

Low value procurement

under the Public Contracts Regulations 2015

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Low value procurement

Outline

1. New legislation
2. Public Contracts Regulations 2015 – general description
3. PCR 15 – “National” provisions and rules for low value contracts
4. EU general principles for low-value contracts

1. New legislation 2014/15

EU legislation

Public Sector Directive 2014/24

Utilities Directive 2014/25

Concessions Directive 2014/23

Implementation deadline: 18 April
2016

UK implementing regulations

Public Contracts Regulations 2015 –
into force (generally, with exceptions)
26 February 2015

Other implementing measures –
consultation expected 2015

2. Public Contracts Regulations 2015

EU-derived provisions (Part 2)

- Part A/Part B distinction abolished
- New separation of contracts:
 - Most public contracts are fully subject to the Regulations
 - Some public service contracts are subject only to a “Light Touch Regime” (health, social care, security, post, legal services etc – list in Schedule 3)
- Full remedies regime (Part 3)

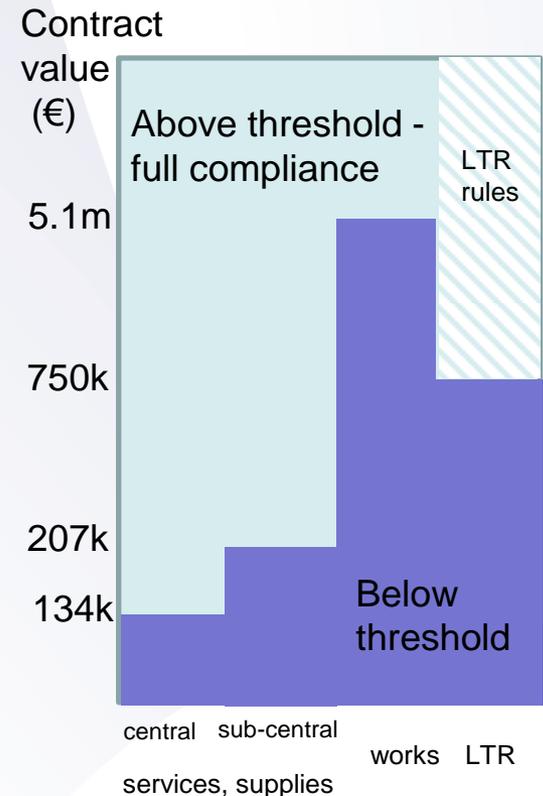
“National” provisions (Part 4)

- Designed to improve access to procurement for SMEs
- Include provisions for below-threshold contracts
- Questions over the available remedies

PCR 2015 – EU-derived provisions

Contracts fully subject to the Regulations

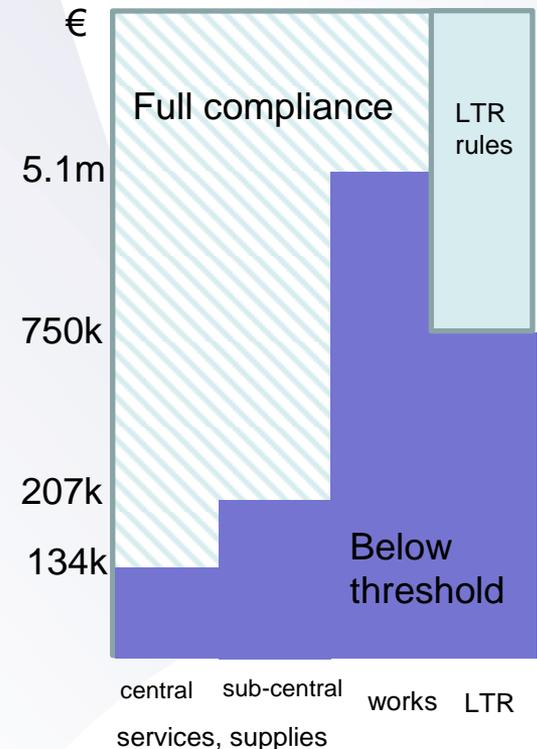
- Financial thresholds are largely unchanged
 - Public works contracts: **€5,186,000**
 - Public service/supply contracts let by central government authorities (i.e. Sch 1 bodies): **€134,000** (with some exceptions for defence contracts)
 - Public service/supply contracts let by sub-central contracting authorities: **€207,000**
- Some new exclusions
 - e.g. procurement of legal services (advice and representation) for litigation (r. 10(1)(d))
- Some new rules and procedures
 - e.g. move towards electronic procurement
 - New “innovation partnerships”



PCR 2015 – EU-derived provisions (2)

Light Touch Regime

- Flexible rules for procurement of health and social services (and other Sch 3 services)
- Much higher financial threshold: **€750,000**
- Detailed requirements left to Member States. Above threshold, PCR15 require:
 - Publicise opportunity at EU level (contract notice or PIN) (r. 75(1))
 - Comply with general principles of transparency and equal treatment (and with process as described in CN/PIN, unless it is possible to diverge without breaching general principles, and tenderers are notified) (r. 76(2)-(4))
 - Apply reasonable/proportionate time limits (r. 76(6))
 - Publish a contract award notice at EU level (r. 75(3))



3. PCR 2015 – national provisions

National rules to improve SME access to public procurement

- Changed since the September 2014 consultation
- Three ‘groups’ of rules:
 - Procurement above the threshold
 - All public contracts
 - Procurement below the threshold

PCR 2015 – national provisions (2)

First set of rules applies to procurement above the threshold

- The authority must “have regard to” Cabinet Office guidance on pre-qualification of tenderers (and report to Cabinet Office on any deviations, as specified in the guidance)* (r.107)
- If the authority sends a contract notice for EU publication, it must also advertise the opportunity on Contracts Finder** (r. 106)***
- If the authority sends a contract award notice for EU publication, or awards a contract under a framework agreement, it must publish award information on Contracts Finder** (r. 108)***

*excludes contracts subject to the NHS Patient Choice (No. 2) Regulations 2013 – i.e. procurement of health care services by CCGs or the NHS Commissioning Board

**excludes contracts subject to the NHS Patient Choice (No. 2) Regulations 2013, and contracts awarded by maintained schools and academies

***applies from 1 April 2015 (except for authorities exercising Crown functions, which must comply from 26 February 2015)

PCR 2015 – national provisions (3)

Second set of rules applies to all public contracts*

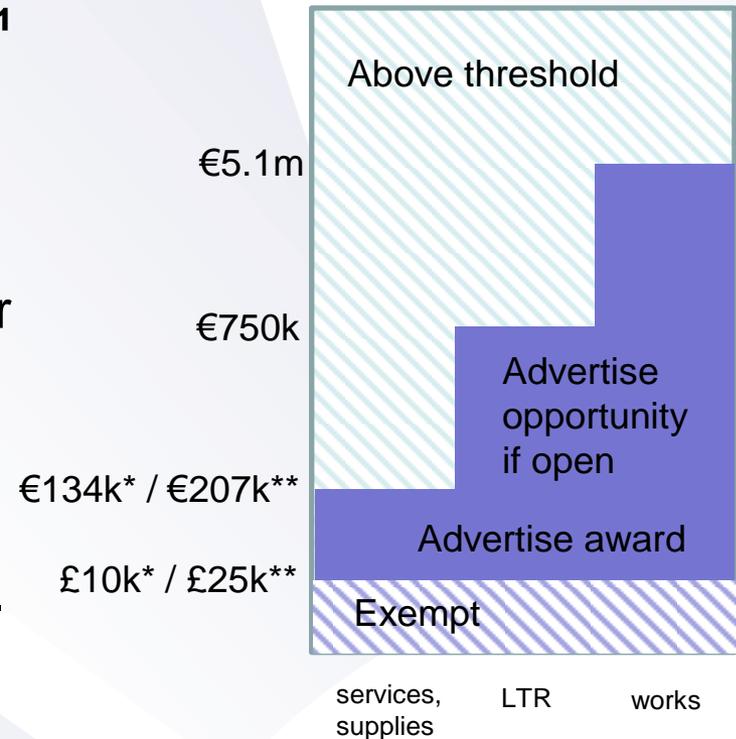
- Public contracts must include provisions requiring the authority to make payment within 30 days of a verified invoice (and to verify invoices “in a timely fashion”); otherwise those terms will be implied (r. 113)
- Authorities must also:
 - Ensure that sub-contracts contain equivalent provisions
 - Have regard to any guidance and model provisions issued by Cabinet Office
 - Publish annual statistics on their compliance with 30-day payment terms (r. 113)

*excludes contracts subject to the NHS Patient Choice (No. 2) Regulations 2013, and contracts awarded by maintained schools and academies

PCR 2015 – national provisions (4)

Contracts below the threshold - publicity¹

- If an authority advertises a below-threshold opportunity (i.e. informs more than a closed group of providers), it must place the opportunity on Contracts Finder (r. 110)²
- An authority must publish specified information about the award of a below-threshold contract on Contracts Finder (r. 112)²



* central government authorities

** sub-central and NHS Trusts

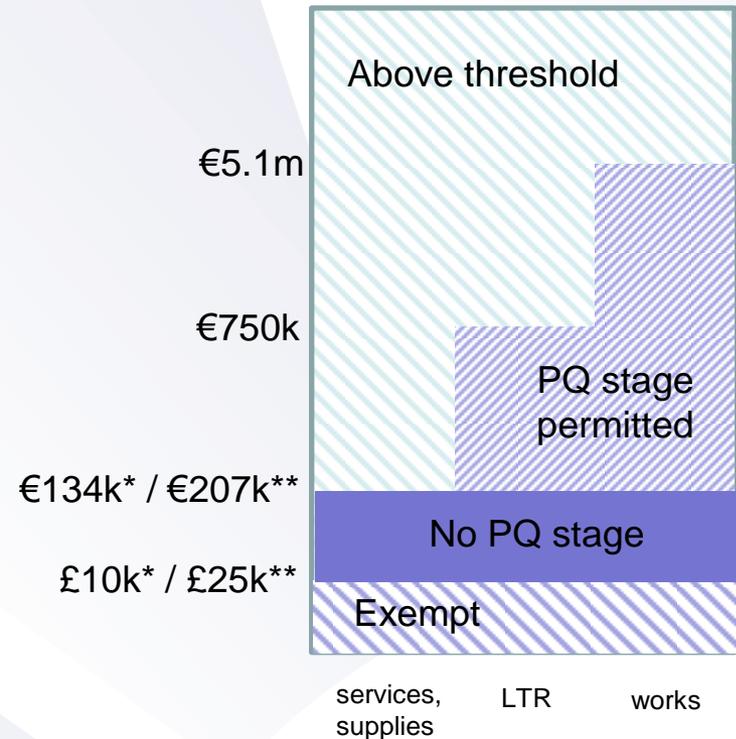
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² applies from 1 April 2015 (except for authorities exercising Crown functions, which must comply from 26 February 2015)

PCR 2015 – national provisions (5)

Contracts below the threshold - selection¹

- When awarding a below-threshold contract of up to €134k* / €207k**, an authority cannot run a separate pre-qualification stage
- The authority can ask “suitability assessment questions” (designed to ascertain bidders’ suitability, capability, legal status or financial standing) during the substantive procurement, but the questions must be:
 - Relevant and proportionate; and
 - Designed with regard to Cabinet Office guidance (and the CA must report to the Cabinet Office on any deviations, as specified in the guidance) (r. 111)



* central government authorities

** sub-central and NHS Trusts



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¹ excludes contracts subject to the NHS Patient Choice (No. 2) Regulations 2013

PCR 2015 – national provisions (6)

What are the remedies for breach of the national provisions?

- The PCR15 include the following provisions:
 - Breach of the national provisions will not affect the validity of a contract (r. 114)
 - The right to bring an action for breach of the Regulations does not apply to the national provisions (rr. 89(1)(a), 91)
 - The standstill obligation seems not to apply to contracts below the threshold (rr. 85, 87)
- What can a tenderer do who suffers prejudice because of breach of the national provisions?
 - Are they left without a remedy? R. 114 seems to assume this is not the case
 - Action in tort for breach of statutory duty? Strong indications against (e.g. limitation)
 - Enforcement by JR? Procurement process could be stopped/rewound before signature (but no remedy thereafter)

4. EU general principles

Low value procurement can engage the general EU treaty requirements of transparency and equal treatment

- This will be the case where the contract is of cross-border interest
 - Matter of evidence: might the contract (if advertised) be of interest to a tenderer located in another Member State (or, perhaps, to a UK subsidiary of an EU company)? (e.g. C-91/08 *Wall* [34])
- What do the EU general principles require?
 - “a degree of advertising sufficient to allow the service concession to be opened up to competition and the impartiality of the award procedures to be reviewed” (*Wall* [36])
 - Advertisement where the non-UK tenderer can be expected to see it; sufficient details of the process to be applied
- Remedies: full suite likely to be available

Any questions?

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