

Implementing further changes to the UK public procurement regime

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Public Law analysis: Patrick Parkin, senior associate in the public procurement team at Burges Salmon, examines the Public Procurement (Amendments, Repeals and Revocations) Regulations 2016 (PPR 2016) ahead of their entering into force and points out potential grey areas which procurement practitioners ought to look out for.

Original news

Public Procurement (Amendments, Repeals and Revocations) Regulations 2016, LNB News 17/03/2016 111

Consequential amendments, repeals and revocations to certain pieces of legislation are made in consequence of the implementation of new contracts legislation, which implement the new EU Procurement Directive frameworks. These changes come into effect on 18 April 2016.

What is the background to these regulations?

While PPR 2016 has an effect on a number of pieces of legislation, the main thrust of the regulations is to update the Public Contracts Regulations 2015, SI 2015/102 (PCR 2015), which came into force in February 2015, replacing the Public Contracts Regulations 2006, SI 2006/5 (PCR 2006).

PPR 2016 are in force as of 18 April 2016, at the same time as the Utilities Contracts Regulations 2016, SI 2016/274 (UCR 2016) and the Concession Contracts Regulations 2016, SI 2016/273 (CCR 2016). The UCR 2016 are an update of the Utilities Contracts Regulations 2006, SI 2006/6 but CCR 2016 are entirely new—there hasn't been a formal set of regulations applying to concession contracts until now. The PCR, UCR and CCR form the core of procurement law in England, Wales and Northern Ireland (although there are separate procurement regulations for defence, security and also for healthcare). There are separate regulations implementing the EU Procurement Directives in Scotland.

18 April 2016 is also the date from which the light touch regime under PCR 2015 applies to contracts over the applicable threshold tendered by NHS England and Clinical Commissioning Groups. However, there is a conflict between the light touch regime and the existing National Health Service (Procurement, Patient Choice and Competition) (No 2) Regulations 2013, SI 2013/500 in relation to a commissioner's obligation to put a contract out to tender.

What are the key amendments made by these regulations?

Material change (PCR 2015, reg 72(1)(b))

PCR 2015, reg 72(1)(b) sets out one circumstance where an authority may vary a public contract during its term without that change being considered a 'material change' in breach of procurement law.

PCR 2015 stated that a contract may be modified during its term without a new procurement procedure:

'(b) for additional works, services or supplies by the original contractor that have become necessary and were not included in the initial procurement, where a change of contractor—

(i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement, or

(ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority, provided that any increase in price does not exceed 50% of the value of the original contract'

The use of the word 'or' in PCR 2015, reg 72(1)(b)(i) suggests that only one of the limbs must be satisfied for the test to be met. This would mean that only a rather low threshold applied, making it relatively easy for contracting authorities to implement in-term contract amendments.

However, Directive 2014/24/EU on public procurement (Public Contracts Directive), from which the PCR 2015 derive, uses an 'and' rather than 'or', so that both limbs of the test must be satisfied. In the absence of clarification until now, our advice to clients has been that the position in the Public Contracts Directive must be correct (and indeed, that there would be risk in relying upon the wording of PCR 2015 alone).

PPR 2016 clarifies that the wording of the Public Contracts Directive is correct and that both limbs of the test at PCR 2015, reg 72(1)(b) must be satisfied. Although this means that the provision is more limited in scope, the clarification is welcomed.

PPR 2016 also amends the transitional provisions that apply when a contract award commenced before 26 February 2015 (when the PCR 2015 came into force). PPR 2016 amends PCR, reg 118(5) to confirm that reg 72 on material change applies to in-term contract amendments even if the procurement process was conducted under PCR 2006.

Mandatory exclusions (PCR 2015, reg 57)

PCR 2015 brought about an update of the mandatory exclusions whereby an authority must exclude a supplier from a procurement procedure if it has committed an offence (eg fraud, tax evasion etc). Since PCR 2015 came into force, the Modern Slavery Act 2015 (MSA 2015) has arrived, which contains various offences in relation to human trafficking. Therefore, the list of mandatory exclusions has been updated so that suppliers will need to confirm that they have not committed any offence under MSA 2015 if they wish to tender.

Authorities should ensure that any standard form pre-qualification documents are up to date to reflect the change.

Are there any grey areas or unresolved issues lawyers will need to watch out for?

More clarity is always welcomed. If we take PCR 2015, reg 72(1)(b) as an example, there are references to 'significant inconvenience' and 'substantial duplication of costs'. These phrases are subjective and open to interpretation. While it will be clear in some instances whether or not there has been 'significant inconvenience' to an authority or a 'substantial duplication of costs', frequently it will be a matter of debate, until such time as we receive further guidance from the courts or the Cabinet Office.

However, the purpose of PPR 2016 is to update, rather than to make sweeping changes and seek to clarify any areas of potential ambiguity in the PCR 2015.

What will lawyers need to be aware of when advising clients in this area?

Lawyers should be mindful of the need to:

- o make sure that you are working from an updated version of PCR 2015—the devil is in the detail
- o ensure clients are using up to date pre-qualification documents, in particular to refer to the addition to PCR 2015, reg 57
- o be aware of the change to PCR 2015, reg 72(1)(b)—especially if you have been working on the basis of making changes to public contracts on the back of satisfying only one limb

Do you have any comments or predictions for 2016 following these sets of regulations coming into force?

We have known that UCR 2016 and CCR 2016 have been on their way for some time and we do not anticipate any other significant reforms.

Naturally, when there is a change in the law, there is a period of adjustment for both authorities and suppliers to understand their new obligations and new opportunities.

For example, we know that utilities will now be able to use the competitive dialogue procedure and the innovation partnership procedure. It will be interesting to see how frequently these procedures are used, or whether utilities will prefer to use their tried and trusted methods.

Interviewed by Duncan Wood.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor



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