As with the predecessor 2006 Public Contracts Regulations which they replace, we anticipate that the 2015 Regulations will take some time to bed in, particularly in respect of some of the new concepts and approaches discussed below. The interpretation of key provisions is likely to evolve over time, not least in light of the various guidance notes which the Cabinet Office intends to publish and no doubt, in due course, case law from the Courts.

**Which Public Contracts Regulations apply - 2015 or 2006?**

The Public Contracts Regulations 2015 apply to all new tender processes started on or after 26 February 2015. These changes apply to England, Wales and Northern Ireland only. New Scottish Regulations are expected to follow later this year.

You should therefore expect to be following the 2015 Regulations if:

- you are responding to a contract notice with a dispatch date of 26 February 2015 or later (see foot of the contract notice for this date)
- you are responding to any other form of advertisement published by an authority on or after 26 February 2015, e.g. an advertisement on the authority’s website or on Contracts Finder for a below threshold contract
- you have received a direct approach from a contracting authority in respect of a proposed public contract on or after this date
- you make an unsolicited approach to an authority regarding a potential public contract on or after 26 February 2015.

Otherwise, you will still be operating in the familiar territory of the 2006 Regulations. This includes if you are bidding for call-off contracts under a framework agreement set up before 26 February 2015.

Based on our experience from the implementation of the 2006 Regulations, we would anticipate that some authorities may start to rely on flexibilities introduced in the 2015 Regulations even if running a tender process started before 26 February 2015. This may well be clearly indicated by the authority, but if you are in any doubt, we would recommend seeking clarification from the authority in question in order to ensure you are clear on the ground rules for the competition.

**When does a contracting authority have to go to market?**

At a high level the scope of the new 2015 Regulations remain the same as the 2006 Regulations. A contracting authority is only obliged to go to market (by which we mean to publish a contract notice) if it is seeking offers in respect of a public contracts for works, goods or services, the value of which is expected to equal or exceed the relevant financial threshold. Financial thresholds are largely unchanged under the new Regulations. Certain general exclusions from the application of the 2015 Regulations (e.g. acquisition of land or existing buildings on land, employment contracts, etc) are also retained.

The 2015 Regulations contain a number of important clarifications however and “codify” certain key principles arising out of EU case law, all of which go to elaborating on the scope of the Regulations as readers know them. These include:

- **Important clarification for developers:** it is essential to know when a development arrangement might trigger the Regulations and in broad terms, this will hang on whether the various elements of the definition of a “public works contract” are present. The 2015 Regulations reflect the requirement which has arisen out of EU case law for the authority to have a “decisive influence” on the type or design of the work (C-451/08, Helmut Muller). Further guidance on this point can also be found in the Recitals to Directive 2014/24/EU.

- **Understanding when an authority can keep services “in-house”:** the Regulations confirm the “Teckal” line of case law that a contracting authority can contract directly with an entity, which to all intents and purposes operates like one of its in-house departments, without undertaking a procurement process. This is only the case however where:
  - the authority exercises over that entity a control similar to that which it exercises over its own departments;
  - the entity carries out more than 80% of its activities with the controlling authority; and
  - there is no private sector capital participation in the controlled entity.

This short guide provides an overview of the new Public Contracts Regulations 2015.

As readers will be aware, these Regulations implement the new EU Public Sector Procurement Directive 2014/24/EU. The new Regulations essentially “copy out” the Articles of the EU Directive, a different approach to that adopted by the UK when it transposed the last (2004) EU Public Sector Procurement Directive. The Regulations make plain that expressions used in the 2015 Regulations will, for the most part, have the same meaning as they bear in the new Directive. So readers are well advised to have the new Directive, as well as the Regulations, close to hand.

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This exemption is typically relied on by local authorities who set up wholly owned subsidiaries. There is also scope under the exemption for the controlled entity to procure services from its parent authority without the need to go to market (so-called “reverse Teckal”)

• Being aware when authorities can work together without prior competition:
  readers may be aware that there is no general exemption under public procurement law for authority to authority contracting simply because the contracting parties are themselves contracting authorities. EU case law (the “Hamburg Waste” decision) has however established a certain situation of “inter-authority co-operation” where, in the right circumstances, authorities can come together without having first gone out to the market. This requires the following conditions to be met:
  - two or more contracting authorities come together to cooperate to deliver a public service they are charged with delivering with a view to achieving objectives they have in common
  - the co-operation is implemented in a manner governed solely by considerations relating to the public interest
  - the participating authorities perform less than 20% of the activities covered by the co-operation on the open market.

Restricted competitions for “mutual-type” organisations
There is also an entirely new provision in the 2015 Regulations which enables authorities to limit competitions for certain types of contracts to “mutual-type” organisations, provided the contracts are for specific categories of services (e.g. health, housing, cultural, etc.) and the contracts are for no more than three years. In this case a contracting authority must still go to market but it may restrict competition to these types of organisations only. If you are an organisation that could potentially benefit from this new provision, you would be well advised to verify that your organisation meets the qualifying conditions to be able to participate in one of these limited competitions. If you are not, it may also still be important to understand these conditions in order to ensure that you are not being unfairly locked out of a contract opportunity. The qualifying conditions are as follows:
  • the organisation’s objective must be the pursuit of a public service mission linked to the same type of services contracts described above
  • any reinvestment of profits must be to further the organisation’s public service mission and any distribution of profits based on participatory considerations
  • the organisation must be employee-owned or require active employee participation
  • the organisation must not have been awarded a contract under this “carve out” within the last three years.

What is the new “light touch regime” and what does it mean for you?
The “light touch regime” is a new regime that will apply to the award of certain types of services contracts (generally for “services to the person”) where the value of those services equals or exceeds the financial threshold of €750,000 (approximately £544,000).

It takes over in part from where the Part B services regime left off. Under the 2015 Regulations the Part A/Part B services distinction has been removed, with one limited exception. Now services are either fully regulated under the 2015 Regulations or fall within and are regulated by the new “light touch regime”. The limited exception is for healthcare services commissioned by the NHS where those procurements are also subject to the NHS (Procurement, Patient Choice and Competition) (No 2) Regulations 2013. In that instance the Part B services rules will continue pending a delayed transition to the “light touch regime” on 18 April 2016.

If you provide any of the following services, you are likely to need to get to grips with the “light touch regime” sooner rather than later: health, social and related services; benefit services; legal services; prison related services, security services and postal services.

The good news is that procurements for “light touch services” are likely to be fairly flexible as the requirements associated with running a tender process for these services are minimal:
  • a contract notice must be published or a prior information notice used as a call for competition (the circumstances for doing so are prescribed)
  • the award procedure must comply with principles of equal treatment and transparency
  • the contract must be awarded in line with the advertised procedure
  • time limits must be reasonable and proportionate.
Flexibility and limited regulation could potentially create uncertainty or lead to situations (as happened with Part B services procurements) where authorities base tender processes on more fully regulated procedures (e.g. a restricted procedure). It will be interesting to see how this regime evolves in practice.

Are there any changes to the usual tender procedures used by contracting authorities?
Yes. These changes can be summarised as follows:
  • accelerated forms of the open procedure and competitive procedure with negotiation will be available in addition to the accelerated form of the restricted procedure which was already available under the 2006 Regulations. In all cases an authority may rely on this expedited procedure only in situations of urgency that it can duly substantiate. It will have to give reasons for relying on this quicker procedure in the contract notice
  • minimum time limits are generally shorter across all of the procedures. For example, under the open procedure the quickest you could invite tenders back following despatch of a contract
A Short Guide to: The New Public Contracts Regulations 2015

From a Bidder’s Perspective

notice was 40 days. That period is now 30 days under the 2015 Regulations. Under the restricted procedure the shortest possible timeframe (return of expressions of interest plus return of tenders) was 65 days. That period has been reduced to 55 days under the 2015 Regulations

- the grounds for use of the competitive dialogue or competitive procedure with negotiation have been aligned and, arguably, widened. On this basis the 2015 Regulations appear to put these two procedures on an even footing. As such, it will be interesting to see whether there is renewed take up of the competitive procedure with negotiation compared to the competitive dialogue

- calls for competition using prior information notices (rather than contract notices) will be possible for local authorities and other non-Central Government entities adopting restricted procedures or competitive procedures with negotiation. Bidders should therefore widen their searches for contract opportunities to cover prior information notices as well as contract notices

- greater scope to negotiate post-tender under the competitive dialogue. If you are in the running at the final tenders stage, an authority may clarify, specify and “optimise” (as opposed to “fine-tune”) your final tender. If you are appointed preferred bidder, you are now permitted under the 2015 Regulations to engage in post-tender negotiations within certain parameters. Arguably these changes are positive for bidders and may create greater opportunity for discussion with the authority in the latter stages of the competitive dialogue process although, once again, it will be interesting to see how this develops in practice.

What are innovation partnerships?
Innovation partnerships are a completely new procedure introduced in the 2015 Regulations. This is a new route to market for authorities and sits alongside the usual tender procedures mentioned above, i.e. open procedure, restricted procedure, competitive dialogue, competitive procedure with negotiation (the negotiated procedure without prior publication of a contract notice is also still available).

They are intended to enable long-term working arrangements (a partnering type arrangement as opposed to a legal partnership) between the public and the private sector to develop an “innovative” good, work or service, which the public sector subsequently purchases. What counts as innovative is set out in the Regulations but may include a new or significantly new product such as a new construction process or marketing method.

Innovative partnerships are a potentially good talking point for bidders when engaging with authorities but bidders will clearly need to be careful about protecting any confidential information and intellectual property rights. There are some limited rules in these areas in the 2015 Regulations.

The procedure for the award of an innovation partnership is based on the competitive procedure with negotiation which may provide some degree of familiarity in this unchartered territory. There are some additional rules which may assist bidders too, such as the obligation on authorities to be clear on the minimum requirements that bidders must meet when submitting high level proposals to deliver the innovative product sought and for these minimum requirements not to be varied in negotiations with bidders.

Many suppliers are asking what innovation partnerships might be suitable for. They are clearly intended by the EU as a basis for addressing EU societal, environmental and economic goals. Could they ever become a norm for more day-to-day procurements here in the UK? This would seem unlikely but not impossible: unlikely in view of additional constraints on how innovation partnerships must be structured and operated laid down in the 2015 Regulations; but not impossible given that an innovative product need not be “new” but rather “significantly improved”.

Will you still be vetted in the same way at the pre-qualification stage?
Bidders can expect still to have to complete a pre-qualification questionnaire (PQQ) in the near future, asking questions related to company standing, previous experience, etc. However, bidders should also be prepared for the arrival of the new European Single Procurement Document (ESPD) which will replace the PQQ and become an EU standard. The ESPD will ask similar questions to those contained in the PQQ but will (like the 2015 Regulations) contain more EU, than UK, speak. The idea behind the ESPD is that bidders will be able to complete this document once and rely on it as preliminary evidence of meeting various pre-qualification standards, thus saving on the time and effort needed to repeatedly complete PQQs. Whilst this is the intended outcome, we also anticipate a certain amount of tailoring of this document by individual authorities.

Even before the introduction of the ESPD however, bidders will need to be ready to answer new PQQ questions introduced by the 2015 Regulations. In particular, bidders can expect to see an updated list of mandatory and discretionary exclusion grounds relating to amongst other things, child trafficking offences and non-payment of taxes (mandatory exclusion) and conflicts of interest and collusion (discretionary exclusion).

Bidders would be advised to verify in advance of taking part in any tender process under the 2015 Regulations that their organisation does not meet any of the mandatory or discretionary grounds for exclusion. If there is a risk that they could do, then they should consider whether they could avail themselves of the new self-cleaning mechanism introduced under the 2015 Regulations. This mechanism allows bidders the opportunity to make the case why, despite satisfying a specific ground, they ought not to be excluded from the tender process. The case should be backed by evidence of active collaboration with authorities, organisational measures taken to address the misconduct, etc. Self-cleaning will be vital for affected organisations in order to ensure they are not debarred from bidding for public contracts for five years (mandatory offence) or three years (discretionary offence).
Bidders should also be aware of certain new rules in the 2015 Regulations regarding what authorities may ask of them and the transparency authorities must give to bidders at the pre-qualification stage of the process. For example:

- a requirement that generally authorities may not set a minimum annual turnover requirement that exceeds two times the estimated contract value
- authorities must state the methods and criteria for determining ratios (e.g. assets and liabilities) applicable to an organisation
- authorities may seek confirmation from you that none of your sub-contractors fall within any of the mandatory or discretionary grounds for exclusion.

Are you still entitled to the same degree of transparency on tender evaluation?

Yes. Authorities are still obliged to disclose the criteria on which they are relying to determine the most economically advantageous tender (MEAT) and any associated weightings or order of priority. Under the 2015 Regulations all contract awards must be based on the MEAT; lowest price can no longer be used as the headline award criteria. Case law regarding disclosure of sub-criteria, weightings and evaluation methodology will continue to apply as the 2015 Regulations do not go into this further level of detail.

A few additional points worth noting for bidders in relation to tender evaluation under the 2015 Regulations:

- Use of life-cycle costing is promoted (but not mandated) in order to encourage authorities to factor in internal costs such as energy consumption, end of life costs, etc associated with a particular contract
- the Regulations legitimise evaluation of the qualifications and experience of staff at award where the quality of the staff assigned to a contract may affect contract delivery
- authorities are obliged to take steps to verify the accuracy of information provided by a bidder if it has any doubts as to its veracity (e.g. the ability of a bidder to meet an authority’s specification or delivery date).

Contract management

Contract variation

Bidders will be familiar from their own change control discussions with authorities that procurement law is a key consideration within these discussions and that procurement law so regulates more than just the initial tender process. The 2015 Regulations cement this understanding and spell out more precisely when a change to a previously tendered contract will give rise to the need for an authority to go back out to the market. The Regulations do this by defining limited circumstances where a contract may be varied without the need to run a new procurement process, including where:

- the change in question is low value/below threshold
- the change (regardless of its monetary value) has already been provided for in the initial procurement documents in “clear, precise and unequivocal” review clauses provided that (i) such clauses state the scope/nature of the possible change and the conditions under which they may be used and (ii) the change does not alter the overall nature of the contract
- the change involves the provision of additional works/services/supplies that have become necessary and were not provided for in the initial procurement documents, where the initial contractor cannot be changed for economic or technical reasons or without significant inconvenience to the authority, and provided that any increase in price is not more than 50% of the original contract value. Bidders should note that the 50% limitation applies to each successive modification (potentially very generous as a result) provided it is not relied on to circumvent the Regulations
- the change is not “substantial”, this being defined with reference to the familiar “materiality” tests established in the 2008 EU Pressetext judgment.

Of particular interest to suppliers looking to acquire new businesses or to restructure is the new provision in the 2015 Regulations that allows a new supplier to step into the shoes of the originally appointed supplier, in whole or in part, following corporate restructuring such as a takeover or insolvency, provided certain conditions are satisfied.

Contract termination

The 2015 Regulations enable an authority to terminate a public contract in three situations and, even if these situations are not set out in a contract, these rights to terminate will be implied into the contract. If bidders do not see these three new grounds for termination in public contracts for which they are bidding, they would be advised to clarify the authority’s intention and the terms associated with their application to avoid any surprises further down the track.

The three situations are:

- there is a substantial modification as defined in the 2015 Regulations
- at the time of contract award the supplier met one of the grounds for mandatory exclusion under the Regulations and should therefore have been excluded
- the contract should not have been awarded to the supplier in view of a serious infringement of Directive 2014/24/EU that has been declared as such by the Court of Justice of the European Union.

Bidders should look out for the guidance promised by the Cabinet Office in this area, which will include model contract clauses. If bidders have to deal with this issue in the meantime with authorities, they would be well advised to clarify the notice periods associated with the exercise of these rights of termination, the impact of termination in these circumstances and whether an authority would still look to exercise its right to terminate in the case of a substantial modification proposed by the authority, rather than the bidder.
Greater transparency of contract award decisions and tender processes

In view of new, more substantial reporting and recording obligations on authorities under the 2015 Regulations, it is worth noting the potential information that authorities ought to have and that therefore could be requested by third parties, whether under the Regulations themselves or the Freedom of Information Act. This information should include:

- copies of all concluded contracts where the contract value exceeds €1 million (supplies or services) or €10 million (works). Contracts must be retained at least for the duration of the contract;
- a report on every contract, framework agreement or dynamic purchasing system to which the 2015 Regulations apply in their entirety containing information such as the contract value, the names of bidders rejected at the pre-qualification stage and the reasons for their rejection and any conflicts of interest identified and how they were addressed.

Additional information should be obtainable in light of the Lord Young reforms set out in Part 4 of the Regulations, including statistics at the end of every financial year on how far an authority has complied with the new obligation to pay contractors within 30 days of a valid and undisputed invoice being raised.

In light of this, bidders should be aware that it is now more likely that information they provide to contracting authorities could later become available within the public domain.

Have my potential remedies changed under the 2015 Regulations?

No. Your rights to information during the standstill period and the availability of remedies (pre and post contract award) have not changed under the 2015 Regulations. These standstill/remedies rules continue to apply to contracts and framework agreements fully regulated by the 2015 Regulations, including contracts subject to the "light touch regime". As with most changes of law, the new 2015 Regulations open up potentially new grounds for challenge, such as whether an authority’s grounds for not dividing a contract into lots are justified in the circumstances.

It is perhaps not surprising that the standstill/remedies rules do not extend to any authority failure to comply with the new provisions in Part 4 of the Regulations which implement UK specific policy on making public procurement more accessible to SMEs (the Lord Young reforms; see below for further information). You could consider raising a challenge by way of a judicial review however.

How do the new Regulations help SMEs?

Making public procurement more SME friendly was high on the EU’s agenda, as well as that of the UK Government. For that reason there is promotion of division of contracts into lots (albeit this is not mandated at UK level), early market engagement, more information on sub-contracting arrangements as well as a great push for fully electronic procurement processes (by October 2018).

At a UK level, Lord Young led a review on how to make public procurement more accessible to SMEs. The results of that review (“the Lord Young reforms”) are set out in Part 4 of the 2015 Regulations. This Part is therefore UK specific and does not implement any part of the new EU Public Sector Procurement Directive 2014/24/EU. The principle which underpins these UK specific reforms is greater transparency - of contract opportunities and contract award decisions. Suppliers can expect the following going forward:

- advertisement of contract opportunities: publication of contract notices (above threshold contracts)/information on contract opportunities (below threshold contracts) on Contracts Finder within 24 hours of when the authority is entitled to publish the notice at a national level/the time the authority first advertises the opportunity in any other way
- pre-qualification stage: requirement on authorities to comply with Cabinet Office guidance on qualitative selection at the pre-qualification stage of the tender process, including avoiding burdensome and disproportionate questions (above threshold contracts)/no pre-qualification stage if contract below €134,000 (central Government contracts) or €207,000 (sub-central Government contracts)
- contract award decisions: publication of certain contract award information on Contracts Finder within a reasonable time (note this obligation extends to the award of call-off contracts under framework agreements, where the value of the call-off contract is, in and of itself, above threshold)
- prompt payment terms in every public contract (whether or not subject to the 2015 Regulations): provisions stipulating that the authority will pay the contractor no later than 30 days from the date on which the invoice if “valid and undisputed” (a concept to be elaborated upon by the Cabinet Office in guidance in due course). This obligation must be flowed down to sub-contractors also.

Note: These provisions will not apply in Northern Ireland as it was felt that many of the principles were already addressed through Northern Ireland’s Procurement Policy. For example, there has been, for a number of years a commitment to paying invoices within just 10 days.

Similarly these provisions will not extend to most Welsh public sector bodies. The scope and extent of the Lord Young reforms contained in Part 4 of the 2015 Regulations are confirmed in Part 1 of the 2015 Regulations which provides that Part 4 will not apply to authorities whose functions are wholly or mainly Northern Ireland or Welsh devolved functions.
Rounding up
We are already working with a wide range of contractors, suppliers, service providers and intermediaries to help them adjust to the new 2015 Regulations. We also understand that a number of suppliers need to understand public procurement law from the perspective not just of the bidder but also of the contracting authority, if they are instructed as agent to run tender processes on behalf of an authority. Those suppliers may also find useful the short guide to the new 2015 Regulations we prepared for contracting authorities.

We are also running a series of seminars on the changes under the 2015 Regulations in London, Birmingham and Belfast.

If we can be of assistance, please do not hesitate to contact our Public Procurement Team. The main point of contact is Stuart Cairns, the Head of the Public Procurement Team:

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