



Department
of Health

The Public Contracts Regulations 2015 and NHS Commissioners

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Guidance - This note summarises the main requirements of the light touch regime of the PCR 2015 and alerts commissioners to these changes.

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Clinical Commissioning Groups; Commissioning Support Units, NHS Trusts and NHS Foundation Trusts

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The Public Contracts Regulations 2015 and NHS Commissioners

Prepared by Department of Health

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1. Introduction

This note is a summary of the new requirements presented by the Public Contracts Regulations 2015 (PCR 2015), for commissioners and those supporting them with their procurements of healthcare services. It should be read in conjunction with the Cabinet Office Guidance on the Light Touch Regime for Health, Social, Education and certain other servicesⁱ.

Further advice on issues relating to procurement, patient choice and competition can be sought from NHS Improvement and/or NHS Englandⁱⁱ. A suite of e-learning materials is also available on the Crown Commercial Service websiteⁱⁱⁱ and hands-on support is available from commissioning support lead providers on NHS England's Lead Provider Framework^{iv}.

The implementation of PCR 2015 requires that commissioners act in an appropriately transparent way when taking procurement decisions and, in particular, that where a decision is taken to award a contract for services above a value of €750,000, this is advertised.

It is important to note that this requirement to advertise does not equate to a requirement to run a full competitive process for all contracts above that threshold. The PCR 2015 requires a fair and transparent process to be followed, but contain a number of flexibilities that, where justified, can be used by commissioners to dispense with the need for open competition.

A complaint for an alleged breach of the Procurement, Patient Choice and Competition (No2) Regulations 2013 (PPCCR) should continue to be taken to NHS Improvement as the regulator. However, a challenge to a decision made under the PCR 2015 can only be made via the courts. For this reason, it is important for commissioners to be clear about their responsibilities, and in all cases the process should meet the relevant requirements set out in the legislation

The principles of the existing PPCCR regime are consistent with the PCR 2015 regime. The PCR 2015 regime is not a barrier to the integration of care services where this makes sense for the local community. Indeed, the 'light touch regime' under the regulations provides clarity on the use of certain award criteria that are highly relevant to patient care, including the needs of vulnerable users, and ensuring the quality, comprehensiveness and continuity of patient services.

2. Background

Procurement is underpinned by a legislative framework. There are two key sets of Regulations for commissioners:

- The Public Contracts Regulations 2015 (PCR 2015); and,
- The National Health Service (Procurement, Patient Choice and Competition) (No2) Regulations 2013 (PPCCR).

The Public Contracts Regulations 2006 (PCR 2006) were replaced by the PCR 2015 on 26th February 2015. The new provisions of the PCR 2015 – relating to the award of clinical services – came into force for clinically commissioned work within the NHS on 18th April 2016. Any new healthcare services contract procurement procedure that commences^v on or after that date will need to comply with the requirements of the PCR 2015.

Commissioners need to comply with a number of requirements under the PPCCR to help them achieve the overall objective of securing the needs of patients and improving the quality and efficiency of services, and include:

- acting transparently and proportionately, and treating potential providers equally and in a non-discriminatory way;
- procuring services from the one or more providers that are most capable of delivering commissioners' overall objective and that provide best value for money;
- considering ways of improving services; and,
- having arrangements in place that allow providers to express an interest in a contract.

Further details on the expectations of commissioners under these regulations can be found in NHS Improvement's Substantive Guidance on the NHS Procurement, Patient Choice and Competition Regulations^{vi}.

Although there are common features inherent in the PPCCR and PCR 2015 obligations, commissioners should be mindful that compliance with one set of regulations does not automatically confer compliance with the other – particularly in relation to exemptions from the processes.

Commissioners must comply with both sets of regulations to minimise the risk of successful legal challenge.

3. Changes to the PCR from 18 April 2016

The preceding PCR 2006 regime distinguished between 'Part A' and 'Part B' services. Because NHS-funded healthcare fell within Part B, commissioners were able to award a contract without advertising where there was no cross-border interest.

Under the PCR 2015, health, social and other specific services^{vii} will instead be subject to a "light-touch" regime where the value of the contract is in excess of €750,000 (£589,148 at current exchange rates). However, the light touch regime retains a procurement exemption under the 'negotiated procedure without prior publication.'

Commissioners of NHS clinical healthcare services should familiarise themselves with the new regime and ensure that they follow the correct procedures.

The overriding principles of transparency and equal treatment of interested providers remain unchanged, and commissioners retain the flexibility to design their own process to identify the appropriate provider in compliance with these principles.

Light Touch Regime

The PCR 2015 introduces some additional requirements that commissioners, and those supporting them with their procurement decisions and processes, need to be aware of and comply with, including:

- the requirement to advertise in the Official Journal of the European Union (OJEU) either by a contract notice or prior information notice (PIN) the intention to award a public contract with a lifetime value of €750,000 (£589,148)^{viii} or more, except where there is a justification for using the negotiated procedure without prior publication (see below); and,
- that any variation to the procurement process (as set out in the contract notice or PIN) must comply with the principles set out in Regulation 76(4) of the PCR2015^{ix}.

Under the light touch regime, commissioners have the freedom to determine the procurement procedure to use when awarding a contract, provided that they satisfy the principles of transparency and equal treatment of providers. Some of the factors that commissioners may take into account when designing and running their procurement processes include:

- ensuring quality, continuity, accessibility, affordability, availability and comprehensiveness of the services;
- the specific needs of different categories of users, including disadvantaged and vulnerable groups;
- the involvement and empowerment of users;
- innovation; and,
- any other relevant consideration.

Commissioners should be aware that once a process has been designed and publicised, it should be adhered to, and departed from only if the conditions specified by the regulations are met^x.

Fulfilling the advertising requirement

The intention of the PCR 2015 is to enable commissioners to be flexible in achieving their commissioning intentions, without a disproportionate burden on their limited commissioning resources.

Except where there is a justification for using the negotiated procedure without prior publication (see below), commissioners must publish in the OJEU their intention to award a contract, using either a PIN or a contract notice. Provided that the PIN complies with the requirements of the PCR 2015, and that the contract to be awarded remains consistent with the information provided in the PIN^{xi}, there is no need to publish a separate contract notice.

The PIN required by PCR 2015 is a high level document, and there is a certain amount of flexibility in what a commissioner should include in it.

Whether a contract notice or a PIN has been used, contract award information will need to be sent to OJEU, following the format set out in Part J of Annex V of the Public Sector Directive (2014/24/EU). Such notices could be grouped on a quarterly basis, in which case they should be sent within 30 days of the end of the relevant quarter.

The PIN must:

- be published publicly on an ongoing basis and updated to reflect the status of the procurement process^{xii};
- contain the information required by the form;
- refer specifically to the types of services that will be the subject of the contract to be awarded, and;
- indicate that the contract will be awarded without further publication and invite interested suppliers to express their interest in writing.

The Cabinet Office has published more guidance on how to complete a PIN.

Negotiated procedure without prior publication

As is currently the case, under the PCR 2015 commissioners retain the ability to use the negotiated procedure without prior publication, in line with Regulation 32, where its use can be fully justified. This will be the case where:

- the commissioner has received no tenders, no suitable tenders, no requests to participate or no suitable requests to participate in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered, or;
- where the services can be supplied only by a particular provider for the following reasons:
 - competition is absent for technical reasons, or;
 - the protection of exclusive rights, including intellectual property rights;

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but only where, in both cases, 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.

Before deciding to use this procedure, commissioners should assure themselves these exemptions apply and seek the appropriate procurement support / advice. If a decision to use this procedure is challenged, commissioners will need to be able to demonstrate how the decision to use this procedure has been reached and to show that the use of the procedure is justified.

Audit trail

Documenting the decisions they make and their reasoning on a systematic basis should assist commissioners in the event of a challenge.

Crown Commercial Service Guidance

Guidance documents are continuing to be published by CCS and you are encouraged to regularly check the website for further updates. <https://www.gov.uk/transposing-eu-procurement-directives>.

Guidance on the Light Touch Regime

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/469057/LTR_guidance_v28_updated_October_2015_to_publish__1_.pdf

Templates

The EU Commission have published the forms which must be used to comply with the new procurement directive, at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.296.01.0001.01.ENG

The minimum requirements for a PIN being used as a call for competition are:

Section I - 1.1, 1.2 (assuming there is joint procurement), 1.3 (although the link to the procurement documents may be supplied at a later date in the invitation to tender), 1.4, & 1.5.

Section II – 1.1 to 1.6, 2.1 to 2.6, 2.7 as far as is known, & 2.13.

Section III – all the requirements here are prefaced with footnote 14, i.e. the condition that they are only required to the extent that the commissioner already knows this information.

Section IV –

IV.1 all the requirements here are prefaced with footnote 14, i.e. the condition that they are only required to the extent that the commissioner already knows this information.

IV.2 – 2.4 is obligatory; sub sections 2.2 and 2.5 also apply to a PIN, but are prefaced with footnote 14, i.e. the condition that they are only required to the extent that the commissioner already knows this information.

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Section V only relates to a contract award notice so does not need to be completed at the PIN stage.

Section VI is optional so does not need to be completed at the PIN stage.

ⁱ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/469057/LTR_guidance_v28_updated_October_2015_to_publish_1.pdf

ⁱⁱ <https://www.gov.uk/government/collections/procurement-choice-and-competition-in-the-nhs-documents-and-guidance>

ⁱⁱⁱ <https://www.gov.uk/guidance/transposing-eu-procurement-directives>

^{iv} <https://www.england.nhs.uk/lpf/lead-providers/>

^v For information on what constitutes commencing a procurement procedure, see regulation 120(2) of the PCR 2015.

^{vi} https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/283505/SubstantiveGuidanceDec2013_0.pdf

^{vii} falling within Annex XIV to Directive 2014/24/EU

^{viii} <https://www.gov.uk/government/publications/procurement-policy-note-1815-new-threshold-levels-2016> - please regularly check this site as the values will change.

^{ix} http://www.legislation.gov.uk/ukxi/2015/102/pdfs/ukxi_20150102_en.pdf (see page 72)

^x <http://www.legislation.gov.uk/ukxi/2015/102/contents/made>

^{xi} PCR 2015 regulation 75.

^{xii} (see annex V part I of Directive 2014/24/EU for the minimum levels of information).