may be required to operate a number of the activities on our behalf under delegated arrangements.

Introduction – Amended to allow use of officer delegated power to amend changes in Job Title resulting from re structures.

1) Basic Principles - Amended to reflect revised financial limits, the new "Light Touch" Regime, the relaxation of permissible contracting arrangements and the move towards mandatory use of e procurement/electronic exchange of documentation, together with appropriate reporting arrangements on TUPE/Pension issues.

2) Requirement to ensure financial impacts of TUPE and Pensions are properly considered and mandatory updating of Contract Register on a Quarterly basis by Chief Officers in line with new member expectation and monitoring arrangements.

3) Amendment of authorisation requirements on the use of Frameworks and similar arrangements to reflect their greater use and acceptance as good practice when used appropriately.

Mandatory requirements on use of the Council's E Procurement System(s) to reflect requirements to communicate electronically; secure and publish contracting information; embedding of good contracting practice, coupled with audit trails and management overview to inform and protect the Council from challenge and disrepute claims.

Clarification on e mail exchange being acceptable as "Signature" where required.

4) Inclusion of "Best Consideration" to reflect position on Property and Asset requirements.

5) Steps Prior to Purchase amended to reflect Procurement Regulations, Social Value Act Consultation requirements and improved contract management arrangements, including contract monitoring and "Gate" Reporting to members.

6) Contract Transparency Code requirements - provision for their inclusion in records to be maintained and published.

7) Clause has been amended to reflect UK requirements on £25k and above contracting arrangements (and the mandatory use of Contracts Finder when advertising opportunities identified) and where the use of the £100k dispensation is allowed, together with appropriate use of Approved Lists and of Local Contractors, Constructionline and Trustmark lists when possible and appropriate. The revised drafting also reflects the curtailment of the use of a Prior Qualification Process for all contracts with an estimated value below the EU Threshold for Supplies and Service (currently around £172.5K).

8) Has been amended to reflect the requirements of the PCR's 2015 and their consequential impact on the lower values of intended contracts now subject to their statutory provisions. The opportunity has been taken to bring Consultancy arrangements in to the general provisions of CPR's rather than have them covered within a separate CPR clause and the drafting has the effect of tightening the authorisations and values required for their use.

9) Amended to reflect acceptance and relaxation over the use of prior engagement//consultation with the Market.

10-12) One of the main areas of change and consequential impacts on our working practice resulting from the UK requirements to use "suitability" questions only as part of an "Open" tender process for below EU threshold activity and use only of the mandatory PQQ documents above this value.

Similarly the move towards use of e documentation and the availability of all contract documents at the issue of Notice (both above and below EU Threshold), coupled with the publication of a greater amount of "Transparency" information, makes mandatory use of the Council's e procurement systems more important.

13) The codification of case law around the approach used to calculate the values of allowable modifications to a contract required, beyond the scope and values indicated at the time of the original Notice and tender processes require a closer look to be maintained on the cost and circumstances around contract variations and their costs. The opportunity to provide for officers to deal with

extension of contract periods included in original reports, subject to satisfactory contract monitoring having been completed.

14) Amendments made to reflect the change wording of the Legislation around reasonable and proportionate time allowance being made for the submission of documents, as well as the minimum time periods included, which also underlines the need to use the Council's E procurement systems and modified tender receipt requirements.

15) Amended to reflect that the legislation includes more flexible requirements around the correction/submission of supplementary information post-tender without necessarily invalidating their original tender submission.

16) Amended to reflect the need for all tender process to be fair, equal, transparent and proportionate, with the Tender Evaluation process, in line with current practice, being underwritten by the use of the CIPFA Standing Guide to Commissioning of Local Authority Works and Service to further detail our approach to such matters as Tender Evaluation. Additionally, the officer review mechanism to consider any formal challenges on Tender Award processes is included, to ensure the proper treatment /consideration of any "challenge" made.

17- 23) Wording amended to reflect a tightening of the requirements around Contract Documentation and its content, including Pension Bond arrangements, together with a strengthening of the Contract Monitoring reports required to be produced in line with current practices.

Annex A – Now subsumed in to Procurement Page on Managers Toolkit on OneBromley.

Annex B – Amended to include Crown Commercial Services Guide to the Public Contract Regulations 2015.



A BRIEF GUIDE TO THE EU PUBLIC CONTRACTS DIRECTIVE (2014)

October 2015

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1. Introduction

- 1.1 The Public Contracts Directives set out the legal framework for public procurement. This guidance note covers the new Public Contracts Directive which will apply when contracting authorities seek to acquire supplies, services, or works (e.g. civil engineering or building). Separate information will be provided to cover new directives on contracts awarded by utilities bodies (e.g. water companies) and concessions contracts. This note does not cover the procurement of contracts for defence and security requirements¹.
- 1.2 The Public Contracts Directive sets out procedures which must be followed before awarding a contract to suppliers (i.e. providers of works, supplies or services) when its value exceeds set thresholds, unless it qualifies for a specific exclusion -- e.g. on grounds of national security. Details of the current thresholds can be found at: <https://www.gov.uk/transposing---eu---procurement---directives>.
- 1.3 This guidance summarises the main provisions of the Public Contracts Directive. It does not set out all the relevant rules. It is not intended as a substitute for project specific legal advice, which should always be sought by a contracting authority where required. This guidance may not apply to contracting authorities in Scotland
- 1.4 The EU procurement regime, based on the Treaty principles of transparency, non---discrimination, equal treatment and proportionality and described by the Public Contracts Directive and Regulations referred to in this guidance, is not static. It is subject to change, driven by evolving European and domestic case law, European Commission communications, new and revised Public Contracts Directives and amendments to the existing UK Regulations.

2. Public Contracts Directives in national law

- 2.1 Public Contracts Directive 2004/18/EC on public procurement was implemented into national law in the UK by the Public Contract Regulations 2006 (with separate transposition in Scotland). These Regulations came into force on 31 January 2006 and have been amended a number of times. New UK Regulations, which will supersede the 2006 Regulations, will implement the new procurement Directives. This

guidance is based on the published text of the new Public Contracts Directive (2014/24/EU) which can be viewed at <https://www.gov.uk/transposing---eu---procurement---directives#the---directives>

3. Purpose

3.1 The purpose of the EU procurement rules, underpinned by the Treaty principles, is to open up the public procurement market and to ensure the free movement of supplies, services and works within the EU. In most cases they require competition. The EU rules reflect and reinforce the value for money (vfm)² focus of the Government's procurement policy. This requires that all public procurement must be based on vfm, defined as "the best mix of quality and effectiveness for the least outlay over the period of use of the goods or services bought", which should be achieved through competition, unless there are compelling reasons to the contrary.

¹ More details at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35925/dsd_govt_awareness_guide.pdf

² See Managing Public Money at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212123/Managing_Public_Money_AA_v_2_-_chapters_annex_web.pdf.

4. Reform of the EU rules – The 2014 Public Contracts Directives

4.1 On 20 December 2011 the European Commission published proposals to revise and update the public sector and utilities procurement Directives (2004/18/EC and 2004/17/EC respectively) plus a proposed new directive on the award of concession contracts³.

4.2 Following negotiations between Member States, the European Parliament and the Commission the texts of the Public Contracts Directives have been agreed and came into force on 17 April 2014. Member States must transpose the Public Contracts Directives into national law within 24 months of that date.

4.3 The new rules support UK Government priorities of economic growth and deficit reduction by making the public procurement process faster, less costly, and more effective for business and procurers alike. They represent an excellent outcome from the UK's extensive negotiations in Brussels.

4.4 These changes provide a much more modern, flexible and commercial approach compared to the existing regime. Outdated and superfluous constraints have been removed, and many new features have been added to streamline and modernise public procurement. For contracting authorities, this means being able to run procurement exercises faster, with less red tape, and more focus on getting the right supplier and the best tender. And for suppliers, the process of bidding for public contracts should be quicker, less costly, and less bureaucratic, enabling suppliers to compete more effectively.

4.5 The Minister for the Cabinet Office has asked the Crown Commercial Service to prepare the transposition of the new rules earlier than the time allowed, to take advantage of the improvements in the rules as soon as possible.

5. New provisions

5.1 This note outlines the requirements of the new Public Contracts Directive, drawing attention to a number of changes to procedures and requirements for public procurement. More detailed guidance on some of the changes described will follow in due course.

5.2 A list of the key changes follows immediately below, with additional detail in the subsequent sections:

General

5.3 Contracting authorities will be able to reserve the award of certain services contracts to mutuals/social enterprises for a time-limited period

5.4 Although the thresholds of application of the rules will not change immediately, the Public Contracts Directive includes a binding commitment on the Commission to review the economic effects of the thresholds on the internal market. This review must be completed by 2019.

Facilitating SME involvement

5.5 Contracting authorities are encouraged to break contracts into lots to facilitate SME participation.

³ Concessions contracts are currently subject to minimal EU regulation; the proposed new legislation aims to ensure that concessions are competed effectively. Concessions contracts involve giving exploitation rights as part of the supplier's reward for delivering a public service or building – examples include toll bridges and car parks built on public-authority-owned land. Risk-transfer is also a significant feature of concessions.

5.6 A turnover cap has been introduced to facilitate SME participation. Contracting authorities will not be able to set company turnover requirements at more than two times contract value except where there is a specific justification.

5.7 A central, on-line point called "E-certis" where suppliers can find out the type of documents, certificates etc which they may be asked to provide in any EU country, even before they decide to bid. This should help suppliers to bid cross-border, if they are unfamiliar with these requirements.

Selection of Suppliers

5.8 A much simpler process of assessing bidders' credentials, involving greater use of supplier self-declarations, and where only the winning bidder should have to submit various certificates and documents to prove their status.

5.9 Poor performance under previous contracts is explicitly permitted as grounds for exclusion.

5.10 Various improved safeguards from corruption:

- Requirements on contracting authorities to put in place appropriate safeguards against conflicts of interest. The rules are not prescriptive on what the safeguards should be, but compliance could be achieved, for example, through a common current practice amongst many UK contracting authorities, where declarations are signed by procurement staff to confirm they have no outside interests with bidders etc;
- Time limits for the exclusion of suppliers (not more than 3 or 5 years depending on the reason for the exclusion);
- Suppliers who have been excluded from public procurement for bad practice can have the exclusion ended if they effectively “self clean”.

Procedure changes

5.11 Preliminary market consultations between contracting authorities and suppliers are encouraged, which should facilitate better specifications, better outcomes and shorter procurement times.

5.12 More freedom to negotiate. Constraints on using the competitive procedure with negotiation have been relaxed, so that the procedure will generally be available for any requirements that go beyond “off the shelf” purchasing.

5.13 The distinction between Part A and Part B Services has been removed, and a new light-touch regime introduced for social and health and some other services. There is an OJEU advertising requirement and other specific obligations for this new light-touch regime, but a much higher threshold has been agreed (EUR 750,000).

5.14 A new procedure, the “Innovation Partnership” procedure, has been introduced. This is intended to allow scope for more innovative ideas. The supplier bids to enter into a partnership with the authority, to develop a new product or service.

5.15 The statutory minimum time limits by which suppliers have to respond to advertised procurements and submit tender documents have been reduced by about a third. This flexibility could be helpful for speeding up simpler or off-the-shelf procurements, but still permits longer timescales for requirements where suppliers will need more time to respond.

Electronic procurement

5.16 Electronic versions of the procurement documentation must be available through an internet URL immediately on publication of the OJEU contract notice.

5.17 Full electronic communication (with some exceptions) will become mandatory for public contracts 4.5 years after the Public Contracts Directive comes into force (i.e. October 2018). For central purchasing bodies the deadline is three years (April 2017).

- 5.18 The rules on “Dynamic Purchasing Systems” (DPS) have been greatly simplified, with the removal of the onerous obligation to OJEU---advertise call---off contracts made under the DPS.
- 5.19 Electronic catalogues for public procurement are expressly permitted, removing any doubt as to their legality.

Contract award

- 5.20 Improved rules on social and environmental aspects, making it clear that:
- social aspects can now also be taken into account in certain circumstances (in addition to environmental aspects which have previously been allowed);
 - contracting authorities can require certification/labels or other equivalent evidence of social/environmental characteristics, further facilitating procurement of contracts with social/environmental objectives;
 - contracting authorities can refer to factors directly linked to the production process.
- 5.21 The full life---cycle costing can be taken into account when awarding contracts; this could encourage more sustainable and/or better value procurements which might save money over the long term despite appearing on initial examination to be more costly.
- 5.22 Legal clarity that contracting authorities can take into account the relevant skills and experience of individuals at the award stage where relevant (e.g. for consultants, architects, etc).

Other

- 5.23 Contracting authorities no longer have to submit detailed annual statistics on their procurement activities. The Commission will collect this information directly from the online system, thereby freeing up valuable time and resources for contracting authorities.
- 5.24 Works concessions contracts are excluded from the Public Contracts Directive. The new Concessions Directive will apply to both works and services concessions when it is transposed into UK law.

6. Training

- 6.1 The EU procurement rules are detailed and technical and to assist in their understanding the Crown Commercial Service has prepared a training package for contracting authorities (though its contents may also be of interest to suppliers, advisers and other interested parties). This document is a part of that package, which is being rolled out across the public sector.
- 6.2 This section of the guide describes briefly the provisions of the EU procurement regime and in particular the new Public Contracts Directive. Where the Public Contracts Directive introduces major changes to the current regime these are **highlighted in bold**.

6.3 The training package will be available for free download from <https://www.gov.uk/transposing---eu---procurement---directives> and is also the subject of an electronic learning package which will be available to contracting authorities shortly.

7. Geographical coverage – which countries have access to the EU rules?

7.1 In addition to the 28 EU Member States and the 3 states of the European Economic Area (Iceland, Liechtenstein and Norway) the benefits of the EU public procurement rules also continue to apply to suppliers from a number of other countries where the EU has entered into an agreement. The main agreement is the one negotiated through the World Trade Organisation (WTO) titled the Government Procurement Agreement (GPA)
http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm#govt.

7.2 Compliance with the EU rules ensures compliance with the GPA, where it applies, and suppliers from GPA countries have the same rights as EU suppliers. The non---EU countries who are signatories to the GPA are:

- Armenia; Aruba; Canada; Hong Kong, China; Iceland; Israel; Japan; Liechtenstein; Montenegro, New Zealand; Norway; Republic of Korea; Singapore; Switzerland; Taipei; and the USA.

7.3 The EU has similar Free Trade Agreements with some other countries, and contracting authorities should check to see if any of these apply if they receive expressions of interest or bids from suppliers in other, non---GPA countries. A Commission list of such agreements can be found at:
http://ec.europa.eu/internal_market/publicprocurement/rules/free_trade_agreements/index_en.htm

8. Contracts outside the scope of the Public Contracts Directives

8.1 Even when a tender process is not subject to the Public Contracts Directives, (for example because the estimated value of a contract falls below the relevant threshold), EU Treaty---based principles of non---discrimination, equal treatment, transparency, mutual recognition and proportionality apply. Where the authority considers that a contract is likely to attract cross---border interest it is obliged to publish a sufficiently accessible advertisement to ensure that suppliers in other Member States can have access to appropriate information before awarding the contract. This is in line with the UK objective of achieving value for money in *all* public procurement --- not just those covered by the Public Contracts Directives. Some degree of advertising, (appropriate to the scale of the contract), is likely to be necessary to achieve transparency where the contract is likely to attract cross---border interest.

8.2 The UK regulations will also include some specific UK rules to support growth by improving suppliers' access to public contracts below the EU thresholds ("sub---threshold contracts"). These rules include requirements for advertising all public contracts below the EU thresholds, but over certain other threshold values, on Contracts Finder. They also include a requirement for contracting authorities to have regard to Crown Commercial Service guidance on the selection of suppliers and the award of contracts and to ensure that suppliers pay their sub---contractors within 30 days (as is already required of contracting authorities).

9. Does the Public Contracts Directive apply to the contract?

9.1 The Public Contracts Directive applies in principle to all contracts awarded by a contracting authority.

However, there are some specific exclusions where there is a relevant defence or security dimension, see Annex A, Flowchart 1. **The Public Contracts Directive also exempts certain contracts between contracting authorities where they are effectively meeting genuine ‘in-house’ requirements within a number of contracting authorities.** This could be through the form of a ‘vertical’ arrangement under shared control (so-called ‘Teckal bodies’ from the lead case in the European court, Case C-107/98). Or it might be through a ‘horizontal’ arrangement, where a number of contracting authorities genuinely co-operate with each other to meet a shared legal obligation (as in the *Hamburg* case in the European court, Case C-480/06).

10. Mixed contracts

10.1 In some cases contracts awarded by contracting authorities will contain elements that are covered under the rules in the new public sector regulations, the new utilities regulations, the new concessions regulations and/or the Defence and Security Public Contracts Regulations. These issues are complex and will be the subject of separate guidance. See Annex A, Flowchart 2 for mixed procurements involving the new public sector regulations, the Defence and Security Public Contracts Regulations and/or Article 346 of the Treaty.

11. Reservation of certain contracts: mutuals and sheltered workshops

11.1 Mutuals

11.2 **One of the UK priorities in the negotiations was to secure flexibility to enable fledgling public service mutuals to gain experience of delivering services before being exposed to EU-wide competition.** The new Public Contracts Directive permits competition for certain contracts, listed by CPV code, mainly in the social and health sectors, to be “reserved” to organisations such as mutuals and social enterprises meeting certain limited criteria described in Article 77 of the Public Contracts Directive. The reservation works in practice by requiring an OJEU competition for those services using the ‘light touch regime’ referred to at paragraph 12.1 below but only allowing bids from organisations meeting the mutual or social enterprise criteria.

11.3 The reservation has time-based conditions to prevent misuse, so contracting authorities cannot reserve contracts for organisations that have been awarded contracts within the last 3 years, and contracts cannot be longer than 3 years.

11.4 Sheltered workshops

11.5 **The Public Contracts Directive also expands the scope of the existing reservation for sheltered workshops/employment programmes** by allowing reservation of any contract for disadvantaged as well as disabled workers, and reducing the minimum proportion of those workers in the supplier’s workforce required for a supplier to be eligible to bid for a reserved contract. The reservation works in practice by requiring an OJEU competition for those services but only allowing bids from organisations meeting the criteria.

12. The ‘light touch regime’ for certain services

12.1 **Under the 2006 Regulations there are different rules for so-called ‘Part A and Part B’ services. In the new Public Contracts Directive, the position for services contracts has changed significantly.**

- A new “light-touch regime” for a smaller number of categories of services contracts in the health and social service areas listed at Annex XIV to the Public Contracts Directive. Some contracts that were formerly “Part B” but are not listed in the Annex, will be subject to the *full* EU procurement rules;
- A significantly higher threshold than for supplies and for other services (EUR 750,000 for public sector authorities);
- A new obligation on contracting authorities to publish a call for competition in the OJEU, as well as a contract award notice, for above-threshold contracts covered by the light-touch regime.

12.3 Member States have flexibility to design their light touch rules. To preserve as much of the existing flexibility as possible the UK rules will be much less stringent than the full EU rules regime. As well as the OJEU advertising requirements the UK rules will require compliance with the basic Treaty principles (transparency, equal treatment, non-discrimination) and publication in OJEU of contract award notices. Otherwise, there will be considerable flexibility for contracting authorities to use procedures, tools and techniques of their own choosing, whether analogous to those in the main rules or not. More detailed information will be released by the time the UK Regulations come into effect.

13. Aggregation rules and thresholds

13.1 The threshold levels for the application of the Public Contracts Directives (which can be found using the links at: <https://www.gov.uk/transposing-eu-procurement-directives>) will be unchanged because of GPA commitments but **the Commission has made a commitment to review, by 2019, the economic effects of the thresholds on the internal market.** The Public Contracts Directive’s rules on determining the value of a contract are unchanged.

13.2 Where a single work involves more than one contract, the estimated value of all the contracts must be aggregated to decide whether the threshold is reached. Where the threshold is reached, each of the works contracts will be covered by the rules except small contracts (known as small lots) the value of which falls below the de minimis level provided for in the Public Contracts Directive.

13.3 In determining whether the threshold has been or is likely to be reached for public supplies or services contracts, the rules require aggregation:

- of the estimated value of separate contracts for meeting a single requirement; and
- where a series of contracts or a renewable contract is entered into for supplies/services of the same type during a twelve month period.

13.4 Where an authority is divided into a number of separate operational units (SOUs) with authority to decide independently whether to enter into procurement contracts, then aggregation need only be applied to each unit. In other cases the authority as a whole must be considered for aggregation purposes. The Public Contracts Directive provides greater detail as to when aggregation can be carried out at the SOU level.

14. Electronic procurement

14.1 **The Public Contracts Directive requires electronic submission of OJEU notices, electronic availability of procurement documents at the time of notice publication, and electronic communication and information exchange for all communication under the Public Contracts Directive, subject to specified exclusions.** Contracting authorities must ensure that the tools and devices used for electronic communication meet certain requirements set out in the Public Contracts Directive. Contracting authorities must decide and apply to these communications, appropriate electronic security, guided by a high level framework in the Regulations.

14.2 **The Public Contracts Directive reforms the DPS to remove the previously burdensome need for OJEU**

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advertising of “call-off” contracts to be awarded using the system. Under the new rules, only the DPS itself will need to be OJEU-advertised, with call-off contracts being subject to much more straightforward procedures, similar to the established process for awarding call-off contracts under a framework agreement by mini-competition. A key advantage of a DPS compared to a framework, which it resembles, is that suppliers can be added at any time to a DPS provided that they pass the exclusion criteria and minimum capacity requirements. This will greatly streamline the system and allow greater competition to be maintained.

14.3 **The Public Contracts Directive also provides helpful confirmation that electronic catalogues can be used as a basis for tenders for contracts or frameworks. Some safeguards are required where contracting authorities intend to compare offers without seeking re-submission of catalogues by suppliers.**

15. Central purchasing bodies

15.1 As now contracting authorities may purchase through Central Purchasing Bodies (CPBs). CPBs may act as a ‘wholesaler’ – supplying an authority on the basis of contracts it has itself awarded and/or provide contracting authorities with access to framework deals or dynamic purchasing systems it has established.

16. Frameworks

16.1 The Public Contracts Directive introduces minor clarifications of the rules on frameworks relating mainly to transparency. Thus contracting authorities must not use a framework unless clearly identified in the notice as permissible users and contracting authorities must be transparent about the methods of call off to be used. It does however confirm that a contract awarded under a framework may have a completion date after the end of the framework.

17. OJEU advertising requirement

17.1 As now, generally contracts covered by the Regulations must be the subject of a ‘call for competition’ published in the OJEU. **In most cases this will be a Contract Notice but in a change from the current rules contracting authorities other than central government (e.g. local authorities) will also be able to use the Prior Information Notice (PIN) for this purpose in certain defined circumstances.** A number of detailed changes have also been made to the information that must be included in the notice forms.

17.2 The Commission is preparing revised versions of its Standard Forms to accommodate these changes. We hope these will be available in time for the UK and other Member States proposing to implement the

Public Contracts Directives early. The Crown Commercial Service is considering the most appropriate way to proceed if they are not available and if necessary will issue guidance in due course.

18. Shorter minimum time limits

18.1 **The minimum time allowed for responses or tenders is reduced to allow flexibility where the current minimum time limits are unnecessarily long.** In certain circumstances these can be shortened further where the requirement is urgent or where sufficient information has already been provided by a prior information notice to allow suppliers to respond quickly. See Annex B for a summary of the time limits in the new Public Contracts Directive.

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19. Choice of procurement procedure

19.1 **The new Public Contracts Directive provides for five award procedures, rather than the existing four:**

- the open procedure, under which all those interested may respond to the advertisement in the OJEU by submitting a tender for the contract;
- the restricted procedure, under which a selection is made of those who respond to the advertisement and only they are invited to submit a tender for the contract.
- the competitive dialogue procedure, under which a selection is made of those who respond to the advertisement and the contracting authority enters into dialogue with potential bidders, to develop one or more suitable solutions for its requirements and on which chosen bidders will be invited to tender. **The new Public Contracts Directive provides greater freedom to use this procedure than do the existing rules** (see below);
- the competitive procedure with negotiation under which a selection is made of those who respond to the advertisement and only they are invited to submit an initial tender for the contract. The contracting authority may then open negotiations with the tenderers to seek improved offers. **The new Public Contracts Directive provides greater freedom to use this procedure than the existing rules** (see below).
- the innovation partnership procedure, under which a selection is made of those who respond to the advertisement and the contracting authority uses a negotiated approach to invite suppliers to submit ideas to develop innovative works, supplies or services aimed at meeting a need for which there is no suitable existing 'product' on the market. The contracting authority is allowed to award partnerships to more than one supplier.

19.2 In certain narrowly defined circumstances the contracting authority may also award a contract using the 'negotiated procedure without prior publication'. Here the contracting authority would approach one or more suppliers seeking to negotiate the terms of the contract. One of the permitted circumstances is where, for technical or artistic reasons or because of the protection of exclusive rights, the contract can only be carried out by a particular supplier.

19.3 Contracting authorities have a free choice between the open and restricted procedures. **The competitive dialogue procedure and the competitive procedure with negotiation are available where certain criteria are met, including where the contract is complex or cannot be purchased 'off the shelf'**. The 'negotiated procedure without prior publication' may only be used in the limited circumstances described in the Public Contracts Directive.

19.4 Contracting authorities using the restricted procedure, competitive dialogue procedure and the competitive procedure with negotiation must aim to select a number of suppliers sufficient to ensure genuine competition. Provided there are sufficient suitable candidates, the Public Contracts Directive requires a

minimum of five for the restricted procedure, and three for competitive dialogue and competitive procedure with negotiation

20. Stages in the procurement process

20.1 The Public Contracts Directive includes procedural requirements designed to ensure all suppliers established in countries covered by the rules are treated on equal terms, to avoid national discrimination. The rules in particular cover the following:

- Specification stage -- how requirements must be described, avoiding brand names and other references which would have the effect of favouring or eliminating particular providers, products or services and the requirement to accept equivalence. The use of performance specifications is encouraged. **The new Public Contracts Directive also makes clear that there is some scope for building into the specification equality issues (e.g. access issues for the disabled) and social/environmental issues (e.g. a requirement to conform to social or environmental labels).** Regarding social/environmental issues, contracting authorities also may specify production processes and methods as long as they are linked to the

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subject matter of the contract.

- Selection stage -- there are a number of grounds for the exclusion of suppliers based on evidence of unsuitability, some of which are mandatory. Reasons include criminal conviction for certain offences (mandatory), failure to pay taxes (mandatory) **and previous poor performance which has led to early termination, damages or other comparable sanctions (discretionary).** Some of the grounds for mandatory exclusion are subject to account being taken of remedial action by the supplier, e.g. organisational changes. **There are statutory limits to the duration of any exclusion period.**
- Those suppliers not excluded can then be assessed on the basis of their economic and financial standing, e.g. whether they meet proportionate levels of financial soundness. **The Public Contracts Directive requires that where this is judged on the basis of turnover this should not normally exceed twice the value of the contract.**
- **Suppliers may also be assessed on their technical capacity and ability e.g. that they will be adequately equipped to do the job and that their track record is satisfactory.**
- **Award stage -- the award of contract must be based on the tender most 'economically advantageous' to the authority (MEAT).** This can however include assessment on the basis of price/cost only as well as other methods including the 'best price/quality ratio' (equivalent to value for money), which can include social and environmental requirements provided they relate to the contract.

20.2 **The Public Contracts Directive also places a duty on the contracting authority to investigate tenders it considers abnormally low and to disregard those that are based on approaches in breach of international environmental or social law.**

20.3 To allow suppliers to seek effective review of contracting authorities' decisions, contracting authorities will as now be required to include a 10---15 day standstill period⁴ between the point when the decision on the award of the contract is made and the signature of the contract. The standstill letter must provide certain information about the contracting authority's decision. There are detailed requirements for this process, which are set out in the Public Contracts Directive.

21. Changes to contracts once awarded

21.1 **The Public Contracts Directive provides useful clarity about the extent to which a contract can be changed after award without the need to re-advertise in OJEU.** Permissible grounds for modification include the existence of suitable “clear, precise and unequivocal” review clauses in the contract; or a need for additional supplies or services where a change of supplier is impossible or would cause significant inconvenience or a need for additional deliveries due to unforeseen circumstances (both subject to 50% maximum increase in contract value); or where a new supplier replaces the existing supplier because of insolvency, genuine restructuring etc.

22. Termination of contracts

22.1 **The Public Contracts Directive contains provisions to ensure that Member States’ contracts allow termination in circumstances where there has been a breach of EU law on public procurement, particularly where this results from a change in an awarded contract.**

22.2 The contracting authority must be able to terminate a contract should any of the following three grounds occur:

⁴ At least 10 days, when the notice is communicated using electronic means, or when using non-electronic means, there is a choice between either 15 days from date of sending; or 10 days from date of receipt

- Where the contract has been subject to a substantial modification that constitutes a new award;
- Where it is discovered after contract award that the contractor should have been excluded on mandatory exclusion grounds;
- Where the Court of Justice of the European Union (CJEU) has declared a serious infringement by the contracting authority of its obligations, meaning the contract should not have been awarded to the contractor.

22.3 The Regulations will specify that contracting authorities must include a condition in contracts allowing them to terminate if any of the grounds are found to apply. As a fallback, the Regulations will also include a deeming provision to ensure this possibility exists where a contract fails to include a termination condition.

23. Enforcement

23.1 The enforcement regime will be included in the Regulations, and derives from the Remedies Directives, which have not changed. The principal means of enforcement for a breach of the Regulations and other enforceable EU law such as the Treaty are:

- action by suppliers against individual contracting authorities in the High Court; and
- action by the Commission against the Member State in the Court of Justice of the European Union (CJEU).

23.2 The High Court’s powers include both pre-contractual remedies (i.e. those that can be imposed before the contract is entered into) and post-contractual. Pre-contractual remedies include the power to suspend an incomplete contract award procedure (an injunction) or the setting aside of a decision in an incomplete contract award procedure. The High Court also has powers to award damages as a pre-contractual remedy.

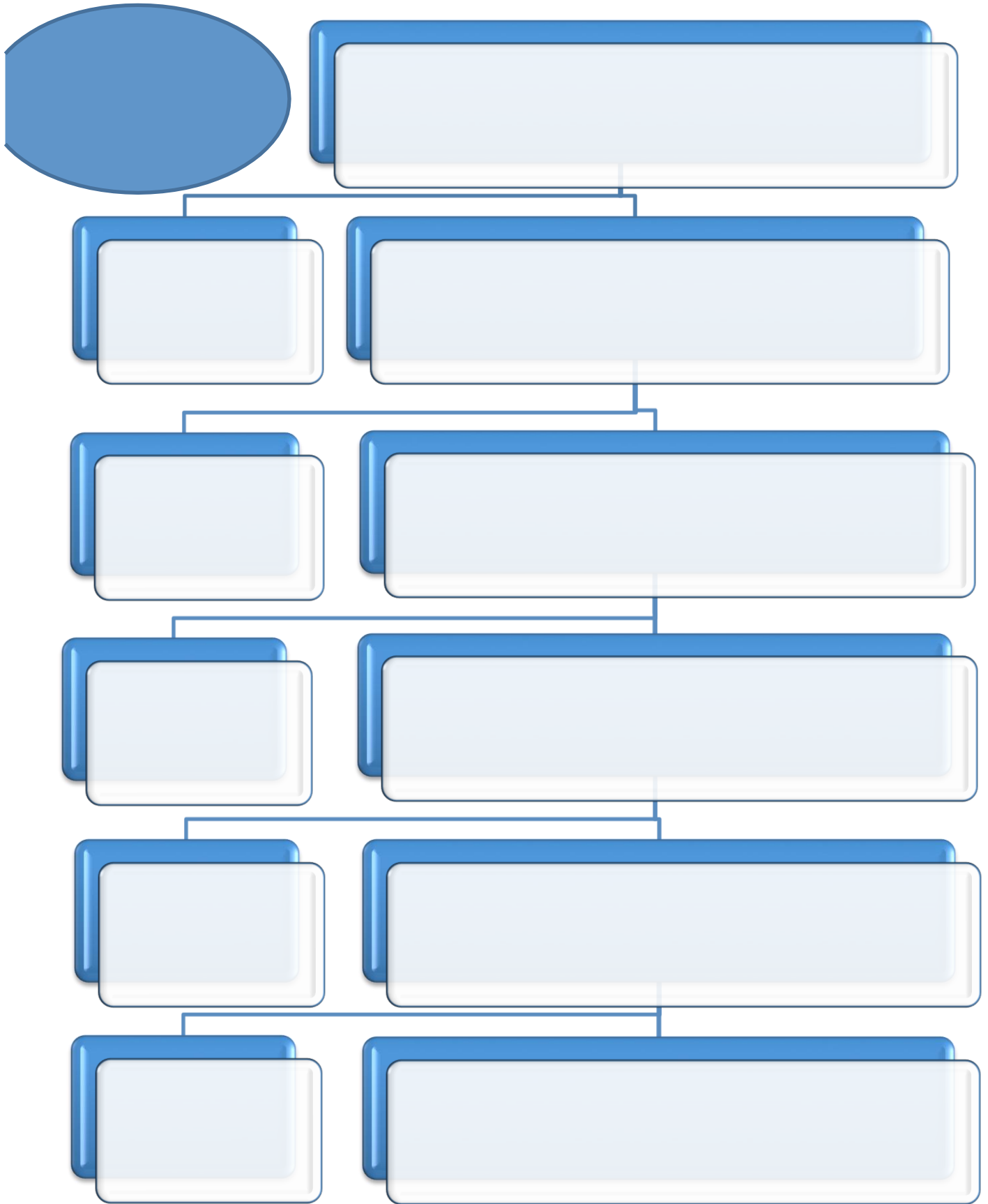
23.3 Post-contractual remedies (for contracts that have already been awarded) include contractual ineffectiveness (i.e. cancellation, but only for very serious rule breaches,) contract shortening, and civil financial penalties (fines). A properly applied standstill period gives good protection against post-contractual remedies.

23.4 Cases can also be pursued via the European Commission, for breach of the relevant European Directive and/or the EU Treaties. These cases, where accepted by the Commission, trigger infraction proceedings against the Member State, and can lead to a CJEU hearing, substantial fines, and potentially other CJEU imposed orders against the Member State if the breach is not satisfactorily resolved by other means.

24. Further information

24.1 For further detailed information, including the training materials, see <https://www.gov.uk/transposing-eu-procurement-directives>. More detailed information on certain aspects of the legislation will also be made available in due course.

24.2 Enquiries should be addressed to: Crown Commercial Service, Customer Service Desk: 0345 410 2222
info@ccs.gsi.gov.uk



**Defence and Security Exclusions – Part 2 of the Public Contract Regulations 2015
Flowchart 1**

Are some parts of the requirement covered by Article 346 TFEU and/or DSPCR 2011 but other parts are not?

YES

Go to Flowchart 2

NO

Does the requirement fall within the scope of DSPCR 2011, or does DSPCR 2011 not apply in accordance with Regulations 7 or 9 of DSPCR?

YES

Part 2 of PCR 2015 does not apply

NO

Does Article 346 TFEU apply?

YES

Article 346 TFEU prevails over Part 2 of PCR 2015

NO

Do the security and secrecy exemptions apply? (Regulations 15(2) and 15(3))

YES

Part 2 of PCR 2015 does not apply in accordance with Regulations 15(2) and 15(3)

NO

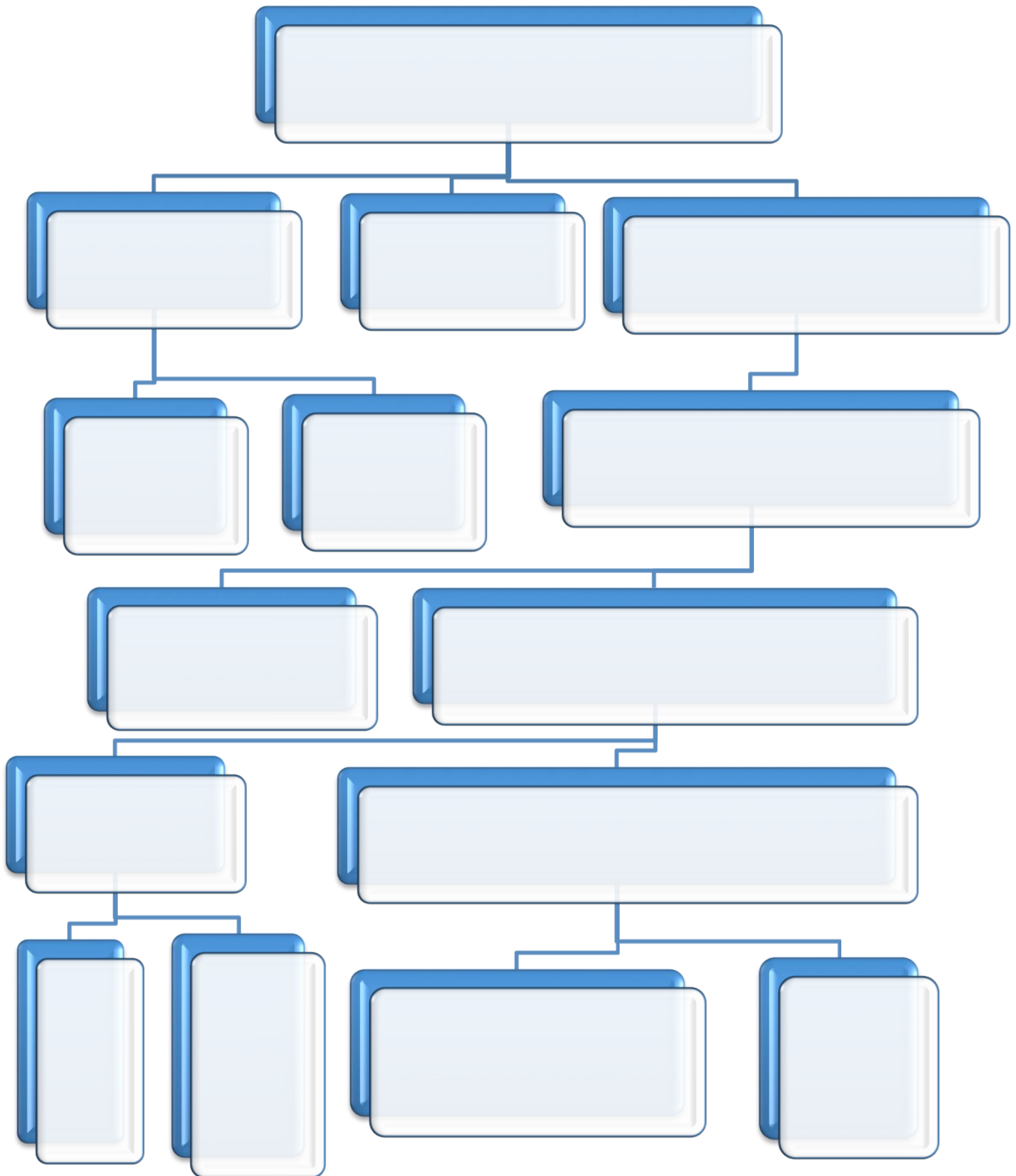
Will the contract be awarded in accordance with relevant international rules? (Regulation 17)

YES

Apply Regulation 17 to determine whether an alternative regime to Part 2 of PCR 2015 applies

NO

Part 2 of PCR 2015 applies subject to its non-defence/security exclusions and thresholds



Are the different parts objectively separable?

NO

Does the requirement include parts to which Article 346 TFEU applies?

YES

Contracting Authority can award separate contracts

YES

If Contracting Authority wants to award a single contract covering all the parts:

NO

Contract may be awarded in accordance with DSPCR 2011

YES

No need to apply Part 2 of PCR 2015

Is the decision to award a single contract being taken to exclude it from Part 2 of PCR 2015 or DSPCR 2011?

YES

Separate contracts must be awarded

NO

Is part of the contract covered by Article 346 TFEU, regardless of whether any part is covered by DSPCR 2011?

YES

Is a single contract justified by objective reasons?

NO

Is a single contract justified by objective reasons?

NO

Separate contracts must be awarded

YES

Can award a single contract without applying Part 2 of PCR 2015

YES

Can award a single contract under DSPCR 2011, without prejudice to exclusions and thresholds in DSPCR

NO

Separate contracts must be awarded

Annex B

OJEU advertising time limits

Minimum OJEU time limits for the Public Contracts Directive

NORMAL MINIMUM TIME	IF ELECTRONIC TENDER PERMITTED	IF URGENT+	WHERE PIN PUBLISHED*	IF SUB CENTRAL AUTHORITY**
Open procedure				
Minimum time limit for receipt of tenders 35 days	Minimum time limit for receipt of tenders 30 days	Minimum time limit for receipt of tenders 15 days	Minimum time limit for receipt of tenders 15 days	-
Restricted procedure				
Minimum time limit for requests to participate 30 days	-	Minimum time limit for requests to participate 15 days	Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days
Minimum time limit for tenders 30 days	Minimum time limit for receipt of tenders 25 days	Minimum time limit for tenders 10 days	Minimum time limit for tenders 10 days	Minimum time limit for tenders to be set by agreement with tenderers. In the absence of agreement minimum time limit 10 days
Competitive procedure with negotiation and innovation partnerships				
Minimum time limit for requests to participate 30 days	-	Minimum time limit for requests to participate 15 days	Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days

Minimum time limit for initial tenders 30 days	Minimum time limit for receipt of initial tenders 25 days	Minimum time limit for tenders 10 days	Minimum time limit for tenders 10 days	Minimum time limit for tenders to be set by agreement with tenderers. In the absence of agreement minimum time limit 10 days
Competitive dialogue				
Minimum time limit for requests to participate 30 days	--	--	--	--
No explicit time limits for submission of initial/subsequent tenders	--	--	--	--

Notes

These are minimum time limits. When fixing the time limits for the receipt of tenders and requests to participate, contracting authorities must take account of the complexity of the contract and the time required for drawing up tenders

+ This shorter time limit is allowed where a state of urgency duly substantiated by the contracting authorities renders the minimum impracticable

* This shorter tendering time limit is allowed where contracting authorities have published a prior information notice which was not itself used as a means of calling for competition, provided that all of the following conditions are fulfilled:

- (a) the prior information notice included all the information required in section I of the PIN notice referred to in the Public Contracts Directive, insofar as that information was available at the time the prior information notice was published;
- (b) the prior information notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

** 'sub---central contracting authorities' means all contracting authorities which are not central government authorities

Main Feature of the Documentation

Member Decision Making

3.1 The current process for member involvement, after the establishment and agreement of a budget is to some extent optional, with inclusion in the process being at Chief Officer volition.

3.2 A clear framework for Portfolio and Executive input into contracts with likely strategic importance is set out with a general need for each to authorise contracting activity at critical “gates” in the process. For Portfolio Holders these are set at contracts with a value of contract estimated to be valued over £500k and for the Executive those estimated to have a value over £1m. The “gates” operate at the following points;

- Formal consultation on the intended action and contracting arrangement (Rule 5) prior to embarking on contracting activity, to provide opportunity for member involvement in the formation and shape of any intended contract.
- Any decision to negotiate rather than subject contracting activity to competitive tender. (Rule 13)
- Contract Award (Rule 16.5).
- The submission of an annual report on contractor performance during the life of the contract to monitor the delivery of required contractual outcomes (Rule 23).

3.3 In addition provision is made, by way of retrospective reporting for Audit Sub-Committee to overview certain activities taken under delegated authority with the submission of a bi-annual report into the application of exemptions to competitive tendering (Rule 3.4 and 13.1).

Other member Involvement

3.4 Some relaxation of the current arrangements around the employment of Consultants is provided for within a controlled environment of consultation with Finance and Procurement. Formal Consultation is provided with the Portfolio

Holder where these Commissions exceed £100k. (Rule 8.5). These are supplemented by the reporting regime put in place around the operation of the service and corporate Contract Registers

Improvements to Management Arrangement

3.5 The need to ensure the use of procurement (and management) best practice runs through the drafting of the document and the inclusion of overviews of activity by officers within Resources and Legal. The following provides an indication of the requirements incorporated.

- Rule 1.1 – Value for Money basis of purchasing to be based on Whole Life Costing and Consideration of Sustainable Procurement practice.
- Rule 2.1.1 & 5.1 – Officers must have regard (and discuss with the Head of Procurement, departures from the best practice identified) the guidance provided in the Council's - "Guide to Successful Procurement".
- Rule 2.2.1 – Maintenance and use of Corporate and Service Contract Register.
- Rule 3.4 – Invoking of Business Continuity Plan
- Rule 3.8 – Value for money and the implicit use of Collaborative Procurement arrangements.
- Rule 3.9 – Use of Voluntary Sector Organisations.
- Rule 7.3 - Use of Framework Arrangements.
- Rule 10 – Contract Award Criteria.
- Rule 16 – Mandatory "Standstill" periods and Call in,
- Rule 21-23 - Use of Programme and Project management best practice and onward reporting of contract management and outcomes to Members.

2. Legal Implications

- 4.1 The attached Financial Regulations and Contract Procedure Rules are made under the provisions of s135 Local Government Act 1972 and set out the practices that should be adopted in regard to the making or entering into of contracts by or on behalf of the Authority. These supplement the power of the Council under s111 LGA 1972 and s2 LGA 2003 to enter into contracts to facilitate the discharge of its functions.

- 4.2 The Accounts and Audit Regulations 2003 require the Council to have a sound system of internal control which facilitates the effective exercise of the Council's functions and includes arrangements for management of risk. The Council is required to conduct a review of the effectiveness of such systems at least once a year.

- 4.3 The Financial Regulations provide the framework for managing the Council's financial affairs and apply to every Member and officer as well as anyone acting on its behalf. The Procedure Rules which are mandatory provide further detail and these are in turn supported by CIPFA code of conduct and practice.

ervices