



Frequently Asked Questions

Q. When will procurers in the UK need to comply with the new regulations?

- A. The directives came into force on 17 April 2014. EU Member States now have 2 years to implement them in national legislation. UK Government is aiming to transpose early for England, Wales and Northern Ireland and purchasers will need to ensure they comply with the regulations. The official date will be released in due course on gov.uk: <https://www.gov.uk/transposing-eu-procurement-directives>

Q. Once the regulations have been implemented, at what point will the new regulations apply above the old?

- A. The new regulations will only bite on new procurement exercises started after the date when the new UK rules take effect. A new procurement exercise starts when a contract notice is sent to OJEU.

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Q. What changes are in the 2014 regulations compared to the 2006 regulations?

- A. We have published a guidance note which lists the main changes and provides some high level detail about various aspects (more detailed, subject specific guidance will follow later).

Q. What benefits will the new regulations bring to my organisation?

- A. The regulations empower public procurement practitioners to take in to account commercial best practice enabling a faster, less costly, and more effective process for business and procurers alike. For contracting authorities, this means being able to run procurement exercises faster, with less red tape, and more focus on getting the right supplier and the best tender. And for suppliers, the process of bidding for public contracts should be quicker, less costly, and less bureaucratic, enabling suppliers to compete more effectively.

Q. Will the new regulations mean a difference in procurement practices?

- A. Yes, and for the better. The reforms secured by the UK will allow greater speed and flexibility whilst improving competition through greater access for SMEs and other suppliers. We expect that it will help purchasing professionals to deliver improved outcomes for taxpayers and other public procurement stakeholders.

Q. Is there any support to help with changing organisations policies and processes?

- A. Yes, the Crown Commercial Service is putting in place a package of measures to support the changeover. This includes:
1. a programme of face-to-face training for public sector procurers to access free of charge, cascaded through the public sector using trainers briefed by CCS and using CCS slides and supporting materials. The training commences mid-May 2014;
 2. written guidance notes, including a handbook on the main changes in the summer, and more detailed subject-specific guidance later;
 3. The above materials used for this training will also be made available on gov.uk for free download by all interested organisations.

4. an e-learning package, available to all public sector staff details of how to register can be found at: <https://www.gov.uk/transposing-eu-procurement-directives>

Q. Sally Collier has said the biggest challenge you face is that procurers just carry on doing what they have always done. How will this training change hearts and minds?

- A. The first step in changing behaviour must be clarity about the opportunities in the new directive for a more commercial approach. In some cases (e.g. the use of pre-market engagement) there has been some reluctance to apply normal commercial approaches because of some procurers' perception of the risk of legal challenge. This package is being delivered as consistently as possible to a very large number of procurers (both face to face to around 6000 procurers and electronically to many others to ensure maximum awareness of what can be achieved using the new EU directives.

Q. Are the policy choice elements included in the training package, if not, how are these being picked up?

- A. The training package includes Crown Commercial Service conclusions on the policy choices following a period of targeted stakeholder engagement. These are consistent with the ministerially agreed strategy of simplification and maximising flexibility.

Q. Who will receive the formal consultation on the draft regulations?

- A. It is a public consultation.

Q. Which suppliers were engaged in the targeted discussion papers on the policy choices?

- A. Suppliers were primarily represented through trade associations such as the CBI and BSA (Business Services Association), acting with inputs from and on behalf of their extensive supplier membership. Some utilities companies also engaged directly.

Q. Will the light touch regime increase OJEU's for ex part B services?

- A. Yes and No. Procurers often place OJEU notices for Part B Services already even though not required. The threshold for LTR contracts (EUR 750000) is much higher than Part B Services, so this would mean fewer notices would be placed. But the effect of fewer services than Part B in the new LTR, will mean more notices in that respect as more contracts will be caught by the full rules.

Q. Will a standstill period be needed for above-threshold contracts in the new Light-Touch Regime? Could the rules in the remedies directive apply in the LTR?

- A. Yes. The standstill period is mandatory in situations where an OJEU contract notice is required. This is different to the position in Part B procurements, because a contract notice was not mandatory. The remedies rules have always applied to Part B services contracts, and will continue to apply to LTR contracts. The remedies directives have not changed.

Q. There are more procedures but can I keep to using Open and Restricted only?

- A. Yes. There is no obligation to use any of the new procedures however, these increased flexibilities including allowing more freedom to negotiate offer many benefits to public sector organisations realising greater value for money.

Q. Why will the regulations include a deeming provision for contract termination? Don't you trust authorities to comply with their obligations?

- A. The Directive places an obligation on the UK, as a Member State, to "ensure" there is the possibility to terminate if any of the grounds apply. Requiring authorities to

include a termination condition in their contracts, with a deeming provision as a safety net, provides assurance that the obligation to “ensure” is met in all cases. This will safeguard the UK against legal challenge for failure to comply with the Directive.

Q. Why have you decided not to regulate to ensure suppliers comply with social/environmental/labour laws?

A. The Directive requires “appropriate measures” to be taken, so there is not an obligation to regulate. The Crown Commercial Service view, informed by stakeholder feedback received during the discussion paper process, is that administrative measures are appropriate and are consistent with the Government’s policy on avoidance of gold-plating.. A compelling case for regulation has not emerged. All decisions are subject to public consultation taking place Summer 2014.

Q What does the use of ‘natural persons’ mean?

A. This simply means a human being (as opposed to a machine/electronic device etc, or opposed to a corporate body, depending on context).

Q. Does the online publication of procurement documents need to be made available without an expression of interest?

A. The rules require that the documents should be made available when the OJEU is published, or if a PIN is used by a sub-central body, from when an authority invites respondents to a PIN to enter into a procurement process foreshadowed by that PIN.

Q. If running a two-stage process do all tender documents need to be ready from the outset?

A. This is not entirely clear from the rules as the defined term “procurement document” does not explicitly distinguish between the documents in the two stages. However, the definition seems to be quite wide, for example covering conditions of contract and there is no explicit carve out for tender stage documents. Therefore I suggest that this should cover the second stage documents; there ought not to be an impediment in principle to making these available from the start.

Q. Will the requirement be covered if the documents are made available on a procurement portal that is openly available (although the portal may require a registration)?

A. The rules do not explicitly cover this; they simply require unrestricted and full direct free access. To be on the safe side it might be better not to require registration. Certainly it seems doubtful the requirement would be met if registration had to be followed by some sort of validation, or any wait for confirmation that the supplier had registered.

Q. How is this affected by the requirement to wait until after the OJEU is acknowledged before publishing a tender domestically? Is Contracts Finder considered an international publication?

A. The key point is that material should not be published elsewhere before / until its OJEU publication (or if they have not received confirmation from publications office with 48 hours)

Q. Can Contracts Finder be used to link to an organisation’s own portal to access tender documents or does the documentation need to be published on Contracts Finder directly?

- A. There is no clear answer to this but a simple link from Contracts Finder that did not require suppliers to go through hoops would seem consistent with the underlying purpose.

Q. Can the PIN be used as an assist to this requirement, such as by contributing to the development of the specification? If using a PIN as a call to competition does this negate the need to publish all documents? Does the PIN now need to be more detailed?

- A. If a PIN is being used by a sub-central body as an alternative to contract notice as a call for competition, the PIN must contain the information in Article 48 2(a)-(d). Use of a PIN as a call for completion does not negate the need to make contract documents available on line; these must be published when the authority invites PIN respondents to enter into a competition foreshadowed by the PIN.

Q. Regarding the use of frameworks by authorities identified in the OJEU notice: Does this mean categories of authorities or do specific organisations need to be named? If an organisation, such as an academy school, is created after a framework is tendered are they precluded from using it?

- A. This isn't explicitly covered by the rules, but based on previous engagement categories can be used if they are clear and unambiguously defined so that everyone readily knows who was or was not in scope. So "all district councils in Norfolk Suffolk and Essex" would probably be OK; but "any contracting authorities in East Anglia" would certainly not. If the permissible users went through some bona fide restructuring without extending scope that would probably be OK. So if an academy school took over from a similar non academy school, that would probably be OK; but if it was a new school in an area which didn't have a school previously; probably not.

Q. Is it the Government's understanding that negotiation is not allowed with a supplier after the final tender is received?

- A. negotiations are NOT allowed after final tenders have been received.

Q. Discretionary exclusion- based on 'significant deficiency' could G4S, for example, be fairly excluded for their poor performance for their London 2012 contract?

- A. Ultimately it has to be for each authority to make its own decision, based on the available facts (and bearing mind the three year limit for discretionary exclusion)

Q. Is there any potential for a centrally available database of supplier performance to be created, such as to gain references from other authorities?

- A. This would be ideal although we would not wish to make any commitments at this point, as it could be a significant burden for which we are not resourced. Perhaps it might be possible to centrally-record cases of mandatory exclusion; but we make no promises at this stage.

Q. Is it possible to apply proportionality to exclusions, such as when dealing with large or small suppliers?

- A. Mandatory exclusion is mandatory; the size of the bidder is irrelevant. The rules allow a derogation from mandatory exclusion for minor non-payment of tax etc where exclusion would be disproportionate. As a general rule, proportionality should be respected for discretionary exclusion events, although one would be expected to judge this by the gravity of the misdeed, not the size of the supplier.

Q. How should the ‘time from exclusion event’ be defined- from the event or conviction?

A. The rules (Article 57.7) require mandatory exclusion arising from a conviction to be the date of conviction. Other [discretionary] exclusion is the date of the event.

Q. How should it be determined if a supplier has been subject to a conviction- does this rely on self-reporting?

A. This is covered by Articles 59, 60, 61, and should be read in detail. But in essence suppliers should be asked to confirm, and then appropriate means of proof/confirmation sought from the winner (eg any appropriate certificates which may be available to the winner according to his Member State. If a supplier tells lies, and the authority finds out, he must be thrown out then, and the authority should also take into account any other evidence it has/finds.

Q. How far down the supply-chain do conditions for mandatory exclusion of sub-contractors apply?

A. Subject to consultation, we do not propose to *require* contracting authorities to verify whether exclusionary grounds apply to subcontractors. The directive only refers to subcontractors, without discussing how far down the chain. In practice it might be impracticable to go below Tier 1 subcontractors, but the decision is ultimately for the authority in each case.

Q. At what stage of the process does this apply, such as during tender or contract management?

A. A supplier can be excluded at any stage during the procurement process if new exclusionary causes arise or come to light. It seems sensible to include contract conditions allowing termination etc in event of good cause arising during contract performance

Q. What happens if the team offered by a supplier changes at implementation? Is there a time limit for taking action in such an instance?

A. Would suggest that if a contract is awarded on the basis of a particular team but the supplier then provides a different team the authority may well look to remedies for breach of contract

Q. Do the rules around mutuals mean that a supplier cannot be awarded a contract again when it is retendered after the first three years?

A. It would not be possible to award a contract to the incumbent “mutual” after the initial 3 year period under the reserved contracts provision. The mutual could, however, compete in an open competition. Also, the reserved contracts provision could be used to award a contract for the same services by the same contracting authority to another qualified supplier (social enterprise/mutual) after the initial 3-year contract.

Q. Reservation of contracts: If a reservation can be made to mutuals and social enterprises for services exceeding the 750,000 Euro threshold can an inference be made that the same can be done for those below this threshold? Will there be guidance for services below the threshold?

A. Re reserving below threshold contracts for mutuals/social enterprises, the Directive is silent and so these provisions could not be used as such. The assumption is that below threshold LTR services (which is wider in scope than the reserved contracts provision) would not be liable to cross border activity. So contracting authorities would be able to award such contracts in the way that they do at the moment, without a need for EU transparency. Below threshold services will be referred to in the LTR guidance,

Q. Has there been any change to the rules relating to research procurement?

- A. Certain research contracts as defined by CPV code (see article 14 of the Directive) remain subject to the rules, provided the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs and the service is wholly remunerated by the contracting authority.

Q. 'Copy Out'- Is there a definition for this in relation to UK law?

- A. Copy-out is where the implementing legislation adopts the same wording as that of the Directive or where it cross-refers to the relevant Directive provision.

Q. Will the 'deeming' provision be applied to contracts awarded prior to the new regulations coming into force?

- A. No. The deeming provision will only apply to contracts awarded under the new regulations.

Q. Don't the new directives offer new grounds for suppliers to challenge?

- A. The new directives are aimed at opening up public procurement and empowering contracting authorities to use the flexibility provided by the new rules.