



Crown  
Commercial  
Service

**THE PUBLIC CONTRACTS REGULATIONS 2015**

**&**

**THE UTILITIES CONTRACTS REGULATIONS 2016**

**GUIDANCE ON THE NEW SUBCONTRACTING PROVISIONS**

Updated October 2016

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## **Overview**

The Public Contracts Regulations (PCR) 2015 provide some additional obligations and flexibilities to enable further transparency and oversight of the working practices of the subcontracting chain. These implement the subcontracting provisions in the new procurement directive. There are also new obligations to give effect to the Government's policy on prompt payment of invoices.

## **What has changed?**

There is a new obligation on the contracting authority, where economic operators are working at a facility controlled by that contracting authority, to require the main contractor to provide its subcontractors' contact details so far as known at the time.

The rules also include two new flexibilities:

- i) a provision enabling contracting authorities to check the credentials of subcontractors to see if there are grounds for exclusion, and if there are grounds, the PCR lays down what action should be taken;
- ii) the contracting authority may ask the main contractor to provide basic contact information on their subcontractors and supply chain

In addition to the changes introduced by the new procurement directive, the PCR requires contracting authorities to ensure prompt payment of valid and undisputed invoices for the entire supply chain (ie within 30 days). See 'Statutory guidance for Contracting Authorities and Suppliers on paying undisputed invoices in 30 days down the supply chain'<sup>1</sup>.

## **Which rules do I need to refer to?**

Subcontracting Regulation 71

Exclusions Regulation 57

European Single Procurement Document (ESPD) Regulation 59-61

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<sup>1</sup> Statutory guidance for Contracting Authorities and Suppliers on paying undisputed invoices in 30 days down the supply chain at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/408142/Prompt\\_Payment\\_Lord\\_Young\\_Guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408142/Prompt_Payment_Lord_Young_Guidance.pdf)

30 Days payment of valid and undisputed invoices Regulation 113.

The corresponding regulation in the 2016 Utilities Contracts Regulations (UCR) is Regulation 87, which contains similar provisions to those of Regulation 71 of the Public Contracts Regulations (PCR) 2015. This also makes clear that utilities that are contracting authorities may verify that there are grounds for exclusion of subcontractors by following the relevant provisions of the 2015 PCR.

### **Key Points**

**Where the contract will be performed at a facility under the control of the contracting authority, the contracting authority is obliged to require the main contractor to provide basic contact information on their immediate subcontractors (R71.(3)).**

- For works and services contracts provided at contracting authorities' facilities under the direct supervision of the contracting authority, for example local authority run leisure centres, or a Town Hall, the contracting authority **must require** the main contractor to provide, basic contact information on their immediate subcontractors involved in such works or services.
- The contracting authority can extend this obligation further down the supply chain if they choose to, but there is no obligation to do so.
- The information must be provided at the latest by the time the contract starts being performed, i.e. when the specific subcontractors are known.
- The contractor **has to** provide the following basic contact information: the name of the subcontractor, their contact details; and the details of legal representatives.

- The contractor also **has to** notify the contracting authority if/when there is any change to the basic contact information described above about the subcontractor, and provide equivalent basic contact information for any new subcontractors.
- The requirement does not extend to organisations that are simply delivering consumables/goods/parts to the site.

**The contracting authority may ask the main contractor to provide basic contact information on their subcontractors and supply chain (R71.(7)).**

- If a contracting authority chooses to it can ask the main contractors of supply contracts and service contracts for the contact details of subcontractors and for notification of any changes or replacements.

**Discretion to verify if there are grounds to exclude a subcontractor on either mandatory or discretionary grounds (R71.(8))**

- Authorities **may** verify whether there are grounds for excluding subcontractors under regulation 57. In doing so, the authority:
  - **must** require the main contractor to replace any subcontractors where the verification has shown that there are compulsory grounds for exclusion: and
  - **may** require such replacement where there are non-compulsory exclusion grounds. .

**Payment of valid and undisputed invoices within 30 days (R113.(2)(c)).**

Regulation 113 requires contracting authorities to ensure prompt payment of valid and undisputed invoices for the entire supply chain (ie within 30 days). Contracting authorities must have regard to the statutory guidance on payment that flows from regulation 113.

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- Separate guidance has been published at:  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/408142/Prompt\\_Payment\\_Lord\\_Young\\_Guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408142/Prompt_Payment_Lord_Young_Guidance.pdf)

## FAQs

**The Directives place a strong emphasis on compliance with environmental and social laws for Contractors – does this also apply to subcontractors and if so how far down the supply chain should I be checking?**

It is best practice to have a good understanding of your supply chain and to analyse and then manage key members of that chain. Contracting authorities have the discretion to verify if there are grounds to exclude a subcontractor on either mandatory or discretionary grounds as laid out in regulation 57. It is the contracting authority's choice how far down the supply chain they may want to verify grounds for exclusions.

Where it is verified that a subcontractor has breached one of the mandatory exclusion conditions in regulation 57 such as a breach of child labour laws or human trafficking then the contracting authority *must* require the main contractor to substitute a new subcontractor.

If it is verified that a subcontractor has violated an obligation in the field of environmental, social or labour law then that falls within the discretionary exclusions section of regulation 57 (8)(a). In such cases the contracting authority *may* require the main contractor to substitute a new subcontractor.

Suggested contract clauses are provided at Annex A.

## Suggested Contract Clauses For Subcontracting

### Social and environmental clause

Article 18 (2) of the new public sector procurement directive (2014/24/EU) requires Member States to take appropriate measures to ensure that in the performance of public contracts, economic operators comply with various obligations in (national and international) environmental, social and labour laws.

The UK Government therefore recommends the use of the following clause in public contracts. It is not mandatory. It refers to the contracting authority as the Authority, and to the contractor as the Contractor/Supplier. These terms should be amended to reflect the defined terms used in the relevant agreement.

Clause giving the Contractor (and Sub-contractors) the right to terminate a sub-contract for the failure to comply with environmental, social and labour laws.

*The Contractor shall include in every Sub-contract -*

- a. a right for the Contractor to terminate that Sub-contract if the relevant Sub-contractor fails to comply in the performance of its contract with legal obligations in the fields of environmental, social or labour law; and*
- b. a requirement that the Sub-contractor includes a provision having the same effect as (a) above in any Sub-contract which it awards.*

*In this clause, 'Sub-contract' means a contract between two or more suppliers, at any stage of remoteness from the Authority in a sub-contracting chain, made wholly or substantially for the purpose of performing (or contributing to the performance of) the whole or any part of this Agreement.*



## **Mandatory and discretionary exclusion clause**

The Authority can insist on the removal of a sub-contractor where there are grounds for exclusion of that sub-contractor under regulation 57. A model clause is provided below for use by contracting authorities, though its use is not mandatory. The clause refers to the contracting authority as the Authority, and to the contractor as the Contractor/Supplier. These terms should be amended to reflect the defined terms used in the relevant agreement.

### Exclusion of Sub-contractors

*Where the Authority considers whether there are grounds for the exclusion of a sub-contractor under Regulation 57 of the Public Contracts Regulations 2015, then:*

- (a) if the Authority finds there are compulsory grounds for exclusion, the Supplier shall replace or shall not appoint the Sub-contractor;*
- (b) if the Authority finds there are non-compulsory grounds for exclusion, the Authority may require the Supplier to replace or not to appoint the Sub-contractor and the Supplier shall comply with such a requirement.*