



Implementation of the Young reforms into the Public Contracts Regulations 2015

In this briefing, we take a look at measures introduced in the Public Contracts Regulations 2015 to extend certain of the procurement rules to below threshold contracts and to make it easier for SMEs to bid for tenders.

The Young Report

The introduction of the new rules to below threshold contracts follows the 2013 Young Report on “Growing Your Business”.

The purpose of the Young Report was to identify ways of helping champion small businesses and encourage the growth of SMEs and ‘micro-firms’, recognising the important contribution such businesses make to the economy.

It found that there was a comparatively low market share held by SMEs across public sector procurement, together with the perception that such public sector contracts are difficult for SMEs to win. It recommended the creation of a set of “single market principles” applied throughout the public sector irrespective of value, which all suppliers can expect when doing business with the public sector.

Following lengthy consultation, a number of Lord Young’s recommendations were accepted and implemented in Part 4 of the Public Contract Regulations 2015. We look at the key changes below.

Unlike most of the Public Contracts Regulations 2015, which is a copy through of the EU public sector directive 2014/24, these changes derive from UK law.

KEY CHANGES

Requirement to advertise contract opportunities and contract awards on Contracts Finder

One of the most important changes is to the use of Contracts Finder, a government tool for advertising contract opportunities across the public sector.

A contracting authority must advertise new contract opportunities on Contracts Finder¹, unless the value is below

£10,000 (for central government) or £25,000 (for all other authorities, including NHS Trusts). A change to the final form of Regulations introduced a time limit for publication within **24** hours of the opportunity being advertised elsewhere.

Key points:

- (a) **Legal requirement:** The requirement to advertise is now a legal requirement, rather than Cabinet Office guidance; and
- (b) **Wider scope:** The Cabinet Office guidance only applied to central government departments. The scope has been extended to cover all public sector contracting authorities.

Contract award information must also be placed on Contracts Finder within a reasonable time. A number of new exemptions have been introduced as a result of the consultation on the draft Regulations, covering situations where such publication would be contrary to public interest, prejudice the commercial interests of one of the parties or prejudice fair competition between economic operators.

Comment

Clarification has been provided on what constitutes a “contract award opportunity”. This includes a PIN and call for competition for framework contracts but importantly does not include call off contracts under framework agreements, meaning that it will be difficult for SMEs to monitor the proper use of call off contracts.

Contracting authorities should take note of the short timescales for advertisement of contract opportunities and implement appropriate processes to ensure compliance, for example, an alert system when an advert is published elsewhere and allocation of appropriate staff to monitor compliance.

Further Cabinet office guidance can be found at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/406820/Guidance_on_the_new_transparency_requirements_for_publishing_on_contracts_finder.pdf

¹<https://www.gov.uk/contracts-finder>

Abolition of PQQ requirements below EU threshold:

Current OJEU thresholds

PUBLIC CONTRACT REGULATIONS 2015	
	Threshold (from 01.01.2014)
Public supply and service contracts – (Central government)	£111,676
Public supply and service contracts – (other contracting authorities)	£172,514
Works contracts, works concessions (all contracting authorities)	£4,322,012

The use of prequalification questionnaires have often been criticised for imposing unreasonably high minimum standards and administrative burdens on bidders which can have the effect of disadvantaging SMEs.

Above threshold contracts: Cabinet Office has mandated the use of a standard set of questions. Failure to use the standard questions without justification is reportable.

Below threshold contracts: Contracting will no longer be permitted to use two stage tender processes or prequalification questionnaires to down-select bidders. However, authorities may still ask questions about a potential supplier (in the manner of PQQ-type questions), for example in relation to technical and professional ability, provided that they are relevant to the subject matter of the contract, proportionate and justifiable.

Cabinet Office guidance can be found at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/409424/4279-15_GN_PQQ_Guidance.pdf

Comment

Whilst the aim of the changes is to streamline the tender process for both bidders and contracting authorities, one of the side effects of the changes may in fact be an increase in the administrative burden upon contracting authorities, as contracting authorities may find it more difficult to reduce the number of bidders early on. Contracting authorities entering into innovative or complex procurements should seek further advice, as the standard set of questions may need to be supplemented to ensure capability to meet complex requirements.

Prompt payment of suppliers

All public contracts will now have to contain wording that provides for all valid undisputed invoices to be paid by the contracting authority within 30 days. Certain contracting authorities will be exempt from the rules.

Every financial year, authorities must publish internet statistics revealing the proportion of invoices paid in accordance with the above requirement.

Cabinet Office guidance can be found at:

<https://www.gov.uk/government/publications/public-contracts-regulations-2015-paying-invoices-in-30-days-down-the-supply-chain>

Comment

Contracting authorities should review their standard terms and conditions and if necessary update them to accommodate the change. Each member of the supply chain must include similar provisions in their contracts.

The need to include prompt payment terms may go some way to address the cashflow issues that SMEs grapple with when faced with lengthy payment terms under current contracts. However, the new policy will only help resolve cashflow issues for SMEs if they are implemented and enforced effectively.

Conclusion

Whilst these Regulations are likely to be welcomed by SMEs, contracting authorities will have much greater transparency and reporting obligations under the new regime and potentially a greater administrative burden in evaluating tenders, due to increased number of bidders progressing to tender stage.

Cabinet Office will have a much greater role in enforcing compliance. However, it is not clear whether a failure to comply with the Regulations will result in bidders having any increased remedies under the Regulations. Regulation 114 makes it clear that a material failure to comply with any requirement under Part 4 does not result in a public contract being declared invalid, although there remains the potential for damages for breach of statutory duty.

Finally, contracting authorities should note that these measures come into force in two phases. For ease of reference, we have set out in the table below the relevant Regulations and corresponding implementation dates.

Table of implementation dates

Relevant authority	Regulation	Implementation date
Central government	All provisions in Part 4 (Above and below threshold procurements)	26th February 2015
Other Contracting Authorities	<ul style="list-style-type: none"> ■ 107 (Use of standard questionnaire – above threshold procurements) ■ 111 (Abolition of PQQ requirements – below threshold procurements) ■ 113 (Prompt payment) ■ 114 (Remedies) 	26th February 2015
	<ul style="list-style-type: none"> ■ 106/110 (Publication of Contract opportunities in Contract Finder – above and below threshold procurements) ■ 108/112 (Publication of Contract Award on Contract Finder– above and below threshold procurements) 	1st April 2015

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