SUMMARY OF PROCUREMENT REGULATIONS

Introduction
The rules on purchasing of goods and services by public sector bodies in the UK are shaped principally by the 2014 European Union Public Procurement Directive. The requirements set out in this directive have been applied to England, Wales and Northern Ireland through the Public Contract Regulations 2015 and to Scotland through the Public Contract (Scotland) Regulations 2015.

Separate rules for the energy, water and transport industries are applied through the Utilities Contract Regulations 2016 and the Utilities Contract (Scotland) Regulations 2016, while the Concessions Contract Regulations 2016 and Concessions Contract (Scotland) Regulations 2016 define rules for contracts which involve selling the right to commercially exploit a service, such as a catering facility in a leisure centre.

The regulations also codify the UK’s obligations under the World Trade Organisation Agreement on Government Procurement, which sets out similar principles to those derived from the EU.

This brief guide is intended to provide a quick overview of the core features of these regulations. It is designed to be read as a supplement to UNISON’s wider advice (listed at the end of this document) on practical steps for influencing the procurement process and TUPE to achieve the best possible outcomes for members.

Regulation coverage
The opening provisions of the European Union Public Procurement Directive state:

It should be recalled that nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive.

However, where a contracting authority does choose to put a service out to tender, the authority must comply with the UK’s regulations in conducting its procurement process.

The full regulations only apply to certain types of contract above a price threshold determined by the EU. The complete set of threshold figures applicable until the end of 2017
are shown here. However, the thresholds of most relevance to UNISON are service contracts for central and “sub-central” government, shown below.

<table>
<thead>
<tr>
<th>Type of service contract</th>
<th>Threshold</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central government</td>
<td>£106,047</td>
</tr>
<tr>
<td>Sub-central government</td>
<td>£164,176</td>
</tr>
</tbody>
</table>

The full listing of authorities that are classified as central government can be found here, however, within the main sectors where UNISON represents members, the principal central government authority is the Department of Health, which encompasses NHS Trusts and the NHS Business Services Authority.

The majority of UNISON sectors are classified as sub-central authorities, including local government, police authorities, higher education and further education. In addition, while the NHS is generally classified as central government, regulatory body Monitor has stated that Foundation Trusts are classified as sub-central authorities.

However, some services which are thought to attract less interest from outside an EU Member State are subject to a “Light Touch Regime.” The full listing of these areas is shown here, but includes healthcare, social services, education, security and catering. These areas have a much higher threshold of £589,148 and those contracts valued above the threshold are subject to a slightly different procedure to those specified in the full rules.

Contracts valued below the thresholds do not have to comply with the full regulations. However, they do have to comply with the principles of procurement set out in the regulations.

The table below sets out the regulations that apply to all forms of contract.

<table>
<thead>
<tr>
<th>Contract type</th>
<th>Regulations applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central and sub central government contracts above threshold</td>
<td>Procurement must comply with full regulations</td>
</tr>
<tr>
<td>Central and sub-central government contracts below threshold</td>
<td>Procurement must abide by principles of regulations</td>
</tr>
<tr>
<td>Light Touch Regime contracts above threshold</td>
<td>Procurement must comply with modified regulations</td>
</tr>
<tr>
<td>Light Touch Regime contracts below threshold</td>
<td>Procurement must abide by principles of regulations</td>
</tr>
</tbody>
</table>

The Light Touch Regime only applies where the service set out in the contract is of the specified type, not simply because the contracting authority works in the field covered by the regime. For example, an NHS Trust works in healthcare, but if it seeks tenders for an IT contract the central government threshold of £106,047 applies. Equally, a local government refuse collection contract would be subject to the sub-central threshold of £164,176, but a home care contract would be subject to the Light Touch Regime threshold of £589,148.
The full regulations

Where a contracting authority has to comply with the full regulations, it can choose to run a competitive procedure from among five types – open, restricted, competitive with negotiation, competitive with dialogue or innovation partnership. The principal steps for these procedures are shown below (innovation partnerships follow broadly the same procedure as competition with negotiation).

<table>
<thead>
<tr>
<th>Steps</th>
<th>Open</th>
<th>Restricted</th>
<th>Competitive with negotiation</th>
<th>Competitive with dialogue</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Competition is opened by placing a contract notice in the Official Journal of the European Union (OJEU). A Prior Information Notice (PIN) can also be issued to provide a brief outline of the contract before the notice appears.</td>
<td>Bidders submit selection questionnaire designed to enable authority to judge capacity to fulfil tender and whether any grounds for exclusion</td>
<td>Authority invites selected bidders to submit tender (minimum of five bidders must be invited to tender)</td>
<td>Authority invites selected bidders to negotiate over a possible solution to the authority’s requirements. Following conclusion of negotiations, authority must invite minimum of three bidders to submit tender.</td>
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<td></td>
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<td>Authority invites selected bidders to negotiate over a possible solution to the authority’s requirements. Following conclusion of negotiations, authority must invite minimum of three bidders to submit tender.</td>
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</tr>
<tr>
<td>4</td>
<td>Tenders, accompanied by completed questionnaire that enables authority to judge any grounds for exclusion, are evaluated against award criteria, the winning bid selected and the award notice is published in OJEU</td>
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<td></td>
<td></td>
</tr>
</tbody>
</table>
The timescales for these procedures are shown below.

<table>
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<tbody>
<tr>
<td>The minimum period between issuing a contract notice and a deadline for receipt of tenders is 35 days, though this can be shortened to 15 days if the notice was preceded by a PIN.</td>
<td>A request to participate in the process must be received within 30 days of a contract notice and a minimum of 30 days must be allowed for receipt of tenders following the invitation to submit (this timescale can be shortened to 10 days where a PIN has been issued). The time allowed for tenders to be submitted can be varied by sub-central authorities provided they are consistent in applying the timescale to all bidders.</td>
<td>A request to participate in the process must be received within 30 days of a contract notice</td>
<td></td>
</tr>
</tbody>
</table>

Open procedures are usually used where a standard type of service is required, the restricted procedure where it is considered useful to whittle down bidders from a large number of potential suppliers and the two forms of competitive procedures where a particularly complex service is required that needs adaptation of readily available solutions. The innovations partnership represents a variation on the competitive procedure that has been introduced as a process to develop services not currently available on the market.
Steps in the process

Selection questionnaire

The standard selection questionnaire is split into three parts (for Scotland, the similarly structured ESPD applies). The first part requires basic information about the bidder, the second requires a declaration about the factors that can form the basis for exclusion and the third seeks to test capacity to fulfil the contract.

The first two parts cannot be amended, but the third allows for adaptation according to the requirements of the particular contract.

Capacity to fulfil the contract is usually tested against economic and financial standing, as well as technical and professional ability. It is not unusual for the economic and financial standing criteria to include a minimum turnover level, but the regulations do not allow the threshold to be set at more than twice the contract value unless it can be justified on the basis of some exceptional circumstance.

Exclusion

The regulations require mandatory exclusion if the bidder has violated bribery, fraud or money laundering legislation (in Scotland, “blacklisting” of trade union officials is also a mandatory ground for exclusion). It is at the authority’s discretion to exclude a bidder if they have violated environmental, social or labour laws, or they have shown persistent deficiencies in prior public contracts which led to early termination of a contract, damages or other comparable sanction within the previous three years.

Violations of social or labour laws can include:

- Health and Safety Executive enforcement and remedial orders;
- Complaints upheld by the Equality and Human Rights Commission;
- Findings against the bidder by an employment tribunal or employment appeal tribunal;
- Breaches of National Minimum Wage or Immigration Asylum and Nationality Acts.

Contract award

The regulations require a contract award to be made on the basis of the most economically advantageous tender (MEAT), which means that costs and benefits over the lifetime of the contract can include economic and social factors.

In England, Wales and Northern Ireland, the regulations also permit a contract to be awarded on the basis of the lowest price. However, in Scotland awards on such a basis are banned.

The weightings attached to the criteria have to be clearly set out in the contract notice.

In order to encourage bids from small and medium sized organisations (SMEs), a contract can be divided into lots and a limit can be set on the number of lots awarded to a single bidder. Where an authority decides not to split a contract into lots, it has to set out a justification in the contract notice.

Where a tender is abnormally low, the authority has to seek an explanation of the costs.

On award, the contracting authority has to name the successful bidder, provide a breakdown of the scores achieved by the bidders and set out its reason for the decision.
A "standstill period" of 15 days is required before the contract can commence and a bidder has 30 days from notification to challenge a decision.

Varying contracts

Once established, contracts can only be modified during the term of the contract if they clearly state an allowance for modification. However, whatever is stated in the contract, modification cannot:

- Substantially change the nature of the contract;
- Add further work valued at more than 50% of the contract’s value;
- Impose a change that is impossible or very problematic for the supplier to meet.

Contracts must contain a clause that allows for early termination where contract change is substantial.

Exemptions

Awards without notice

The regulations only allow a contract to be awarded through negotiation without issuing a contract notice in the following specific circumstances:

- No tenders or suitable tenders were received when advertised through open or restricted procedure;
- The service can only be supplied by a specific operator;
- The service has to be fulfilled with extreme urgency.

Awards outside regulations

Contracts between two public bodies can lie outside the regulations where the following specific circumstances apply:

- The contracting authority exercises control over the organisation delivering the goods or services, similar to the control it exercises over its internal departments;
- The provider derives almost all of its revenue from the delivery of services to the controlling body.

This definition can throw into doubt contracts with public bodies that have been given a degree of autonomy in their operations.

Contracts between public bodies that are co-operating with one another to perform a public function can also form grounds for exemption.

Reserving contracts for specific types of organisation

Contracts can be reserved for mutuals and social enterprises within certain sectors (mainly social, health and educational), though such contracts cannot last more than three years.

The regulations also allow for "sheltered workshops" or suppliers who’s main aim is the “social and professional integration of disabled or disadvantaged persons.”
Non-standard forms of contract

Framework agreements
A framework agreement is a particular form of contract where a contracting authority establishes an arrangement where a number of suppliers are accepted as competent to deliver the service and the framework specifies the terms for awarding specific contracts as required.

Contracts derived from a framework are called call-offs and the framework specifies the terms of call-offs, such as awarding on a rotation basis among the named suppliers or through a mini-competition.

The restrictions on framework agreements are that they cannot exceed four years and the terms of a contract cannot be varied substantially from what is set out in the framework. Only authorities clearly identified as part of the framework can award contracts, though the contracts awarded can last longer than the framework itself.

Once the framework has been established, there is no requirement for call-off awards to be published.

Dynamic Purchasing System
A Dynamic Purchasing System is like a framework agreement, but it allows new suppliers to be added as potential suppliers over the duration of the arrangement and there is no time limit on its application.

The timeframe follows the rules of the restricted procedure, and like a framework there is no requirement for call-off awards to be published.

Light Touch Regime Regulations
Contracts valued above the threshold for services specified as part of the Light Touch Regime have to follow the procedure for publishing a call for competition through a contract notice or prior information notice in OJEU, as well as publishing the contract award notice in OJEU. However, the contracting authority is not bound to follow any of the procedures specified under the full regulations. Nonetheless, in adopting any variation from these procedures, the authority has to comply with principles below.

Below Threshold Regulations
Contracts valued at less than the thresholds for central government, sub-central government and Light Tough Regime contracts do not have to comply with the procedures set out under the full regulations, however, they do have to abide by the principles of the regulations highlighted below.

- Equal treatment of all bidders – particularly to ensure that no bidders are treated differently in terms of the requirements placed on them and the access they are given to information;
- Proportionality – particularly in terms of setting reasonable time limits given the scale and complexity of a contract as well as reasonable pre-qualification criteria, such as a sales threshold proportionate to the contract;
• Transparency – particularly in terms of advertising contracts widely, as well as disclosing selection and award criteria;
• Mutual recognition – particularly in terms of accepting qualifications from other member states as evidence of ability to fulfil a contract.

In practice a contracting authority may be tempted to treat below threshold contracts in a similar way to above threshold contracts for simplicity and to avoid the danger of challenge that a contract has been awarded unfairly. However, whatever procedure the authority adopts it cannot impose a two stage process and so has to drop the pre-qualification stage. An authority will usually set out its protocol for below threshold contracts in its procurement guidance.

Contracts issued by sub central authorities or NHS Trusts worth in excess of £25,000 generally have to be advertised in Contract Finder, which acts as the UK’s principal source of information on contracts.

Public Contracts Scotland Regulations 2015
In Scotland, it has been noted in this guide that the contract regulations differ from those applicable across the rest of the UK in the following principal ways:
• The award criteria cannot be based solely on lowest price
• Grounds for mandatory exclusion of bidders includes “blacklisting” of trade union representatives

However, a further layer of regulations are also applicable in Scotland as a result of the Procurement Reform (Scotland) Act 2014. These regulations mean that:
• A specified set of procedures apply to “regulated procurements” for services worth less than the EU thresholds but more than £50,000 and such contracts have to be advertised on Public Contracts Scotland;
• Contracting authorities are encouraged to promote payment of the Living Wage as part of a consideration of fair work practices within the award criteria;
• Contracting authorities have to consider how the procurement can improve economic, social and environmental wellbeing of the area;
• Contracting authorities with a significant procurement expenditure (defined as regulated procurements equal to or greater than £5m) must prepare a procurement strategy and annual report;
• The inclusion of community benefit requirements must be considered for any regulated procurement of £4m or more.

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1 Separate national databases of public sector contracts are kept for Northern Ireland, Scotland and Wales through eSourcing NI, Public Contracts Scotland and Sell2Wales.
Utilities Contract Regulations

Coverage of the Utilities Contract Regulations include the energy, water and transport industries.

They differ from the standard Public Contract Regulations in the following principal ways:

- The threshold for the full regulations to apply comes into effect for services valued at £328,352;
- Framework agreements cannot exceed eight years;
- Contract authorities do not have to explain any decision not to split contracts into lots.

Concessions Contract Regulations

The Concessions Contract Regulations apply to contracts which involve selling the right to commercially exploit a service, such as a toll bridge or cafeteria. The regulations vary in many ways from the standard Public Contract Regulations, but the most important differences are:

- The regulations apply to contracts worth in excess of £4,104,394;
- Like the Light Tough Regime, the regulations demand advertisement in OJEU but otherwise only specify principles to be observed rather than set procedures;
- Award criteria have to be based on “overall economic advantage;”
- Contracts are generally limited to five years.

Further details are available here.
Further information

UNISON's procurement web page is at
https://www.unison.org.uk/get-help/knowledge/contracts/procurement/

UNISON's general guides on the procurement process and TUPE
How your Branch can Stop Outsourcing and Protect Members
TUPE Branch Guidance

UNISON’s service group guides on the procurement process

Health - Resisting Privatisation in the NHS

Higher education - Privatisation and Shared Services in Higher Education

Local government
Securing in House Services
Negotiating a Procurement Agreement
Ethical Procurement
Use of Key Performance Indicators
Equalities in Procurement

UNISON's summaries of devolved arrangements

UNISON Scotland - Procurement Briefing

UNISON Northern Ireland
Public procurement is a devolved matter in Northern Ireland and a separate Procurement Board and Central Procurement Directorate (CPD) exists to oversee the direction of procurement and develop guidance for public sector procurement. CPD also undertakes procurement exercises for the NI Executive Departments.

For further information relating to procurement in Northern Ireland contact John Patrick Clayton - j.clayton@unison.co.uk

Procurement Training
UNISON’s Learning and Organising Services (LAOS) runs a course on influencing the procurement process. For more information, please contact LAOS on learningandorganising@unison.co.uk