

A guide to the new Public Contracts Regulations 2015



Disclaimer

This document is intended to act as a summary of the Public Contracts Regulations [February 2015]. It has been prepared to help providers to obtain an over view of the new Rules. They are a guide only. No reliance should be placed on the contents for legal or similar purposes. Before pursuing a legal challenge of any kind it is recommended that reference be made to the full Regulations which can be downloaded from.

<http://tenderingforcare.com/regulations/public-contracts-regulations/public-contracts-regulations-2015>

This Summary represents an aspect of TfC's weekly service to its Members. The purpose of the service is to ensure that providers are kept updated on:

- The latest information and announcements by government which are relevancy to health and social care tendering;
- The latest guidelines on tendering and procurement news; and
- Changes arising from recent case law.

To find out more about Membership please go to:

<http://tenderingforcare.com/membership>

For details of our weekly information service please go to:

<http://tenderingforcare.com/membership/update>

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Key terms

Candidate	economic operator that has sought an invitation or has been invited to take part in a restricted procedure, a competitive procedure with negotiation, a negotiated procedure without prior publication, a competitive dialogue or an innovation partnership;
Contract Award notice	advert giving the details of the organisation that has been awarded a contract
Contract notice	advert about a opportunity to tender for a contract
CPV	Common Procurement Vocabulary as adopted by Regulation (EC) No 2195/2002 of the European Parliament and of the Council(a) as amended from time to time;
Economic operator	any person, persons or public entity offering to supply goods, works or services
Official Journal	the Official Journal of the European Union;
Prior information notice (PIN)	An advert giving advance(early warning) notice of a tender opportunity up to 12 months in advance



Thresholds (Regulation 5)

These Regulations apply to all public procurement for contracts equal to or above the following thresholds

Public Contracts

The euro value remains constant. The conversion to GBP value takes place on 1st January of evenly numbered years. It remains constant for the two years thereafter.

	Supplies	Services	Works
Central Government Authorities	£111,676 €134,000	£111,676 €134,000	£4,322,012 €5,186,000
Other Public Sector Contracting Authorities	£172,154 €207,000	£172,154 €207,000	£4,322,012 €5,186,000
Social and Other Specific Services (previously 'Part B') The value is calculated as the total contracted value. So the total value of a framework or LOTS, over the contract period plus any stated possible extensions.	n/a	£625,050 €750,000	n/a
Subsidised Contracts	n/a	£172,514 €207,000	€5,186,000

Utilities Contracts

	Supplies	Services	Works
All Sectors	n/a	£172,514 €207,000	€5,186,000

Procedures

All contracts above the thresholds must be dealt with using a 'procedure' defined in the Regulations. The purchaser must tell you which 'procedure' is being used and this cannot be changed once the tendering process has begun.

The Regulations define all the stages of each procedure as well as minimum timescales.

The Open Procedure (Regulation 27)

This is a one-stage process. All the information is provided and any tenderer may submit a tender. There is no separate Pre Qualifying stage.

Minimum timescale, 35 days

The Restricted Procedure (Regulation 28)

This is a 2-stage process.

Stage 1 is the Pre Qualifying Questionnaire (PQQ). This is a questionnaire using mainly yes/no type questions. The minimum timescale for stage 1 is 30 days

Stage 2 is the 'Invitation to Tender' (ITT). This is usually a set of text questions for which you provide a 'method statement'. The minimum timescale for stage 2 is 30 days

The Competitive Procedure with Negotiation (Regulation 29)

This is a multi-stage procedure



Stage 1 is the Pre Qualifying Questionnaire (PQQ). This is a questionnaire using mainly yes/no type questions. The minimum timescale for stage 1 is 30 days

Stage 2 is the 'Initial Tender'. This is usually a set of text questions for which you provide a 'method statement'. The minimum timescale for stage 2 is 30 days. The 'Initial Tender' will form the basis for the subsequent negotiations.

Stage 3 is 'negotiation' the negotiation may take place in several rounds, with some candidates being removed at each round

Stage 4 is the final competitive tender

NB. Negotiation can only be used in a procedure where this has been declared by the purchaser at the outset. 'Negotiation' is normally prohibited from the procedures unless formally declared in the tender documents

The Competitive Dialogue Procedure (Regulation 30)

This is a multi-stage procedure

Stage 1 is the Pre Qualifying Questionnaire (PQQ). This is a questionnaire using mainly yes/no type questions. The minimum timescale for stage 1 is 30 days

Stage 2 is the 'dialogue'. The dialogue may take the form of written submissions, face-to-face meetings, or formal presentations. The dialogue can take place in several rounds. Candidates may be removed at each round.

Stage 3 is the 'final (competitive) tender'

Innovation partnership (Regulation 31)

This is a new procedure. The purchaser is required to identify the need for innovative products, services or works that cannot be met by purchasing products, services or works that are already available on the market."

This is a multi-stage procedure

Stage 1 is the Pre Qualifying Questionnaire (PQQ). This is a questionnaire using mainly yes/no type questions. The minimum timescale for stage 1 is 30 days

Subsequent stages involve negotiation with a final competitive tender

Negotiated Procedure without prior publication (Regulation 32)

Under certain carefully defined conditions the purchaser may negotiate with individual providers without any advertisement or competition if there is evidence of:

- No response to an advert for an 'open' or 'restricted procedure
- No suitable tenders for an 'open' or 'restricted 'procedure
- Extreme emergency (life or death)
- Copyright issues
- Purchase of antique works of art or performance

Framework Agreements (Regulation 33)

A 'framework agreement' is not a procedure. One of the procedures described above must be used in order to decide a framework agreement.



A framework agreement is not a 'contract' or even a guarantee of a contract. The 'agreement' describes how the purchaser and the providers included in the agreement will enter into 'specific 'contracts' during the life of the agreement. Providers that have not been successful in being admitted into the 'agreement' cannot be considered for the subsequent contracts.

A framework agreement can last for 4 years.

Consultation (Regulation 40)

Purchasers are allowed to conduct market consultations before advertising a tender, providing that this does not distort the subsequent competition.

Prior involvement of candidates (Regulation 41)

Providers that have been involved in drawing up the tender either through the consultation or in other ways can still be allowed to tender for the contract as long as the purchaser takes specific steps to ensure that the competition is not distorted.

If the purchaser is unable to prevent distortion then the provider must be excluded from the tender.

Technical specifications (Regulation 42)

The tender documents must include technical specifications. The technical specifications must;

- Take account of accessibility for disabled people and all users
- Allow equal access for all providers and not create obstacles to public competition
- Not favor a particular provider

Variant tenders (Regulation 45)

A purchaser may decide whether variant tenders are to be accepted or not

Lots (Regulation 46)

A purchaser can decide to split the contract into a number of lots. It is up to the purchaser how many lots. The purchaser can choose to limit the number of lots any individual provider may be awarded. The purchaser must give reasons for the decision to divide into lots or otherwise, as well as explaining how the lots will be awarded.

Time limits (Regulation 47)

Minimum time limits are given for each of the procedures. However purchasers are required to extend the minimum time limits in the following circumstances:

- Where the tender is complex
- Where the tender cannot be completed before a visit to the site
- Where a tenderer requests information in good time and this information is not supplied at least six days before the submission deadline
- Where there is a significant change to the procurement documents

The minimum time limits can also be reduced under certain conditions



Prior Information Notices (PIN Regulation 46)

Purchaser can publish their 'intention' to planned procurement, between 35 days and 12 months before the intended procurement.

If they wish purchasers may publish a prior information notice in lieu of an advert. Invitations to tender can be sent to those who have expressed interest in the PIN without further advertising.

Contract Award Notices (Regulation 50)

Notices to be sent out within 30 days of the formation of a framework. Authorities are not bound to send notices of contracts awarded under a framework agreement.

Informing candidates of the decision (Regulation 55)

Candidates must be informed immediately a decision has been made:

- To award a contract;
- Not to award a contract;
- To enter into a framework agreement;

General Principles for awarding contracts (Regulation 56)

- Where the criteria have been met;
- Where the candidate has not been excluded;

The purchaser may decide not to award a contract where the candidate does not comply with environmental, social and labour laws

Exclusions grounds (Regulation 57)**I. Mandatory exclusions**

"Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with Regulations 59, 60 and 61, or are otherwise aware that that economic operator has been convicted [by final judgment] of any of the following offences:

- Conspiracy
- Corruption
- Bribery
- Theft
- Money Laundering
- Cheating the Revenue
- Fraudulent Trading
- Tax Offences
- Conspiracy to Defraud
- Fraudulent Evasion
- Drug Trafficking
- Sexual Offences
- Destroying, Defacing, Concealing Documents
- Asylum and Immigration offences
- Offences to do with the Proceeds of Crime



2. Discretionary exclusions

Contracting authorities may exclude an economic operator from participation in a procurement procedure”

- Non compliance with environmental, social, labour law
- Bankruptcy,
- Insolvency,
- Winding Up,
- Grave professional conduct that renders integrity questionable
- Breach of tax/Social Security obligations under Judicial decision
- Agreement with others to distort competition
- Persistent /significant breach in earlier contract
- Serious misrepresentation in verifying grounds for exclusion
- Unduly influencing the tender decision
- Obtaining confidential information that gains an advantage
- Negligently providing misleading information that impacts decision concerning exclusion, selection, award

Duration of exclusions:

- 5 years for mandatory exclusions
- 3 years for discretionary exclusions

Self-Cleansing:

The purchaser may choose to overturn the exclusion if the provider can produce evidence that;

- Made compensation or undertaken to make compensation
- Clarified the facts in a comprehensive manner by cooperating with the authorities
- Taken concrete technical, organisation and personnel measure to prevent a reoccurrence

Selection criteria (Regulation 58)

The term “selection criteria” relates to the Pre Qualifying stage.

The Selection criteria are:

- Suitability to pursue a professional activity
 - Registered with certain trade bodies
- Economic and financial standing
 - Minimum turnover at least 2 times contract size
 - Satisfactory accounts and credit rating
- Technical and professional ability
 - Relevant experience
 - Suitable human and resources

Means of Proof (Regulation 60)

Purchasers can require organisations to produce proof as evidence that they should not be excluded, or that they meet the criteria for ‘selection’ (see above). The Regulations specify what can and cannot be used as proof.



Acceptable means of proof under the Regulations:

(i) For exclusion offences described in Regulation 57,

- official registers and judicial records from a competent judicial/administrative body
- certificates from a competent judicial/administrative body
- an solemn oath taken before a competent judicial/administrative body, or trade or professional body or notary.

(ii) for economic and financial standing

- appropriate statements from banks
- relevant professional risk indemnity insurance
- financial statements or extracts from financial statements where publication is a legal requirement of the country
- a statement of turnover for a maximum of three years
- in the absence of the above any other documents acceptable to the purchaser

(iii) for technical and professional ability:

- list of work carried out for maximum of 5 years (in normal circumstances) with certificate of satisfactory execution and outcomes
- list of deliverables for a maximum of 3 years (in normal circumstances) giving sums, dates, recipients
- indication of any technical bodies involved
- technical facilities and measures for ensuring quality
- supply chain management and tracking systems
- a check carried out by the purchaser or on behalf of the purchaser of the capacity and technical capabilities of the applicant
- the educational and professional qualifications of the applicant and its managerial staff providing this is not part of the award stage. NB this can only be done at one stage not at both.
- Environment management measures
- Average annual manpower and number of managerial staff for the last 3 years
- Tools, plant or technical equipment available
- The proportion of the delivery to be sub contacted
- Authenticated samples, descriptions or photographs of the product to be supplied
- Certificates confirming the technical specifications of the product to be supplied, drawn up by official quality control institutes or agencies of recognized competence.

Quality assurance standards and environmental management standards (Regulation 62)

1. Quality Assurance

If the purchaser requires certificates confirming quality standards, then they must rely on certificates based on European standards certified by accredited bodies.



The purchaser must accept equivalent certification from other member states

If the applicant is unable to get such certification within the relevant time limits for reasons beyond their control then the purchaser must accept an equivalent providing that the applicant can prove that it complies with the required quality assurance standards

2. Environment

If the purchaser requires certificates confirming environmental management systems or standards, then they must refer to:

- The Eco Management Audit Scheme of the European Union;
- Other environmental management systems recognized by Article 45 of Regulation (EC) No 1221/2009(a);
- Other environmental management standards based on European or international standards by accredited bodies

The purchaser must accept equivalent certification from other member states

If the applicant has ‘demonstrably’ no access to the certification described above, or unable to get such certification within the relevant time limits for reasons beyond their control then the purchaser must accept an equivalent providing that the applicant can prove that it complies with the required environmental management standards

Contract Award Criteria (Regulation 67)

Contracts must be awarded based on “most economically advantageous tender” (MEAT) criteria.

i) **Cost criteria:**

- Whole life cycle costing (see below)
- Price/quality ratio
- Fixed price (competing on quality only)

ii) **Quality criteria:**

- technical merit,
- aesthetic and functional characteristics, accessibility, design for all users,
- social,
- environmental
- innovative characteristics
- trading and its conditions;
- qualifications and experience of staff
- after sales service
- delivery conditions
- technical assistance

Contract award criteria must ensure competition

Contract award criteria must be accompanied by specifications that allow the tender to be effectively evaluated to assess how well it meets the award criteria.



The purchaser must specify in the tender documents any weightings it will apply to the criteria “even where this is identified on the basis of price alone”

Life Cycle costing (Regulation 68)

Purchaser can choose to assess costs using a life cycle approach. In such cases they must declare this in the tender documents and specify:

- the data they require from the tenderer
- the method they will use to assess the data

Life cycle costs comprise the following:

- i) costs borne by the purchaser or other users
 - acquisition costs
 - costs of usage (energy and other resources)
 - maintenance costs
 - end of life costs (collection, recycling)
- ii) Environmental cost (greenhouse gasses. Climate change, other emissions)

Abnormally low tenders (Regulation 69)

Where an abnormally low tender price is submitted, the purchaser must require an explanation from the tenderer. The purchaser may reject and abnormally low tenders under the following circumstances:

- the explanation given does not satisfactorily explain the low price
- the price is low because the tender does not fulfill legal obligations
- the price is low as a result of ‘State Aid’

Award of contracts for social and other specific services (Regulation 74)

Public contracts for social and other specific services listed in Schedule 3 shall be awarded in accordance with this Section.

The CPV codes that apply are:

75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000- 7, 98133000-4, and 98133110-8.

Principles of awarding contracts (Regulation 76)

Contracting authorities may decide on the procedures to be used when tendering for contracts covered by the relevant CPV codes (above).

However the procedures shall be at least sufficient to ensure compliance with the principles of transparency and equal treatment of economic operators.

In their award procedure contracting authorities may take into account any relevant considerations, including:

- the need to ensure 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.



Reserved contracts (Regulation 77)

Contracts falling within certain CPV codes specified in the Regulations can be 'reserved' for organisations meeting the following criteria:

- The objectives of the organisation are linked to the contract
- Profits are reinvested to achieve the organisations objectives
- Management structures are based on employee ownership or participation or require the active participation of employees, users , stakeholders
- The organisation has not held a contract for these services in the last three years
- The contact cannot be awarded for more than three years

Notice of decisions (Regulation 86)

The purchaser must send a notice giving information of a decision to award a contract or conclude a framework all:

- 'Candidates' (applicants that were rejected in earlier rounds before the invitation to tender)
- Tenderers (organisations that submitted a tender)

The notice 'must' contain the following:

- Reasons for the decision
- Characteristics and relative advantages of the successful tenders
- The scores of the successful tenderer and the scores of the applicant
- The name of the successful tenderer
- Details about the 'standstill period' (see below)
- Details of failure to meet technical specifications, compliance with standards required

Notice to candidates 'must' contain all the information above with the exclusion of the words "relative advantage"

This Regulation does not apply if:

- It is a below threshold contract and there was no contract notice
- There is only one tenderer
- A contract is awarded under a framework
- Where it is against the public interest
- Where it would the commercial interests of a supplier
- Where it might prejudice fair competition

Standstill period (Regulation 87)

The 'standstill period' must last for a minimum of 10 days if the notice described above was sent electronically or by fax.

If the notice was sent b other means then the standstill period must last for either a minimum of 15 days from when the notice was sent, or 10 days from the time that the last tenderer received the notice.



During the standstill period the purchaser must not enter into a contract or conclude a framework agreement.

Applying through the Courts (Regulation 91)

A breach of duty required owed by purchasers to comply with procurement legislation is actionable on the part of tenderers if it results in risk of or actual loss, or damage.

Time limits for court proceedings (Regulation 92)

Proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

The proceedings are judged to have started when the claim form is issued.

Grounds for ineffectiveness (Regulation 99)

There are three grounds for 'ineffectiveness':

- a. 1) Failure to publish a contract notice where a contract notice was required by the Regulations
- a. 2) Breaches of the Regulations concerning the standstill period
- a. 3) Breaches of the Regulations about award of contracts under frameworks
- b) breaches of the Regulations about award of contracts under dynamic purchasing systems
- c) the estimated contract value is equal to or greater than the threshold

Below Threshold Procurement (Regulation 109)

This Regulation does not apply to:

- NHS contracts
- Central government contracts below £10,000 (net of VAT)
- Local government contracts below £25,000 (net of VAT)
- Contracts equal to or above the threshold

Advertising in 'Contracts Finder' (Regulation 110)

Contracts that are below the threshold are required to be advertised in contracts finder "regardless of what other means it uses to advertise the opportunity"

The advert must be placed in contracts finder within 24 hours of the time when the opportunity is advertised in any other way.

<https://www.gov.uk/contracts-finder>

Assessing Suitability (Regulation 110)

Purchasers are not allowed to include a 'pre-qualification stage in below threshold procurements.

A pre-qualifying stage is defined in the Regulations as a stage where the purchaser assesses the suitability of a tenderer with the intention of reducing the number that are allowed to proceed to the next stage of the procurement.



However a purchaser can ask a tenderer 'suitability questions' to assess whether they

- meet the minimum standards of:
- suitability
- Capability
- Legal status
- Financial standing

The 'suitability questions must be:

- Relevant to the procurement in question
- proportionate



About Tendering for Care

Tendering for Care (TfC) is the trading name of a suite of support services which have been developed by Project Development and Support Ltd. The Company was incorporated in 1998 to help health and social care charities who wished to seek funding from European, Lottery and similar sources.

Tendering for Care held its first training courses in tendering during the summer of 2005. It has continued to provide these and a wide range of tendering support services since that time.

TfC has been designed to meet the needs of providers of all types of health, medical and social care service providers as well as housing associations and RSLs when tendering or re-tendering for public sector contracts. Those companies benefitting from the support and/or the training which TfC offers, encompasses organisations from very small to the largest health and care providers in the country.

We also provide training and support to the public sector - the "purchasers". This includes managing the public procurement process to ensure Regulatory compliance; providing training courses for Commissioners; and participating in tender appraisal.

Customers can purchase services on a one-off basis

Alternatively there is an option to become a Member of TfC based on an annual Subscription. Membership offers a Menu of Benefits from which the customer may select the most appropriate for their organisation. Membership can be cost-effective solution to securing professional help with tendering as substantial discounts are available.

Mission

To build the capacity of companies and provider organisations in the HEALTH, MEDICAL, SOCIAL CARE, HOUSING and SUPPORT SECTORS to tender effectively for contracts to deliver services on behalf of public sector purchasers. These may be Local Authorities, Central Government Departments, Government Agencies, CCGs, the NHS, etc.

How we do this

By providing a wide range of information, training and support services, on a menu basis, each service being capable of being tailored to the needs of companies, organisations and individuals.

TfC can help you to write successful tenders.

We can work with you to ensure that your organisation, including its policies and systems, is best placed to provide all of the evidence needed to score well. Customers who use our approach consistently score within the range 90% to 97%. Some have even achieved winning scores of 99%. Successful tenderers need to perform at this level to be sure of success. If necessary, we can help you to form and to tender successfully as a consortium or SPV.



Our services and what our customers say about us

All of the support and resources your organisation needs to be awarded contracts is available in one place either on a membership/subscription or one off basis.

<http://tenderingforcare.com/membership>

I do not know anywhere else where all of the information and support I need to tender successfully is available in one place. The fees we pay are out of all proportion to the huge value of the benefits we receive. Thank you. [member comment 09.09.2015]

Tender preparation – but expect to be asked to provide a lot of detail about your organisation.

<http://tenderingforcare.com/membership/preparation>

We are delighted with the result which will mean that we can expand into new areas – it was a lot of work but well worth it [customer comment following the award of a contract as a result of a tender we had prepared]

Tendering review and support service – you prepare the tender with our intensive help and guidance

<http://tenderingforcare.com/membership/review>

Thank you so much for your support and guidance, we couldn't have done it without you!! [response from a satisfied customer 20.09.2015]

Training for staff – provided at one of our open courses or for your staff or membership delivered “in-house” website

<http://www.tenderingforcare.com/training>

Made a dull topic interesting and accessible in a way which was both good and engaging. The course tutor was great; he explained situations in easy to digest language. He was clearly up to speed on the new Directive and Rules and the current tendering environment he was very knowledgeable. The course met all of my learning needs in this area admirably [Comment from one of over 7,000 people trained in the past six years]

Information and resources – all the information you need to tender successfully, updated weekly. Includes inside information about tender scoring; updates as the new Regulations are implemented; case law which changes what is and is not legal and therefore what purchasers can and cannot do

<http://tenderingforcare.com/membership/update>

Your excellent service saves me so much time and was the reason for me asking you about our recent successful challenge. I would not have known that a challenge was possible without your information. I would just have very sadly accepted the loss of a long standing contract and some loyal staff .[A satisfied Member following a successful challenge to a contract award resulting in the organisation finally being awarded the contract]

All funding, including tendering is about change. Purchasers specify what they want to buy. To be awarded the contract you must meet their requirements – Organisational change is an essential component of successful tendering. Does your organisation and its policies meet current requirements? Our organisation review service will tell you.

<http://tenderingforcare.com/membership/tendering-support-services/assessment-of-capacity-and-capability>

We implemented the changes you recommended following our review and are amazed how much easier it is to tender successfully. You reached areas we had not even considered [Comment form a customer following a due diligence and policy review]



TfC works solely with Health and Social Care providers and offers:
Help with tender preparation;
All the help needed for successful tendering available in one place:
Information on tenders and tendering;
Help with effective action and what can be done when things go wrong
Essential training and guidance for senior managers, and those who prepare tenders.

To discuss your requirements

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