

Public Contracts Regulations 2015 – Overview & Key Changes



Llywodraeth Cymru
Welsh Government

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1. Overview

What are the EU Procurement Directives?

The EU Procurement Directives set out the overarching principles and legal framework for public procurement and establish procedures which must be followed for contracts above certain thresholds. Their aim is to open up the market to ensure the free movement of goods and services within the EU. The current Directives were adopted in 2004 and transposed into UK law in 2006.

What's different about these Directives?

Over the last four years, the Procurement Directives have undergone significant review and modernisation by the European Commission. The Welsh Government has worked closely with the UK Government during that time to ensure its views and those of stakeholders in Wales were fed into the process. It should be noted that Part 4 of the Regulations, which relates to the Lord Young reforms, will not apply to bodies in Wales whose functions are wholly or mainly Welsh devolved functions.

The new Directives simplify the EU procurement rules to make public procurement faster and less costly. For the public sector, this means faster procurements, less red tape and more focus on getting the right supplier. For suppliers, bidding for public contracts will be quicker, less costly and less bureaucratic, enabling suppliers to compete more effectively.

When will the new rules come into force?

The UK Government has transposed the new Directives earlier than the two year deadline so that the benefits can be realised sooner; the new rules were implemented through the Public Contract Regulations (PCR) on 26 February 2015.

What is NOT changing?

- No change in the bodies covered by the Regulations – ‘contracting authorities’
- No immediate changes to thresholds (Commission to review by 2019)
- No changes to Remedies
- As is the case currently, Authorities must comply with Treaty principles (transparency, non-discrimination, equal treatment and proportionality)

What do contracting authorities need to do?

All contracting authorities should by now have read the new PCR, undertaken an impact assessment to understand how they will affect their procurement processes and taken the necessary preparatory steps in order to ensure compliance.

2. Supporting Welsh Government Procurement Policies

The new Regulations are welcome; many of them are in line with existing Welsh Government policy and practice and will help strengthen adoption of the Wales Procurement Policy Statement. The new rules provide a framework, which enable the delivery of good procurement outcomes.

3. The Lord Young Reforms

The UK Government has confirmed that Part 4 of the Regulations, which relates to the Lord Young recommendations, will **not** apply to bodies in Wales whose functions are wholly or mainly Welsh devolved functions. So the majority of public sector bodies, apart from those such as the police and DVLA, can disregard Part 4 and be assured that use of SQuID for all value procurements and Sell2Wales will continue in Wales and be strengthened by the new procurement rules.

4. Key Changes

Below is a summary of the key changes in the Regulations:-

➤ **Promoting sustainable procurement**

Integration of environmental, social and labour requirements into public procurement procedures is a key feature of the new PCR. There is a new cross-cutting social clause based on compliance with environmental, social or labour law obligations and contracting authorities must ensure compliance with this. Social aspects can be included in award criteria and contract conditions may include economic, innovation-related, environmental, social or employment-related considerations. Life cycle costing is encouraged and the new rules allow buyers to refer to specific labels/eco-labels (Reg.43) and to consider all factors of the production process, provision or trading even where such factors do not form part of the material substance of the product (Reg.42) eg toxic chemicals, energy efficiency, fairly traded products and sustainable timber.

This will support an already strong approach to sustainable procurement in Wales and aligns with the Welsh Government's Community Benefits policy.

➤ **Open, accessible competition**

The new rules will enhance SME access to public procurement and several new provisions facilitate this. Conditions for joint bidding must be proportionate so as not to discriminate against consortia bids and turnover requirements are capped to twice contract value (Reg.58(9)). There is an 'adopt or justify approach' to lotting and reasons must be provided if not used (Reg. 46). Contracting authorities can stipulate if tenders can be submitted for one, several or all lots and limit the number of lots to be awarded to one bidder. The criteria for dealing with lots must be stated upfront in the tender documents. Sub-contracting is also now subject to specific provisions (Reg.71). Contracting authorities can ask what % of the contract will be sub-contracted, can make direct payments to sub-contractors and ask for information on sub-contractors and supply chain.

This supports key Welsh Government policies to make it easier for small and third sector firms to bid for work and direct payment of sub-contractors.

➤ **Simplifying procurement processes**

There is a new duty of 'proportionality' along with the principles of transparency, equal treatment and non-discrimination (Reg.18) which is in line with Value Wales' Supplier Qualification Information Database (SQuID) approach. The process of assessing bidders' credentials has been simplified (Reg.58) and bidders may prove their suitability, financial status and abilities with self-declarations instead of providing full documentary evidence as previously required, with only the winning bidder needing to provide full evidence. There are also new provisions on self-cleaning - bidders must have the opportunity to demonstrate any self-cleaning they have undertaken before any decisions are made on exclusion – each needs to be dealt with on a case by case basis. Exclusion periods are 5 years for mandatory offences and 3 years for discretionary.

The new rules align with the Welsh Government's SQulD (Supplier Qualification Information Database) approach and will help strengthen its use. The SQulD question set has been amended in line with the new Regulations.

European Single Procurement Document / eCertis

To note, the Commission are developing a European Single Procurement Document (ESPD) which will be available in due course (Reg.59) This is similar to SQulD, consisting of selection questions and is completed by suppliers to submit standard information. Use of SQulD will continue in Wales however suppliers must be allowed to use the ESPD to submit their selection information if they so wish. In addition, the Commission maintain a system called E-Certis - a central, on-line point where suppliers can find out the type of documents and certificates needed to bid in any EU country – its use has been delayed for the time being but it will be mandatory in due course.

➤ **Speeding up procurement**

E-procurement will gradually become mandatory and eventually e-submission of tenders and requests to participate will be mandatory (estimated October 2018 / Central Purchasing Bodies April 2017). It is important to note that from 26 February, electronic OJEU notification & electronic availability of procurement documents immediately from date of notice publication is mandatory and the URL address must be provided in notice or invitation to express interest (Reg.53). Given the increase in e-procurement, timescales for tender return and expressions of interest are reduced by around a third (Regs.26 – 32). However, the rules make it clear that these are just minimum timescales and suppliers will need sufficient time to prepare and submit their tender depending on what is being bought and the complexity of the requirement (Reg.47).

The new rules on electronic procurement will strengthen the work of the Welsh Government's eProcurement Service (ePS) and use of Sell2Wales.

➤ **Procedures**

The new PCR provides for five award procedures rather than the existing four (Reg.26-32). The open and restricted procedures remain and the new rules provide greater freedom to use competitive dialogue than the existing rules. The contribution that negotiation can make to value for money has been recognised and there is broader potential for negotiation with suppliers and service providers in certain circumstances, including where the contract is complex or cannot be purchased 'off the shelf'. Competitive procedure with negotiation (similar to the old negotiated procedure) and its use is more clearly described. The new 'Innovation Partnership' is an exciting addition to the procedures, providing greater flexibility and potential to develop and buy new innovative public services in Wales. This is crucial at a time of tighter budgets, demographic growth and fewer resources.

➤ **Supplier engagement & innovation**

The new rules recognise the benefits that can come from engaging with the market early in the procurement process and involving suppliers in the preparation of procurement exercises (Reg.40). This will hopefully break the traditional view of needing to keep suppliers at arms' length and improve supplier relationships and procurement outcomes with increased use of outcome based specifications. The new rules allow market consultation prior to procurement to assess the market's structure, capability and capacity. This will help to build market knowledge and allow effective market facilitation in strategic commissioning. However, competition must not be distorted and there are safeguards provided to address this.

This supports the principle in the Wales Procurement Policy to improve dialogue with suppliers and improve value for money by benefitting from supply chain feedback.

➤ **Changes to Services**

A new light touch regime (LTR) has been introduced for social, health & other services and the distinction between Part A and B services has been removed (Reg. 74-76). The Commission has recognised the special characteristics of social services and the importance of cultural context and sensitivity. Member States have been able to develop their own rules for the LTR which are far less stringent than EU rules and a new threshold of £560,923 (750k euros) applies. Rules are limited to advertising requirements - so a contract notice or PIN will need to be placed in OJEU – plus a contract award notice, the principles of transparency and equal treatment of bidders must be observed and time limits must be reasonable and proportionate. ‘Other services’ include legal, hotel and restaurant, postal services, security services, benefits, certain manpower and agency staff services (see Schedule 3 of PCR).

Supporting Strategic Commissioning

The new rules will help support strategic commissioners and strengthen quality of service provision. Contracting authorities may take important elements into account through award criteria (not just price) such as 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; and innovation. This should help authorities secure services according to local needs and ensure sustainability of service which is critical, with potential contract performance conditions including economic, innovation-related, environmental, social or employment-related considerations (Reg. 70).

The new lighter regime will help to strengthen service provision in Wales, providing improved flexibility so contracting authorities can select service providers that best suit their needs.

➤ **Award Criteria**

Contract award must be based on MEAT which includes price; cost (including life cycle costs); and best price/quality ratio ie VFM (Reg.67). As now, award criteria must be linked to the subject matter of the contract and the relevant weightings for each shown in the procurement documents. There are new award criteria of social and innovative characteristics and some new rules on life cycle costing are provided

➤ **Minor Changes to Rules for Frameworks**

The new Regulations make several points clear on the rules for frameworks (Reg.33) mainly in relation to transparency. Users of framework agreements must be clearly identified in the OJEU notice and where frameworks can be used by direct award or re-opening competition, the decision must be made by applying the objective criteria set out in the tender documents / framework terms. The new rules also make it clear that contracts awarded through frameworks may exceed the length of the framework itself.

➤ **Reserved Contracts**

The reserved contracting provisions in the new PCR have been extended and strengthened. Under Regulation 20, contracts can be reserved for sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers. In addition, Regulation 77 allows 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 which meet certain limited criteria.

This will provide greater opportunity to work with third sector firms and supported businesses in Wales for the delivery of public services and help to strengthen relationships.

➤ **Improving Quality of Bids / Suppliers / Providers**

There are several, welcome, new provisions which will help ensure a higher quality of bids and that we only do business with responsible and ethical suppliers/service providers. The past performance of suppliers can be taken into account and deficient suppliers can be excluded from the process. In addition, abnormally low bids can be rejected if unsatisfactory reasons are provided by suppliers (Reg. 69). The new cross-cutting social clause will ensure compliance with social and labour laws and/or international conventions and helps to address what is sometimes termed 'social dumping'. There is now legal clarity that skills and experience of service providers can be considered at award AND selection stage to increase quality of service provision.

This will strengthen Value Wales' work to date of promoting ethical and responsible procurement in Wales and use of Sustainable Risk Assessment.

➤ **Exemptions for Public-Public Contracts**

There are new rules provided, for the first time, on which contracts can be concluded between public sector bodies without applying the Regulations. This reflects the need for legal certainty on the matter and is based on European Court of Justice case law. Contracts between two public bodies can be exempt from the rules if certain conditions are met including where the 'control' lies, activities of the authorities and direct private capital – see Regulation 12 for full details.

➤ **New Reporting Requirements**

There are new reporting and documentation requirements that contracting authorities will need to comply with. For all frameworks & Dynamic Purchasing Systems (DPS) covered by the Regulations, contract authorities must complete written reports providing various tender details and decisions. Documentation must be kept for at least 3 years and must be sent to the Commission or the Crown Commercial Services upon request.

Public Sector Procurement Policy in Wales

The Welsh Government's Value Wales team leads on the development of procurement policy, guidance and tools to strengthen best practice procurement in Wales. The Procurement Route Planners, which host all Value Wales' guidance documents and tools have been updated to reflect the changes and are available at

<http://prp.wales.gov.uk/>

Queries regarding the new rules or relating to Welsh procurement policy may be directed to vwpolicy@wales.gsi.gov.uk.