



Cabinet Office



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# **Government Response to the Consultations on UK Transposition of new EU Procurement Directives**

**Utilities Contracts Regulations 2016**  
**Concession Contracts Regulations 2016**

## Introduction

1. This is the Government Response to recent consultations on UK transposition of the following EU Procurement Directives:
  - a) Directive 2014/25/EU<sup>1</sup> on procurement by entities operating in the water, energy, transport and postal services sectors, replacing Directive 2004/17/EC, for Utilities Contracts; and
  - b) Directive 2014/23/EU<sup>2</sup> on the award of Concession Contracts, which does not directly replace any previous directive.

## Background

2. On 28 March 2014 the three, new EU Procurement Directives were published in the Official Journal of the EU following adoption by the EU institutions. They came into force on 17 April 2014. The UK and other EU Member States have until 18 April 2016 to transpose the Directives in national implementing regulations. The Public Sector Directive (2014/24/EU<sup>3</sup>) has already been transposed by the Public Contracts Regulations 2015, which came into force on 26 February 2015.
3. The EU Procurement Directives provide for transparent, fair and competitive procurement across Member States. The new Directives include several wins for the UK Government, following extensive UK lobbying and negotiation in Brussels. These improvements make an important contribution to the Government's strategy for growth, freeing up public procurement markets through simpler, more flexible procurement rules, cutting red tape, and helping UK companies make the most of the EU's single market.
4. The consultations on the draft Utilities Contracts Regulations 2016 and the draft Concession Contracts Regulations 2016 were published by the Government on 21 August 2015 and closed on 18 September 2015. The consultations focused on the draft regulations for the new Utilities Contracts Directive and Concession Contracts Directive. Many of the provisions in the Public Sector Directive are analogous to provisions in the Utilities and Concessions Directives. We had already consulted on generic matters that are applicable to all three Directives. The results of this previous consultation<sup>4</sup> were carried through where applicable to these Regulations. The application in these Regulations of decisions on policy choices following the previous consultation was set out in the consultation documents.
5. A link to the consultation documents was issued directly to a number of known stakeholders and was also made available publicly on the GOV.UK website. The consultations formally concluded a long-running period of continuous UK stakeholder engagement on these new Directives, which started in 2011 when the European Commission's own consultations began.

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<sup>1</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2014.094.01.0243.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0243.01.ENG)

<sup>2</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2014.094.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0001.01.ENG)

<sup>3</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2014.094.01.0065.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0065.01.ENG)

<sup>4</sup> <https://www.gov.uk/government/consultations/transposing-the-2014-eu-procurement-directives>

## Responses Received

6. A total of twenty responses were received. Table 1 below summarises the split of respondents by consultation and by category.

**TABLE 1: Respondents by Category**

<b>Category of respondent</b>	<b>Respondents to Utilities Consultation</b>	<b>Respondents to Concessions Consultation</b>	<b>Total</b>
Business	2	0	2
Devolved Administrations	1	1	2
Legal	2	1	3
Local Government	2	4	6
Utility	5	2	7
<b>Total</b>	<b>12</b>	<b>8</b>	<b>20</b>

7. We are grateful to all of those stakeholders who responded to the consultations. This document describes the overall results and summarises the key points raised by stakeholders. Part A does this for the Utilities Contracts Regulations consultation, and Part B for the Concession Contracts Regulations consultation.

## Scope of the Regulations

8. Following discussions with officials in the Scottish Government, we have decided to maintain the territorial approach, which currently applies under the Utilities Contracts Regulations 2006, so the Regulations will set out that they do not extend to Scotland. This approach will also be adopted for the Concession Contracts Regulations 2016. The Scottish Government intends to make corresponding provisions in their regulations.

## Next Steps

9. The consultations have confirmed that the draft implementing regulations implement the Directives effectively and do so in the best way, subject to the results described in this document. The Government now intends to implement the new Utilities Contracts Regulations and Concession Contracts Regulations by 18 April 2016 for England, Wales and Northern Ireland.

## **PART A - Analysis of responses to consultation on Utilities Contracts Regulations**

***Question 1. Draft Regulations: We seek general comments on the approach to the drafting of the draft Regulations (in particular the copy out approach).***

10. There were nine responses to this question.

### **Summary of Consultation Returns**

11. The respondents who referred specifically to copy out were mostly in favour of the 'copy-out' approach. One respondent pointed out that this could be a problem where the Directive contained anomalous provisions. Another respondent commented that the copy out approach prevented the possibility of clarification and this would mean that more guidance would be required, referring explicitly to the guidance already published concerning the Public Contracts Regulations 2015 (PCR 2015).

12. Two respondents questioned the fact that the draft Regulations, like the 2014 Utilities Directive, did not contain a list of covered utilities. Another respondent agreed with the approach of not providing a list, on the grounds that an indicative list would need regular updating to stop it becoming out-of-date and that it would be better to allow utilities to form their own view as to whether or not they met the relevant criteria.

13. Two respondents raised concerns on the consistency between the transitional provisions in the PCR 2015 and CCS Guidance on contract modifications and requested that action be taken to provide legal certainty on this issue in any corresponding provisions in the Utilities Contracts Regulations 2016 (UCR 2016).

14. There were various suggestions for drafting amendments in the responses to the consultation as a whole. These will be taken on board where appropriate.

### **Government Response**

15. The positive reaction to the copy out approach is welcomed. As the responses have noted, there is already a substantial body of guidance available. This is likely to be augmented to reflect the position in the UCR 2016.

16. Adopting the copy out approach was part of the reason for not adding a list of utilities. Such a list is not included in Directive 2014/25/EU, unlike the previous Utilities Directive 2004/17/EC. As noted above, one respondent makes the very valid points, with which we concur, that such a list would need regular updating and it would be better to allow utilities to form their own view as to whether they met the relevant criteria.

17. The correct position on when the rules on contract modifications come into force has been set out in the FAQ section of the “Guidance on amendments to contracts during their term”. The following provides a link to the guidance: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/466370/Guidance\\_on\\_Amendments\\_to\\_Contracts\\_-\\_Oct\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/466370/Guidance_on_Amendments_to_Contracts_-_Oct_2015.pdf). This is equally relevant to UCR 2016, but this will also be clarified in these Regulations.

***Question 2. Please provide comments on regulations 1 to 15 (general provisions and activities).***

18. There were six responses to this question.

**Summary of Consultation Returns**

19. Apart from minor drafting suggestions, the main issue raised by several respondents concerned the need to be clear about which procurement documents need to be available from the date of publication of the OJEU notice. Such comments on procurement documents were also reiterated in comments on subsequent regulations.

**Government Response**

20. Information about which procurement documents need to be published at the time of the OJEU notice has been provided in the FAQ section of the Guidance on electronic procurement and communication.

21. The link to this guidance is: <https://www.gov.uk/government/publications/public-procurement-regulations-electronic-procurement-and-communication>. This is equally relevant to UCR 2016.

***Question 3. Please provide comments on regulations 16 to 42.***

22. There were seven responses to this question.

**Summary of Consultation Returns**

23. There were some suggestions for minor drafting amendments. One respondent commented that two provisions, namely on the principles of procurement and concerning grouping of economic operators, were good. This respondent also commented that it was not clear which appropriate measures utilities should take to avoid conflicts of interest.

24. Another respondent asked that the maximum time possible for adjustment to full electronic communication should be provided for.

25. One respondent questioned whether the difference in wording in regulation 29(4) in comparison with Article 29(6) would change the impact of this provision, which concerns affiliated undertakings.

### **Government Response**

26. The appropriate measures on avoiding conflicts of interest will be covered in guidance. The maximum time possible for adjustment to full electronic communication (i.e. 18 October 2018) has been provided for in regulation 1(3). Further consideration is being given to the drafting of regulation 29(4) concerning affiliated undertakings.

### ***Question 4. Please provide comments on regulations 43 to 57.***

27. There were seven responses to this question.

### **Summary of Consultation Returns**

28. One respondent commented that regulation 48 seemed to raise an anomaly about how the use of a Periodic Indicative Notice (PIN) as a call for competition under competitive dialogue fits with other aspects of the regulations.

29. Two respondents requested guidance on the application of the new provisions concerning framework agreements.

### **Government Response**

30. The anomaly regarding how the use of a PIN as a call for competition fits with the Competitive Dialogue procedure has been taken up with the European Commission. As noted in the answer to question 1 above, there is likely to be various amendments to the existing body of guidance to reflect the changes for UCR 2016.

### ***Question 5. Please provide comments on regulations 58 to 85.***

31. There were eight responses to this question.

### **Summary of Consultation Returns**

32. One respondent made positive comments about the position taken on two options: the possibility for utilities to ask for supplementary information and giving utilities the discretion about whether to break contracts into lots or not. The concerns about procurement documents were raised again in this section and, as set out in the response to Question 2 above, this has been addressed in guidance.

33. Two respondents asked that cross references to provisions in the PCR 2015 concerning exclusion grounds should be set out in full in UCR 2016.

## **Government Response**

34. It is considered preferable to use cross references to PCR 2015 concerning exclusion grounds, because this would be more consistent with the general copy out approach.

### ***Question 6. Please provide comments on regulations 86 to 99.***

35. There were six responses to this question.

## **Summary of Consultation Returns**

36. Two respondents concurred with the approach of not requiring direct payment to contractors. Two respondents raised questions about the drafting of the regulation concerning the modification of contracts (regulation 88(1)(b)), where a similar approach was taken to the corresponding provision in the PCR 2015 (regulation 72 (1)(b)). The draft UCR 2016 provision followed the PCR provision in using “or” at the end of regulation 88(1)(b)(i). The concern was that the change from “and” to the use of “or” gives a different meaning to that in the Directive.

## **Government Response**

37. We will change “or” to “and” in regulation 88(1)(b). A consistent approach will be adopted across all three procurement Regulations.

### ***Question 7. Would an explicit reference to the previous exemption applications in the Regulations be helpful?***

38. There were eight responses to this question.

## **Summary of Consultation Returns**

39. Of the eight replies, seven were in favour and one raised no objection. Two respondents asked for any future successful exemption decisions to be added.

## **Government Response**

40. Following this very positive feedback, references to the previous exemptions decisions will be included in the UCR 2016.

### ***Question 8. Would an option for Utilities to apply for an exemption directly be helpful?***

41. There were eight responses to this question.

## Summary of Consultation Returns

42. Of the eight replies, six were in favour and the other two said they did not object.

## Government Response

43. The option for utilities to apply for an exemption directly to the European Commission will be provided for in the UCR 2016.

### ***Question 9. Do Utilities consider that the estimates of costs and benefits are reasonable?***

44. There were six responses to this question.

## Summary of Consultation Returns

45. Some respondents estimated that, in their sector, some former Part B service contracts would now be procured under the full rules as a consequence of the ending of the Part B regime. Estimates of the number of such contracts, and monetised estimates of the costs involved, were provided. Those respondents also identified other additional costs for their sector that had not been taken into account in the Impact Assessment (IA) and provided monetised estimates of those costs. One respondent commented that the figures were reasonable. Another respondent commented that ending the supply of detailed annual statistics on procurement activities would deliver minimal monetary benefit. While another queried why the IA had not taken account of the use of qualification systems in utilities' procurements.

## Government Response

46. The rules on the use of qualification systems have not changed compared to the current rules. As a result, there are no additional costs or benefits for the IA to take into account.

47. The other views and additional cost estimates will be taken into account in the final IA.

### ***Question 10. Do Utilities consider it would be possible to monetise any of the other benefits, and, if so, would they provide estimates, where appropriate?***

48. There were four responses to this question.

## Summary of Consultation Returns

49. Respondents were not able to offer monetised estimates for the other benefits (reduction in statutory minimum time limits for responses and tenders, use of electronic catalogues, simplified rules for Dynamic Purchasing Systems, and use of preliminary market consultations). One respondent, in commenting on the shorter



minimum time limits, observed this specific change may not realise much benefit as the regulatory process and rigour remains the same.

### **Government Response**

50. We will reflect these views in the final IA. These other benefits will remain non-monetised.

## **PART B - Analysis of responses to consultation on Concession Contracts Regulations**

### ***Question 1. Draft Regulations. We invite general comments on the drafting of the Regulations.***

51. There were seven responses to this question.

#### **Summary of Consultation Returns**

52. Respondents made various suggestions for drafting amendments. The respondents who referred specifically to copy out were mostly in favour of the ‘copy-out’ approach. Two respondents raised issues of detail or interpretation on the legal drafting. Others called for the recitals to the Concession Contracts Directive to be included in transposition to address and elucidate specific issues.

53. Two respondents raised the issue that the Directives and the draft Regulations restrict concession contracts to five years, which would often be an insufficient period of time for a contractor to recoup its initial investment.

54. A number of respondents requested guidance on specific areas including the scope of a concession, how to calculate the maximum duration of the concession, and guidance covering the contents of the recitals. Another respondent requested guidance on the application of regulation 33<sup>5</sup> (electronic availability of concession documents) and regulation 36 (procedural guarantees).

55. One respondent raised a concern on the consistency between the transitional provisions in the PCR 2015 and CCS Guidance on contract modifications and requested that action be taken to provide legal certainty on this issue in any corresponding provisions in the Concession Contracts Regulations 2016 (CCR 2016).

56. A respondent also raised a question about the drafting of the regulation concerning the modification of contracts (regulation 43(1)(b)), where a similar approach was taken to the corresponding provision in the PCR 2015 (regulation 72(1)(b)). The draft Concessions provision followed the PCR provision in using “or” at the end of regulation 43(1)(b)(i). The concern was that the change from “and” to the use of “or” gives a different meaning to that in the Directive.

#### **Government Response**

57. We have considered carefully all of the drafting suggestions received, judging each one on merit and against our overarching principle of avoiding gold-plating or additional regulatory burdens. These have been taken on board where appropriate.

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<sup>5</sup> The numbering of regulations in this document refers to the numbering as it was in the draft Regulations of the consultation dated 21<sup>st</sup> August 2015

58. The recitals in EU legislation are used to provide an explanation of the reasoning behind the Articles and are not substantive provisions. Consequently they have not been included in the Regulations but will be used when drafting guidance.

59. The Directives and the draft Regulations do state that the duration of concessions shall be limited. However provision is made (Article 18 and regulation 17) for concession contracts that need to last more than five years in order to recoup investments made in operating the concession together with a return on invested capital. The texts explain that the time period of the contract is to take into consideration both initial investments and investments made during the life of the concession contract. Consequently no amendment to the draft is required.

60. To meet the request for guidance, either the guidance already published covering PCR 2015 will be augmented to include specific sections on concessions or new concession specific guidance will be drafted.

61. The position on when contract modifications come into force will be detailed in CCR 2016 and accompanying guidance.

62. We will change “or” to “and” in regulation 43(1)(b). A consistent approach will be adopted across all three procurement Regulations.

***Question 2. We invite stakeholders’ comments on the proposed regulation on Governance.***

63. There were six responses to this question.

**Summary of Consultation Returns**

64. The majority of respondents considered the drafting of regulation 64 was too broad in giving Cabinet Office too wide a scope to request information. Consequently, this scope could place onerous reporting requirements on contracting authorities and contracting entities.

65. Two respondents expressed the opposite view, that the regulation as drafted is not broad enough, and so might not be sufficient to comply with the monitoring and reporting obligations of the Directive. They felt that the regulation would not enable Cabinet Office to gather information for its own regulatory purposes.

**Government Response**

66. To ensure an effective implementation of the Directive without imposing an additional level of bureaucracy, the drafting of regulation 64 will be amended. The amended text will define the scope of the contents of the reports that the Cabinet Office may request and will reflect the requirement laid out in the Concession Contracts Directive.

***Question 3. We seek stakeholders' comments on, but strictly limited to, whether the proposed drafting of the remedies rules achieves our objective of sewing the existing remedies provisions into the new concession contract rules framework in a satisfactory way.***

67. There were three responses to this question.

### **Summary of Consultation Returns**

68. All the respondents agreed that the proposed drafting of the remedies rules met the objective of sewing the existing remedies provisions into the new concessions contract framework in a satisfactory way.

### **Government Response**

69. Following this positive response we will retain the drafting as it stands.

***Question 4. We invite comment on the cost and benefit assumptions in the Impact Assessment.***

70. There were six responses to this question.

### **Summary of Consultation Returns**

71. Some respondents commented that the assumption on the average number of service concessions per year that would now be in scope of the new rules was not entirely adequate to cater for the number of such contracts they estimated would be awarded in their sector. Estimates of the number of contracts, and monetised estimates of the costs involved, were provided. Those respondents also identified other additional costs for their sector that had not been taken into account in the IA and provided monetised estimates of those costs. Others agreed that bringing service concessions in scope would create additional procurement process costs for concession awarding bodies, although one respondent commented it was likely this change would be cost neutral.

72. The majority of respondents did not agree that savings would be delivered through increased competition created by the new rules. Some commented that sufficient cross-border interest might not be generated to deliver additional savings. Respondents from one sector said their procurements already take place in a competitive market. Another respondent commented it is current best practice to advertise concessions to optimise competition, even for service concessions where there is not a legal requirement to do so under the current procurement rules.

### **Government Response**

73. These views and additional cost estimates will be taken into account in the final IA.

***Question 5. We invite comments on whether it would be possible to monetise any of the other benefits.***

74. There were three responses to this question.

### **Summary of Consultation Returns**

75. Respondents said it would not be possible to monetise the other benefits, principally the saving in procurement process time as a result of the shorter statutory minimum time limit for suppliers to respond to adverts and submit tenders, when compared to the current rules.

### **Government Response**

76. We will reflect these views in the final IA.

***Question 6. Do stakeholders consider the new Regulations will speed up the procurement of a concessions contract? Information to support comments would be welcome.***

77. There were seven responses to this question.

### **Summary of Consultation Returns**

78. All respondents said the new Regulations will not speed up the procurement of concession contracts. Some suggested the burden of complying with a regulated process would slow down the process, while others said it would be neutral or difficult to quantify.

### **Government Response**

79. We will reflect these views in the final IA.

***Question 7. Stakeholders that currently follow the utilities sector concessions regime are invited to provide specific comments on the description of the benefits of the new Regulations as detailed in Annex C.***

80. There were five responses to this question.

### **Summary of Consultation Returns**

81. Respondents from one sector commented there would be no noticeable increase in concessions awarded on a cross-border basis, nor any improvement in bid prices, because the market in which they operate is already fully competitive. Another respondent took a different view and said there is a benefit to opening up the EU concessions market to full EU-wide competition.

## **Government Response**

82. We will reflect these views in the final IA.

***Question 8. Stakeholders are invited, as part of this consultation, to provide specific comments on the likely extent of the impact of the new procedures on the potential loss of profit and extent of familiarisation costs.***

83. There were five responses to this question.

## **Summary of Consultation Returns**

84. Respondents tended to focus on familiarisation costs and other, additional procurement process costs rather than on the impact of increased competition on bidders' profits. Some respondents identified costs for their sector that had not been taken into account in the IA and provided monetised estimates of those costs. One respondent commented that bidders will incur additional bid costs each time as concession awarding bodies will be following a more structured procurement process.

## **Government Response**

85. Respondents told us in response to other questions that there would be no benefit to concession awarding bodies from savings delivered through increased competition created by the new rules. Consequently, this change is not expected to have an impact on bidders' profits.

86. These and other views expressed, as well as the familiarisation and other additional costs identified, will be taken into account in the final IA.

***Question 9. Stakeholders are invited to comment on the assumption that there will be no more than one successful challenge to a concession every five years on the basis that there have been a low number of challenges on concessions to date.***

87. There were six responses to this question.

## **Summary of Consultation Returns**

88. One respondent agreed the number of successful challenges is likely to be low and that the new rules would not lead to an increase in the number of challenges. Others took a different view, commenting that bringing more concession contracts in scope increases the likelihood of disgruntled suppliers using the remedies provisions and exposing concession awarding bodies to additional costs. Some respondents also pointed out that additional costs will be incurred in defending challenges, regardless of the merits of the case and whether or not it proceeds to court or is ultimately successful. Other respondents identified additional remedies

costs for defending challenges and for litigation in their sector that had not been taken into account in the IA. In providing monetised estimates of these costs, those respondents took the same view that there would be at least one substantial challenge every five years.

### **Government Response**

89. These views and additional cost estimates will be taken into account in the final IA.