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THE PUBLIC CONTRACTS REGULATIONS 2015

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THE UTILITIES CONTRACTS REGULATIONS 2016

GUIDANCE ON PROVISIONS THAT SUPPORT MARKET ACCESS FOR SMALL BUSINESSES

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OVERVIEW

What are the rules that support access to public contracts by small businesses?

The Public Contracts Regulations (PCR) 2015 have a number of new or updated provisions which may encourage and improve access to public contracts by small businesses¹. These either remove unnecessary barriers to participation, or reduce procurement-process costs, time, or bureaucracy. Many of these provisions will also improve the procurement process for larger bidders, and for contracting authorities.

Why is this helpful / necessary?

The new procurement directive emphasises the importance of participation by small businesses in public sector contracts. It is widely agreed that small businesses should be encouraged to participate in public procurement and that actual or perceived barriers should be removed where possible. Participation by small businesses in public contracts can increase competition, encourage innovation and flexibility, and help improve value for money for public bodies, and better services to citizens. These businesses are an important driver of employment and economic growth and ensuring they have maximum opportunity to win public contracts helps the wider economy.

Part 4 of the PCR 2015 implements the recommendations made by Lord Young of Graffham, which should make contract opportunities more accessible to small businesses. [Separate guidance](#) has been issued on these reforms, but in summary those provisions:

- Ensure that when a contracting authority advertises a contract opportunity above or below the EU threshold, it is also advertised on the Contracts Finder website.
- Require contracting authorities to have regard to Cabinet Office guidance on the qualitative selection of economic operators (suppliers) for above threshold procurements, to prevent small businesses from being asked burdensome or unnecessary questions.
- Remove a pre-qualification stage for below threshold procurements.
- Improve prompt payment, by including a requirement for contracting authorities to include provision for 30-day payment terms that flow through the supply chain.

¹ The term 'small businesses' is synonymous with the EU definition of Small and Medium Sized Enterprises (SMEs) http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/smedefinition/index_en.htm

What are the main changes from the old rules?

The key changes include:

- Dividing contracts into lots is at the authority's discretion, as in the old rules, but under regulation 46 authorities will have to explain in writing any decision not to do so. This should encourage greater use of lots, which may be helpful for small businesses.
- The exclusion and selection requirements have been streamlined, and only the winning bidder normally has to submit supporting documents.
- There are new rules on authorities' requiring suppliers to have a minimum turnover, which should avoid smaller suppliers being unjustifiably excluded.
- Minimum process timescales have been reduced.
- The rules on Dynamic Purchasing Systems have been simplified
- The new Innovation Partnership procedure may benefit small businesses with innovative proposals, but who lack the resources to develop fully their solutions "on spec".
- The requirements for electronic communication have the potential to reduce process costs for all bidders. With effective implementation of electronic communication, access to opportunities by small businesses may be improved.

As in the old rules, groups of suppliers may participate in procurement procedures, which may benefit smaller firms that lack the capacity or capability to bid for some contracts on their own. Suppliers may also rely on the capacity of other entities.

The rules are not intended to give small businesses preferential treatment, nor allow quotas. That would also be contrary to Treaty principles, and could undermine value for money and effectiveness in public procurement.

Many of these changes have also been included in the 2016 Utilities Contracts Regulations (UCR), but in Regulation 65 there is no requirement to explain in writing where a contract has not been divided into lots.

These changes are expanded upon in the narrative below.

KEY POINTS

Division of contracts into lots

As in the old rules, the new regulations allow contracts to be divided into lots (Regulation 46)². Dividing a contract into lots may provide more opportunities for small businesses to bid effectively because the size of the lots may correspond better to the capacity of small businesses. Alternatively, the content of the individual lots could be adapted to fit with specialized sectors of or according to different project phases. Authorities are free to choose whether or not to divide a contract into lots, and if so, the number and type of lots (Regulation 46(1)).

However, unlike the old rules, if an authority chooses not to divide a contract into lots it must provide an indication of the main reasons for its decision, either in the contract documents or in the written report that is required to be produced at the end of the procurement process (Regulation 46(2)). Therefore in practice authorities will need, when designing their procurement procedure and planning its process, to consider the merits of lots, and make a conscious decision whether or not to lot, and then explain that decision in writing. This may therefore lead in practice to a greater use of lots where these are appropriate, which may facilitate market access for small businesses.

The new rules allow an authority to accept bids for combined lots as well as bids for individual lots (Regulation 46(6)). If so, the authority must specify in the contract notice or invitation to confirm interest which lots may be combined.

Conversely, an authority can choose to limit the number of lots for which a supplier may bid (Regulation 46(3)). An authority may also decide the maximum number of lots that any one supplier is allowed to win, even if one supplier submits the best bid (against the award criteria) for more than the maximum number (Regulation 46(4)). In that case the authority must specify in the procurement documents the method by which it will decide which lots to award to that supplier (Regulation 46(5)).

Contracting authorities must specify in the contract notice or invitation to confirm interest whether suppliers may bid for one, several, or all lots, and if applicable the maximum number of lots that any one supplier may win.

Exclusion and selection

The rules governing supplier exclusion and selection have been streamlined. The small business friendly aspects include the following:

- **Self-certification.** Suppliers should normally only have to self-certify that the exclusion grounds do not apply and that they meet the selection criteria; only the winning bidder has to provide documentary evidence to confirm (Regulation 59(9)).

² Unless indicated otherwise, all regulation references are to the PCR 2015

- **There will be a standardised form of self-declaration** (the “European Single Procurement Document” (ESPD)), to be reusable as far as is practicable across procurements (Regulation 59(1) et seq). Suppliers should not have to submit evidence that an authority already holds, or can freely obtain from elsewhere such as official databases (Regulation 59(10)).

These simplifications benefit all suppliers, but may be particularly useful for small businesses that may have more limited bidding resources.

- **Minimum Turnover cap.** Where authorities require a supplier to have a certain minimum turnover in the area covered by the contract, this should not be more than twice the contract value³ except in duly justified cases such as the special risk attaching to the contract (Regulation 58(9)). The effect of this is that small suppliers should not be excluded by unnecessarily large minimum-turnover requirements. Of course there is no obligation to impose *any* minimum turnover requirement, and authorities should not do so unless it is genuinely necessary for the particular procurement.

Electronic communication requirements

Separate guidance covers the use of electronic communications in detail. This section highlights the potential benefits for small businesses from the use of ecommunications, which will become mandatory in 2017 for central purchasing bodies and 2018 for others.

Regulation 22(1)) has the potential to assist bidders by speeding up access to documents, and submission of tenders, and by reducing the costs and time involved in handling paper documents. As in the old rules, authorities must ensure that ecommunications tools and devices are non-discriminatory, generally available, interoperable with ICT products in general use, and do not restrict suppliers’ access to the procurement procedure, and meet certain criteria (Regulation 22).

With immediate effect, the new rules require authorities to make procurement documents available free of charge electronically from the date of publication of the Contract Notice, which will give suppliers maximum opportunity to familiarise themselves with the procurement documents.

E-Certis

The e-Certis database contains information on exclusion and selection evidence available to suppliers in different Member States, and of the evidence that is commonly sought by procuring authorities in different States. This should help suppliers including small businesses that wish to bid across borders, and authorities who receive bids from cross-border suppliers.

³ For a framework the relevant figure is the value of maximum number of contracts expected to be undertaken by one operator at the same time, or if not known, the value of the framework (or lot within framework)

Minimum time limits

Many of the minimum time limits in which suppliers must respond to adverts and submit tenders have been reduced. The opportunity to use minimum timescales may be greatest in smaller and simpler procurements and these procurements may be particularly attractive to small businesses. The two most relevant procedures for this discussion are the open procedure and the restricted procedure. Separate guidance⁴ covers the actual timescales (there are many variants depending on the procedure used).

Of course these are *minimum* timescales, and longer periods will be appropriate in some cases (and may in some cases be more helpful to smaller businesses). Authorities should take account of the complexity of the contract and the time required for drawing up tenders (see Regulation 47(1)). Early market engagement may help in deciding the timescale that may actually be appropriate in a particular case. Time must be allowed for any necessary site visits etc, and any need to provide suppliers with additional information, or changes to contract documents, appropriate to the magnitude of the change and the time which suppliers may reasonably need (Regulation 47(2) – (4)).

Use of Prior Information Notices (PIN) as a call for competition

For the first time, and subject to certain conditions, sub-central authorities (ie those which are not central government) may use a PIN published in the Official Journal to call for competition, instead of using a Contract Notice (see Reg 48(5) for details)⁵.

In summary, the PIN must:

- Refer specifically to the goods, works, or services which are covered
- Indicate the purpose of the PIN and invite suppliers to express interest
- Provide additional specified information about the requirement and the intended procurement process (compared to an “information only” PIN not used to call for competition)
- Be sent for publication between 35 days and 12 months before subsequent procurement process,
- Not cover a period longer than 12 months (except where used for contracts awarded under the Light Touch Regime)

Suppliers then respond to the PIN expressing interest, and the authority must invite all respondents to participate in the subsequent procurement process.

This use of the PIN may only be used for the restricted procedure and competitive procedure with negotiation (which can include the setting up of framework agreements and dynamic purchasing systems).

⁴ See Annex B of the handbook on the new procurement rules for the timescales:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/407236/A_Brief_Guide_to_the_EU_Public_Contract_Directive_2014_-_Feb_2015_update.pdf

⁵ For the Light Touch regime *all* authorities may use a PIN; see Regulation 75 and separate LTR guidance

This use of the PIN may give suppliers early warning of forthcoming opportunities, and means they can then express interest in advance and place the onus on the authority to invite them to participate at the appropriate point. This can aid suppliers' forward planning and reduce administration in seeking and responding to advertisements, particularly if one PIN is used for several subsequent award processes. Therefore it may be helpful to small businesses.

Dynamic Purchasing System (DPS)

The DPS rules have been simplified and improved. CCS has issued detailed guidance on the new DPS rules, but in brief it has the following potentially small businessfriendly aspects.

DPS can be divided into categories for example by size of contracts to be awarded, subject matter, or geographical area of delivery. This can help maximize small businesses' opportunities to bid (Regulation 34(3) & (4)).

Suppliers can apply to join the DPS at any point during its existence (Regulation 34(15)), which may benefit start-ups, suppliers which wish to break into new public sector markets, and suppliers which only meet the selection criteria some time after the DPS was set up.

All suppliers who pass the exclusion requirements and who meet the selection criteria must be admitted, and all suppliers on the relevant category must be invited to bid for each contract under a DPS (Regulation 34(21) & (22)).

Suppliers admitted to the DPS will not be required to undertake the exclusion and selection stage for each and every contract awarded under the DPS. This further reduces costs and burdens.

Innovation Partnership

Separate guidance on procedures covers the detail, but the small business-friendly aspects include:

This new procedure enables an authority to set up partnership(s) with one or more separate suppliers aimed at the development of an innovative product, service or works, in phases (Regulation 31). The authority will set intermediate targets for each phase, and at the end of each phase may decide to terminate the process or if applicable reduce the number of participating suppliers. Negotiation with suppliers is permitted. If successful, the final outcome may be the manufacture of the product, the supply of the service, or the completion of the works.

The innovation partnership may be useful for small businesses that lack the resources speculatively to develop innovative solutions in the absence of interim payments or having a specific customer in place.

Groups of economic operators

As before, the new rules allow groups of suppliers (economic operators) to participate in public procurements, and these groups do not have to take a specific form in order to take part, although the authority can require a winning group to take a specific legal form if necessary for the proper performance of the contract (Regulation 19(3) – (6)).

The rules also allow suppliers to rely on “other entities” in the performance of a contract, subject to certain exclusion and selection requirements set out in Regulation 63, and discussed in separate guidance on exclusion and selection. These entities may be part of a group, additional to a group, or outside a group of suppliers.

The potential to form groups, and / or to rely on other entities may be particularly useful for small businesses, which may lack the capability or capacity to fulfill a requirement on their own.

Q and A

Q. Is it permissible to reserve contracts or lots for small businesses?

No. Unlike the rules that allow contracts to be reserved to sheltered workshops and suppliers who employ disabled or disadvantaged workers (Regulation 20), or the rules that allow social and other services to be reserved for “mutuals” and similar providers in certain circumstances (Regulation 77), there is no provision to reserve any contracts or lots to small businesses. Doing so would be contrary to the rules and to Treaty principles, and would be liable to challenge from other suppliers (under the Remedies rules) and / or from the Commission (under the infringement procedures)

Q. How and when should requirements be divided into lots?

This is not specified in the rules. It is for the authority to decide whether to divide the contract into lots, and if so, the number and type of lots, based on its own requirements and circumstances. For example, lots might be based on the type of deliverable, size of individual contracts, or geographical area of delivery. Early market engagement may give helpful pointers as to what will suit the market and encourage best value for money. As with all procurement decisions, it must be based on the genuine needs of the authority, and not be intended to discriminate.

Q. For what reasons may contracts *not* be divided into lots?

Decisions must be made on a case-by-case basis by the contracting authority, for any reason it deems relevant. The recitals to the directive highlight some examples where a decision not to lot may be appropriate: where lots could restrict competition; or risk making the execution of the contract excessively technically difficult or expensive; or the need to coordinate the different contractors for the lots could seriously risk undermining the proper execution of the contract.

It is implicit that any decision not to lot should be made on substantive grounds in each case, not simply be a default position.

Q. If an authority permits bids for combined lots, must a supplier be required to bid both for combined lots and individual lots?

There is nothing in the rules that would require this. Authorities should allow suppliers maximum freedom to decide which lots they wish to pursue. If the authority has a business need that a specific combination of lots is always to be bid-for together, it may be that the requirement should not be divided into separate lots.

Q. If an authority wishes to use to use the option to award contracts for combined lots how should it go about it?

It is for the authority to decide how to structure its requirements and procurements processes in each case, depending on the specific circumstances, taking case-specific advice as appropriate. CCS can necessarily only provide some generic pointers and suggestions. It will be for the authority to decide which combinations of lots are likely to be most useful.

The authority will need to establish the award criteria and marking schemes for each individual lot, plus award the criteria and marking schemes for the permissible combined lots. For consistency and comparability of the individual and combined bids, the criteria and marking schemes for the combined lots will probably be the same or very similar to those of the individual lots, (perhaps with additional specific criteria covering identifiable benefits from combined lots). Of course these award criteria and marking schemes must comply with the requirements of Regulation 67 and must be made available within the procurement documents.

Authorities will then need to assess the bid for the individual lots, and the bids for the combined lots, and determine whether the sum of the “best” bid from each of the individual lots provides better value for money than the best bid for the combined lots. The supplier with the best of the combined bids (and possibly the best overall) might not necessarily submit the best bid for each of the individual lots.

Q. Doesn't the possibility of awarding combined lots undermine the principle and purpose of lotting in the first place?

No. It allows the potential benefits of lots whilst also allowing the possibility of fewer (or one), combined contracts if this proves the better option.

Q. If an authority wishes to limit the number of lots any one supplier may win, how should it go about it?

It will be for the authority to decide both the maximum number and the process it will adopt if one supplier scores highest on more than the maximum number of lots that any one supplier may be awarded.

As an example, one approach might be to award to the supplier those lots where that particular supplier had achieved the greatest advantage over the second placed bidder; an alternative approach might award the supplier those lots where its overall score against the evaluation criteria was highest, irrespective of the “winning margin” in each lot.

Q. Could an authority use both the “combined lotting” provisions and the “maximum number of lots” provision in the same procurement?

There is nothing in the rules to preclude this. It would be for the authority to decide whether there was an advantage in doing so. For example, if the authority allowed two different sets of combined lots, it could decide that no one supplier would be awarded both.

In all these circumstances, authorities will wish to avoid excessive complexity, which could confuse suppliers, and render evaluation and comparison of bids difficult. Authorities must also clearly and transparently set out their intentions and methodology in the procurement documents.