MILLS & REEVE

British Universities Finance Directors Group

Higher Education sector guide to the Public Contracts Regulations 2015 (March 2015)

1 Introduction

The Public Contracts Regulations 2015 ("PCR 2015") implement in England and Wales the new EU Directive 2014/24/EU (the "Directive") on public procurement. Separate regulations will implement that Directive in Scotland later this year.

A copy of the PCR 2015 is available **here**. Readers may also find the .gov page on transposition of the procurement directives useful, as this, at least at present, is where the Crown Commercial Service is posting all its guidance and resources on the PCR 2015.

The PCR 2015 are in generally in force for all procurements commenced on or after **26th February 2015** and, subject to various transitional provisions and exceptions, they replace the Public Contracts Regulations 2006 from that date. For these purposes, a procurement will usually be "commenced" when the OJEU advertisement is sent, but note that it may also be commenced where a university approaches a supplier to seek expressions of interest in a contract, or where it responds to a supplier who has sent an unsolicited expression of interest or offer to it.

This note is aimed at the higher education sector and highlights some of the key new provisions in the PCR 2015 that will be of interest. It is not intended to be an exhaustive discussion of every aspect of the PCR 2015.

The note is structured as follows:

- a note on the definition of "contracting authority" and the application of the PCR 2015 to universities;
- an (non-exhaustive) overview of the key new **obligations** for universities under the PCR 2015;
- an overview of some of the key new **flexibilities** for universities under the PCR 2015; and
- a **Q and As** section, in response to a range of questions on the PCR 2015 submitted by universities to the British Universities Finance Directors Group.

2 Application of the PCR 2015 to Universities

There is no substantial change to the definition of "Contracting Authority" in the PCR 2015, so if a university considered itself to be a Contracting Authority under the 2006 Regulations, it should consider itself to be a Contracting Authority under the PCR 2015 in the absence of any major change to funding structures.

Close readers of the PCR 2015 will notice that the definition is set out in a new way and has been simplified to mirror the wording of the new Directive. "Contracting Authority" is a defined term which now

includes the term "bodies governed by public law" which is the relevant part of the definition for universities:

"*bodies governed by public law" means bodies that have all of the following characteristics:*

(a) *they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;*

(b) *they have legal personality; and*

(c) *they have any of the following characteristics:—*

(i) *they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law;*

(ii) *they are subject to management supervision by those authorities or bodies; or*

(iii) *they have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.*

The old definition of "contracting authority" in Regulation 3(w) of the 2006 Regulations caught most universities because universities are "*financed wholly or mainly by another contracting authority*" (i.e. where public funding to the universities was 50% or more). Obviously the wording at (c)(i) in the definition set out above is slightly different (it uses "*financed, for the most part*") but in our view it does not change the basic test used at present; that is, that if a university is funded more than 50% by a body governed by public law, it will be a contracting authority for the purposes of the PCR 2015.

This means that universities will still need to make an annual calculation of how their funding is made up in order to establish whether they fall within the definition of "contracting authority" or not. Of course we expect many universities will continue to take the pragmatic approach of simply assuming that they are contracting authorities, to avoid the need to make this annual calculation.

Note that if a university is a contracting authority it will be classed as a "sub-central contracting authority" for the purposes of the PCR 2015, as it is not a central government body listed at schedule 1. As discussed below, this categorisation brings with it certain useful flexibilities for universities.

3 Key New Obligations for Universities under the PCR 2015

3.1 Lord Young Reforms

3.1.1 Contracts Finder – advertisement of contract opportunities **above** the EU threshold

From 1 April 2015, when an advertisement of an above-threshold contract is sent to the OJEU, Regulation 106 requires the contracting authority to also advertise it on Contracts Finder within 24 hours of the time it becomes entitled to advertise at national level. Note that Contracts Finder has been re-launched and is now at www.gov.uk/contracts-finder; you may wish to update internet bookmarks. There is an exemption to this requirement if publication impedes law enforcement, is not in the public interest, or would prejudice commercial interests or competition.

There is also a statutory obligation to have regard to Cabinet Office guidance about how and when the information needs to be published. As at March 2015, the latest guidance is available here. The guidance includes minimum data requirements about the opportunity and helpfully states that:

"Where a contracting authority has an existing electronic link between their own portal and Contracts Finder, which means that the opportunities (or information contained within) are automatically published on Contracts Finder, this link will normally be sufficient to comply with these new requirements, as long as the advertisement contains the minimum data requirements listed in para 5. The contracting authority remains responsible for ensuring that this is the case."

There is a suggestion (see Regulations 106(4) and (5) and 108(7) and (8)) that the Cabinet Office is considering a system where information is automatically extracted from the OJEU and copied across to Contracts Finder without further action being required by universities. This has perhaps been introduced as a result of concerns expressed in the consultation on the PCR 2015, and in an effort to reduce the additional burden on universities in complying with these additional provisions.

3.1.2 Contracts Finder – advertisement of contract opportunities **below** the EU threshold

From 1 April 2015, if a university chooses to advertise a contract opportunity which is above the *de minimis* threshold of £25,000 but below the relevant EU thresholds, Regulation 110 requires it to ensure that the advertisement is also included on Contracts Finder. The guidance includes minimum data requirements for inclusion if the contract is being advertised on Contracts Finder. Note that there is no absolute obligation to advertise an under-EU threshold contract, merely an obligation to include details on Contracts Finder where an advertisement is used. (The only exception to this is that there has always been the possibility that the application of the general EC Treaty principles might require the advertisement of an under-threshold contract if there was likely to be cross-border interest, and this will remain the case when Regulation 110 is in force.)

3.1.3 Contracts Finder – information about contract awards

From 1 April 2015, Regulations 108 and 112 require universities to post on Contracts Finder award details of all contracts awarded (where these are over the *de minimis* threshold of £25,000). For under-threshold contracts over the *de minimis* threshold, note that this obligation still applies even where the contract was not originally advertised on Contracts Finder. The guidance gives further details of the information that must be published.

3.1.4 Above-threshold contracts – limitations on assessing suitability at selection stage

From 26 February 2015, Regulation 107 imposes a statutory obligation on universities to have regard to government guidance issued around selection and exclusion of suppliers when running an above-threshold procurement. The Crown Commercial Service ("CCS") has recently issued detailed statutory guidance and a standardised PQQ which universities must read and follow.

Where a contracting authority decides to depart from the guidance or the standard wording of the core and additional PQQ questions, this will amount to a "reportable deviation" for the purposes of Regulation 107, requiring the contracting authority to make a report explaining the reasons for its decision. The guidance suggests that the obligation to make these reports only commences from 1 September 2015, although it also notes that the CCS will be undertaking "spot checks" in the interim period to assess whether contracting authorities are able to provide robust justifications for any deviations made.

3.1.5 Under-threshold contracts – ban on separate PQQ stage

From 26 February 2015, Regulation 111 has brought in a new ban on use of a selection (PQQ) stage for under-threshold contracts and a statutory obligation to have regard to Cabinet Office guidance around this. The CCS has published some frequently asked questions on the Lord Young reforms which contains more guidance on how contracting authorities are permitted to assess suitability in a below-threshold procurement. For example, the guidance suggests that, as part of the the ITT for an under-threshold contract, a university could apply pass/fail mandatory and discretionary exclusion criteria as set out in clause 23 of the 2006 Regulations and undertake a financial check in accordance with the principles set out in PPN 02/13, as well as seeking references if the capability of the individual is essential to the delivery of the contract.

Note that if a university is procuring (1) a public works contract or (2) a services contract for a "light-touch regime" service listed in schedule 3, these will only be classed as "under threshold" for the purposes of Regulation 111 if they are under the threshold for sub-central contracting authority services and supply contracts listed at Regulation 5(1)(c) (approximately £172,000).

3.1.6 Payment of Invoices

Regulation 113 applies from 26 February 2015 and puts onto a statutory footing what previously had been the subject of guidance only; an obligation on universities to pay valid and undisputed invoices within a 30 day period (Regulation 113(2)(a)).

There is also a requirement to ensure that invoices are considered and verified in a timely fashion – undue delay approving an invoice will not be a justification for failing to treat an invoice as valid and undisputed (Regulation 113(b)). Finally, there is an obligation on universities to ensure that suppliers abide by these conditions in relation to their own sub-contractors, such that the 30 day payment term is passed down the supply chain (Regulation 113(2)(c)).

Where a public contract fails to include these provisions, Regulation 113(6) will "deem" them to be included in any event, meaning there is no possibility of opting out of these obligations.

This topic forms part of the Q and As on the Lord Young reforms which contain some useful steers as to how universities should comply with the new rules. It also suggests that model clauses will be made available for use in contracts.

There are now statutory obligations to have regard to guidance issued in this area and a requirement at Regulation 113(7) from 2016 to publish at the end of March annually on the internet a report on compliance with Regulation 113 obligations. The report must include, in relation to the previous financial year (to paraphrase):

- details of the percentage of invoices that were paid on time;
- details of liabilities the university has incurred as a result of breaching its obligations to make timely payment; the Lord Young reform Q and As appear to suggest that this only needs to be done from end March 2017 in relation to the previous 12 month period; and
- details of the amount of additional interest that was actually paid in discharge of that liability.

3.2 **Light Touch Regime**

Except in relation to the provision of health services[1], the old "Part B services" category has been abolished and replaced with the so-called "light touch" regime for all services listed at schedule 3 of the PCR 2015. Where a university is procuring a schedule 3 service and the contract is over the "light touch regime" threshold of EUR 750,000 (stated by the CCS guidance to be equivalent to £625,050 sterling), there will be a new obligation to advertise in the OJEU.

Schedule 3 services likely to be of particular relevance to universities are (i) education and training services; (ii) exhibitions / fairs / congresses / seminars / cultural events services; (iii) catering services; and (iv) legal services (with some exceptions under Regulation 10(d)).

Note that, while an over threshold light-touch regime contract will now require OJEU advertisement for the first time, nonetheless a university will have flexibility to design the procurement process with no obligation to follow one of the formal selection procedures, provided that whatever process is implemented is transparent, non-discriminatory and treats bidders equally. That said, recent CCS guidance on the light-touch regime suggests that, as a minimum, a light-touch process should seek tenders in response to the OJEU advertisement, include mandatory/discretionary exclusion criteria, publish the award criteria and sub-criteria, send award letters and hold a standstill period.

3.3 **Sub-contracting – information requirements**

Where a university is procuring works, such as the provision of new student accommodation, or services that are to be provided at a facility run by the university, it must comply with the new requirement at Regulation 71. This states that, following the award decision and prior to the commencement of the contract, the university must require the main contractor to notify it of details of all the sub-contractors insofar as they are known at the time. The university must also impose a requirement on the main contractor to notify it of any changes to those details during the performance of the contract.

Regulation 71(8) states that contracting authorities may require European Standard Passport Documents to be provided in relation to "new" sub-contractors and it may assess whether any new sub-contractor falls to be excluded under Regulation 57. If, as a result of this exercise, it transpires that compulsory exclusion grounds exist, the university must compel the main contractor to replace the offending sub-contractor.

Universities will need to ensure that the terms of the contract with the main contractor allow them the flexibility to comply with Regulation 71.

3.4 **New "good standing" requirements**

Universities will need to update their "good standing" list of mandatory and discretionary exclusion criteria to ensure it reflects new Regulation 57.

3.5 **Regulation 84 report**

Another obligation for universities to plan ahead for is the requirement at Regulation 84 to draw up a report in relation to each contract or framework that is awarded, and ensure it includes all the information set out at Regulation 84(1). This requirement does not apply to contracts called off from a framework agreement (see Regulation 84(2)). There is an ability to simply cross refer to the contract award notice, where this

[1] As defined in the NHS (Procurement, Patient Choice and Competition)(No.2) Regulations 2013

already contains all the information required. Note that by Regulation 84(5) the Cabinet Office has the right to request a copy of the report.

In particular, as well as general details of the winning bid, the suppliers involved, the value and subject matter of the contract, the Regulation 84 report on a particular contract must also include (non-exhaustively):

- where the competitive with negotiation, competitive dialogue, or negotiated without notice procedure was used, the justifications for this choice in accordance with Regulation 26(4) or Regulation 32;
- where a procurement procedure is abandoned, the reasons why the university decided not to proceed;
- details of any conflicts of interest identified and how these were resolved;
- justification, if needed, of a decision not to divide the contract into lots; and
- if any bids were found to be abnormally low, reasons for the rejection of these.

In addition to the Regulation 84 requirements, other reporting obligations are imposed by the "Lord Young" section of the Regulations at Part 4. Please see the Q and A section at the end of this note for further details.

3.6 **Electronic availability of procurement documents**

A further potentially onerous requirement is at Regulation 53, which requires universities to offer full and unrestricted access free of charge to all the procurement documents from the date that a contract (OJEU) notice (or invitation to confirm interest following a PIN) is published in the OJEU.

"Procurement documents" is a defined term in the PCR 2015 and will include, in addition to the OJEU/call for competition itself, and non-exhaustively, technical specifications, descriptive documents, pre-qualification questionnaires, invitations to tender, and the terms and conditions of the contract.

We have been asked whether there is any guidance on what "unrestricted and full direct access free of charge" means here and we have not seen any new guidance on this as yet. However, the wording "unrestricted and full direct access" mirrors exactly the wording used in the "old" directive, in relation to which we do have some (admittedly now rather old) EU guidance. In our view the safest course is to assume that the same principles around what constitutes "unrestricted and full direct access" will continue to apply, unless and until anything is said to the contrary.

3.7 **Termination right**

Universities need to update their standard terms and conditions to ensure that the new Regulation 73 requirements are met. This Regulation requires public contracts to contain the right for a universities to terminate the contract where:

- there has been a substantial modification to the contract within the meaning of Regulation 72; or
- the contractor should have been excluded under Regulation 57(1) or (2) – grounds for mandatory exclusion; or

- the contract should not have been awarded in view of a serious infringement under European law which has been declared as such by the Court of Justice under Article 258 of TFEU (infraction proceedings).

Where these rights are not included, Regulation 73(3) will deem them to be included in the contract. However, greater legal certainty will be achieved if the university gives advance consideration to the issue of a Regulation 73 termination by including appropriate provision in the contract itself, for example, around giving notice, consequences of termination and so on.

4 Key new flexibilities for Universities

4.1 Universities as sub-central contracting authorities

4.1.1 Use of Prior Information Notices as a call for competition

A key flexibility is at Regulation 26(9), which permits universities to use a Prior Information Notice ("PIN") as a call for competition to commence a procurement under either the restricted or the competitive with negotiation procedures. To take advantage of this flexibility, the PIN must comply with the content requirements set out at Regulation 48(5).

4.1.2 Flexibility to shorten timescales by agreement with bidders

When using the restricted or competitive with negotiation procedures, universities may set their own time limit for receipt of bids, subject to agreement with all the bidders involved (see Regulations 28(7) and 29(7)). Where time limits are set by agreement, universities must also make sure they abide by the general rules on the setting of time limits at Regulation 47.

4.2 New procedures allowing greater flexibility to negotiate

Under the PCR 2015, there are now two main procedures which allow the possibility of negotiating with bidders; the new competitive dialogue process and the new competitive with negotiation process (in addition to a third which will be less commonly used, the innovation partnership, which is discussed further below). The competitive with negotiation/competitive dialogue procedures can be used provided the university can show that:

- needs cannot be met without adapting readily available solutions; or
- requirements involve design or innovative solutions; or
- the contract cannot be awarded without negotiation due to its nature, complexity, legal or financial make up or risks attached; or
- the specifications cannot be established with sufficient precision; or
- following an open/restricted procedure, where only irregular or unacceptable tenders were submitted.

We note that in relation to the competitive with negotiation process, Regulation 29(15) allows universities to reserve the right not to negotiate, if they indicate this in the OJEU notice or other call for competition; it is worth reserving this right from the outset to preserve flexibility.

The competitive with negotiation process, perhaps counter-intuitively, does not permit any negotiation following receipt of final bids (see Regulation 29(21)). If universities wish to negotiate with a preferred bidder they will need to use the competitive dialogue process, which now permits this, provided that certain safeguards are met (see Regulation 30(20) for further details of these).

Note that neither process permits negotiation of the minimum requirements or award criteria as originally set out in the procurement documents.

The new competitive with negotiation process looks to be especially suited to construction projects, such as the building of student accommodation. Provided the circumstances for its use (above) are fulfilled it will allow the university to invite contractors to raise comments on the building contract terms prior to tender, for the university to review, consider and if desired, amend the contract in line with the contractors' comments, before reissuing to contractors prior to them submitting their final bid. The negotiation process could potentially go through a number of iterations (particularly if the works are risky or complex and there is not much uptake in the market).

Universities should note the recent CCS guidance on how to complete the OJEU forms such as contract notices in the interim period when the PCR 2015 and the possibility of new procedures are in force in England and Wales, but the OJEU forms have not yet been updated.

4.3 New innovation partnership process for R&D projects

Historically it has been challenging to run a procurement that involves both the R&D and subsequent purchase of a product, without infringing principles of transparency, equal treatment and non-discrimination. Universities will be keen to take advantage of the new innovation partnership process set out at Regulation 31, which now allows for the R&D and purchase of a product or service within the same single procurement process (with transparency and other safeguards built in to it).

Note that if universities wish to use this new process in the interim period before the OJEU has updated forms such as the OJEU notice, they will need to refer to the recent CCS guidance on how to complete the "old" forms.

The process envisages that the university publishes an OJEU contract notice to which bidders respond by providing the selection information requested by the universities. The OJEU notice will contain a link to the procurement documents which will identify the need for the innovative product, service or work, which cannot be met on the market, and detail minimum requirements; bidders use this as the basis on which they decide to bid. The minimum time limit for receipt of requests to participate is 30 days from the day which the contract notice is issued. In terms of assessing the value of the contract for the purposes of establishing whether it is over the relevant threshold, Regulation 6 makes it clear that account must be taken of the maximum estimated value, net of VAT, of the research and development activities as well as of the supplies, services or works to be developed and procured at the end of the partnership.

When assessing R&D proposals/tenders to become a partner of the university, selection criteria may be used to establish capacity in the field of research and development when selecting candidates. Regulation 65(4) requires the selection of a minimum of three candidates to go forward to the tender stage.

The university may negotiate on tenders submitted, up to but not including the final tender, to improve the detail of the tender (although the original award criteria and minimum requirements are not negotiable). The Regulation sets out safeguards around how equal treatment and confidentiality can be maintained during this negotiation phase. The university may select one or more than one partner. The criteria to

award the innovation partnership must always be the most economically advantageous tender with the best price-quality ratio.

The aim of the partnership is the development of the product/service/work followed by the purchase of it by the university, subject to it meeting performance levels and price agreed at the start of the process. The innovation partnership process envisages successive phases of development and production, in accordance with staged targets, and it allows the university to make payments in instalments to the partner or partners. The university can, by reference to those staged targets and provided that the procurement documents are explicit about this, terminate the partnership following a particular phase or terminate individual contracts to reduce the number of partners at the end of a phase. The contracts must address the issue of how intellectual property rights are to be owned.

There is a general requirement that the university ensures the resulting partnership structure and the duration and value of the phases of the project are commensurate with the degree of innovation required and the estimated value of the products, works or services created through the partnership.

As the innovation partnership is a new process it is of course untried and untested; as yet to our knowledge there is no guidance on its use in practice (though it is possible that the European Commission or the CCS may issue guidance in due course). Universities wishing to use the process should ensure they scrutinise the relevant requirements set out in Regulation 31 and elsewhere in the PCR 2015, and satisfy the general EU Treaty principles around ensuring transparency, equality of treatment and non-discrimination. One can foresee certain key risk areas, such as (1) claims by disappointed would-be partners or others in the market that the requirement was not sufficiently innovative so as to justify the use of the process; (2) in multi-partner processes, issues around the preservation of commercial confidentiality, especially when dealing with multiple bids and inviting bidders to improve their bids prior to submission of final tenders; (3) in a multi-partner process involving several separate sets of negotiations, how to ensure equality of treatment of all bidders/partners; (4) disputes around ownership of intellectual property rights in the development of the innovation; and (5) claims that the process has been used in an anti-competitive way.

4.4 Ability to reserve contracts to not for profit social enterprises for certain specific services

Regulation 77 of PCR 2015 contains new opportunities for universities to reserve contract opportunities for certain services to certain types of non-profit organisation (so called “mutuals”), without having to go out to tender. The services must be within the CPV codes specified in Regulation 77; the following of which are likely to be of greatest relevance to universities:

- Higher education services;
- E-learning services;
- Staff training;
- Tutorial services; and
- Adult education at university level.

In order to be exempt from the requirement to go out to tender, the organisation being awarded the services contract must meet the following conditions:

- its objective is the pursuit of a public service mission linked to the delivery of those services;

- profits are reinvested and/or are distributed on participatory considerations;
- ownership of the organisation is based on employee ownership/participatory principles or requires the active participation of employees, service users or stakeholders;
- the organisation has not had a contract for the services concerned reserved to it by this contracting authority in the previous three years;
- the contract term is no longer than three years; and
- the call for competition/advertisement makes reference to Article 77 of the Directive (from which the provisions of Regulation 77 are derived).

Universities might find this structure helpful for non-core business, for example, in the establishment of organisations to provide apprenticeships or other training opportunities.

4.5 Purchasing consortia

Many universities are members of purchasing consortia that use framework agreements to meet requirements e.g. the London Universities Purchasing Consortium (LUPC) and Advanced Procurement for Universities and Colleges (APUC). The PCR 2015 bring little significant change to how frameworks will operate in practice although they do introduce minor clarifications of the rules on frameworks relating mainly to transparency. For example, universities must not use a framework unless clearly identified in the notice as permissible users, and must be transparent about the methods of call off to be used. Usefully, Regulation 33 confirms that a contract awarded under a framework may have a completion date after the expiry of the framework.

4.6 Greater clarity around in-house awards and joint co-operation

There is an increasing trend within the HE sector to look to shared services models as a way of driving down cost.

If a university is considering a shared services arrangement it will need to establish whether the procurement law regime will apply to the proposed structure. Can the contract be awarded directly to the new corporate vehicle which is going to deliver the services, or will the university/ies involved be required to run a competitive process?

Previously we relied on European case law (particularly, the *Teckal* and *Hamburg* cases) for authority on when an in-house contract or joint co-operation arrangement fell outside the scope of the procurement rules. The PCR 2015 now sets out these exemptions in statute for the first time.

Regulation 12 states that a contract will be regarded as an exempt in-house contract where:

- the contracting authority exercises over the contractor concerned a control which is similar to that which it exercises over its own departments ("similar control" in this context means the contracting authority exercising "a decisive influence over both strategic objectives and significant decisions" of the contractor. It includes where this control is exercised by another body, provided that other body is itself controlled by the contracting authority); and
- more than 80 % of the activities of the contractor are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other bodies that are themselves controlled by that contracting authority; and

- there is no private sector ownership of the contractor, with certain exceptions.

Regulation 12(2) specifically permits an extension of the *Teckal* exemption to what can be called "horizontal in-house transactions". Provided that three conditions listed above have been met, Regulation 12(2) states the exemption will also apply where (to paraphrase) "*a controlled legal person, also being a contracting authority, awards a contract to its controlling contracting authority, or to another entity that is also controlled by that controlling contracting authority*".

Regulation 12 also provides an exemption for joint co-operation between universities where (to paraphrase):

- the contract establishes joint co-operation in the performance of public services with a view to achieving mutual objectives; and
- the implementation of the co-operation is governed only by the public interest; and
- the participating authorities perform "on the open market" less than 20% of activities concerned by the co-operation.

Although Regulation 12 represents codification rather than any great change in the legal position, it does provide greater legal clarity on the rules applicable to in-house contracts and joint co-operation. Particularly helpful is the inclusion of the clearly stated 80%/20% thresholds; previously, for example, there was less clarity around how far an in-house company was free to provide services to customers other than its owner-customers.

4.7 Ability to plan for contract change

Another benefit of the new regime for universities is increased clarity around when extensions to a contract or changes to terms and conditions of a contract can be made without creating the requirement for a new procurement process to be run. Previously we relied on case law, particularly the *Pressetext* case, as our authority in this area. Regulation 72 now sets that test out in statute for the first time and clarifies it to a certain extent. It highlights the importance of drafting contract change provisions with a forward looking eye as to whether your contract change provisions will fall within the requirements of Regulation 72 and so avoid triggering a new procurement.

Regulation 72(1) states that a modification which is provided for in the original contract in "clear, precise and unequivocal" terms will **not** trigger a new procurement process.

A substantial modification not originally provided for in the contract will trigger a new procurement process. This will arise where the modification materially changes the nature of the contract or if there is:

- replacement of the contractual partner (usually); or
- introduction of new conditions that would have allowed for other bidders to compete or changed outcome; or
- considerable extension of contract scope; or
- a change to the economic balance in favour of the contractor in manner not provided for in the contract.

In addition to circumstances where the modification was provided for in the original contract, there are four situations where the PCR 2015 do not require a further procurement process to be run, as follows:

- where the **change in value is relatively small** - under 10% (services & supplies) or under 15% (works) **and** is also under the applicable EU financial threshold (this is cumulative where there is a series of changes) (Regulation 72(5)); or

- where there are **unforeseen circumstances** (provided the change does not alter the overall nature of contract and the price increase is not greater than 50%; note too that there is a requirement to publish an OJEU notice about the modification once it has taken place) (Regulation 72(1)(c)); or

- where **additional works, services or supplies are necessary and a change in contractor cannot be made** for economic or technical reasons e.g. interoperability with existing kit; or where to change suppliers would cause significant inconvenience or duplication of costs. To come within this category the price increase must not exceed 50% and there is a requirement to publish an OJEU notice about the modification once it has taken place (Regulation 72(1)(b)); or

- there has been a **replacement of the supplier following a corporate restructuring, insolvency or merger**, and the new supplier still meets the original selection criteria. This exemption is only available where there is no other substantial modification to the contract (Regulation 72(1)(d)(ii)).

We are expecting the CCS to issue model termination clauses for inclusion in contracts in due course, so universities should look out for these and consider incorporating them into their standard terms and conditions.

4.8 Conditions

Regulation 70 includes an opportunity for universities to insert special performance conditions, provided these are included in the call for competition or procurement documents and can be linked to the contract itself. Universities may wish to use this mechanism to further certain policy aims, for example, to promote sustainability or access to higher education for less privileged students.

5 Questions and Answers

In this section we provide responses to certain queries submitted by members of the British Universities Finance Directors Group. Our responses are shown in blue font.

Regulation	Subject	Clarification Required
5 (d) & Schedule 3	Thresholds & Light Touch Services	• Is the "light touch" procedure for former Part B services subject to Below-Threshold Procurement (Regulation 109) - are they not mutually exclusive? Regulation 109(1) states that chapter 8 (Regulations 109-112) applies to all procurements where Part 2 would have applied if they had been over the relevant threshold. The light touch regime is within Part 2 (see Regulation 5(d)) and therefore the below-threshold regime applies to light touch contracts if they are under the 750,000 EUR threshold but over the £25k *de minimis* amount. Note that the effect of Regulation 111(2) is to ban a separate PQQ stage in a light touch procurement where the contract value is under the £172k EU threshold (rather than the higher EUR 750,000 light touch threshold).
32 (2)	Negotiated Procedure Without Competition	• What will be the equivalent process for Below-Threshold Procurement? Unless required by internal policies/standing orders, or in cases where respecting the EC Treaty principles of transparency, non-discrimination and equality of treatment requires it, there is no absolute obligation to go out to tender or follow a formal process for an under-threshold contract and subject to its own internal rules a university can negotiate privately with a supplier. • Is there any correlation with Regulation 110 (4) (b)? Regulation 110(4)(b) confirms that merely making approaches to bidders privately to supply under a below-threshold contract will not amount to "advertising a contract opportunity" and so will not trigger the under-threshold obligation to advertise on Contracts Finder. Note that by Regulation 110(5)(a) you will be taken as

		advertising a contract opportunity if you put it in the public domain with a view to seeking interest.
53	Electronic Availability of Procurement Documents	• In order to reduce the timescales do ALL procurement documents need to be available when the OJEU notice is placed. For example, making the specification and invitation to tender documents available to companies expressing an interest at the PQQ stage of a restricted procedure? Note that the obligation to make all procurement documents available from the date of the OJEU is an **absolute** one, rather than an optional route in order to reduce timescales. Regulation 53(5) does state that the timescales must be extended by 5 days where Regulations 53(3) and (4) apply, but the circumstances set out in the latter are very specific. There is no option to simply choose to not make documents available electronically from the date of the OJEU and accept an extension of the timetable as a "penalty" for that. "Procurement documents" is a defined term and is broad. We suggest it would cover the OJEU, PQQ, ITT (or equivalent), terms and conditions of the contract and any other related documentation.
58 (9)	Selection Criteria	• What might constitute a "special risk" such that a higher than 2:1 contract value: turnover ratio may be justified? Unfortunately neither the regulations themselves nor the CCS guidance on selection offer any answers here, probably because the government is keen not to give express blessing to any deviation from its new guidance around turnover ratios. Given the degree of focus at both EU and government level on limiting turnover requirements, and the fact that departing from the standard PQQ will now be a "reportable deviation" under Regulation 107, universities should be very cautious about imposing higher turnover requirements.
68 (1) (a)	Life-cycle Costing	• Can "costs relating to acquisition" include the contracting authority's costs of implementation/change? Do these costs need to be stated in the tender documentation? Provided the university can show that the cost of implementation/change is part of the cost of acquisition, then yes and the documentation should be transparent as to what costs are taken into account. Note if universities intend to use a life cycle costing approach to evaluating tenders, they must inform bidders in the procurement documents of the data they must provide and the method by which the contracting authority will determine the life-cycle costs based on those data. The methods are set out in legislation listed in Annex XIII to Directive 2014/24/EU (the new Public Contracts Directive).

78 - 82	Design Contests	• What sort of design contests are these regulations designed to cover e.g. architectural designs? "Design Contest" is a defined term in the PCR 2015, as follows: "*design contests" means those procedures which enable a contracting authority to acquire, mainly in the fields of town and country planning, architecture and engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes*;" • Is there any correlation with Regulation 67 e.g. where the design contest is one criterion as part of a set of weighted evaluation criteria e.g. suitability of design (40%), cost of design and its implementation (40%), suitability of design team proposed for the project (20%)? Yes. Subject to the general rules around the setting of award criteria (i.e. must establish the most economically advantageous tender and be linked to the subject matter of the contract) then you can have the design contest as part of a range of criteria. This is common in design and build contracts.
109 (3)	Below-Threshold Procurements	• Where a sub-central contracting authority devolves procurement below £25,000 does that mean that Regulation 6 (3) or 6 (4) will apply to aggregation of below-threshold procurements? The answer here depends on whether the "separate operational units" are separate enough to qualify under Regulation 6(4) as being "independently responsible for procurement". Please see the next answer for guidance on this. If this is not the case, then aggregation will need to be done across all the operational units (Regulation 6(3)). If it is the case, then each independent unit will aggregate its own procurement values separately. • What does "independently responsible for procurement" mean in the context of academic departments of a university? The answer will depend on whether the academic departments have the necessary degree of independent budget control and decision making powers or not. Recital 21 to the parent Directive gives a steer here as to the features that would tend to suggest an academic department was independently responsible for procurement; it says: "*it could be justified to estimate contract values at the level of a separate operational unit of the contracting authority, [such as for instance schools or kindergartens] provided that the unit in question is independently responsible for its procurement. This can be assumed where the separate operational unit independently runs the procurement procedures and makes the buying decisions, has a separate budget line at its disposal for the procurements concerned, concludes the contract independently and finances it from a budget which it has at its disposal. A subdivision is not justified where the contracting authority merely organises a procurement in a decentralised way.*"

		• Where there is repeat spend with one supplier over a period of time, which Regulation takes precedence, Regulation 6 (4) or Regulation 6 (16)? Our reading is that the Regulations work in tandem; if an independent unit is responsible for its own procurement in accordance with Regulation 6(4) then presumably that unit must aggregate its own devolved spend with that supplier in accordance with Regulation 6(16).
110	Publication on Contracts Finder	• Do evaluation criteria need to be published as part of the "contract award opportunity"? The CCS guidance suggests that evaluation criteria do not form part of the minimum data requirements for publication on Contracts Finder of a contact award opportunity for either an above or below threshold contract. Obviously if the contract is over the threshold and published in the OJEU you would expect the criteria and evaluation scheme to be published or linked there as part of the procurement documents. • Is there any correlation with Regulation 67? See above.
110	Publication on Contracts Finder	• Does this have to be done each time a £25k plus requirement occurs? Could 'blanket' adverts be placed on Contacts Finder covering frequently procured goods, works and services between £25k and £100k, for example, directing potential bidders to an eTendering solution (e.g. In-Tend) where potential bidders could register and be invited to bid in the future on a rotational basis (similar to operating an approved list)? Firstly, note that the obligation to advertise under Regulation 110 only applies where the university chooses to advertise a contract opportunity. Note that by Regulation 110(5)(a) you will be taken as advertising a contract opportunity if you put it in the public domain with a view to seeking interest. Subject to EU Treaty principles and any internal rules, a university can still privately appoint a supplier for a below threshold contract without any advertisement and without any obligation to use Contracts Finder. So, **there is no absolute obligation to advertise under threshold contracts on Contracts Finder**, merely a requirement that, if you do choose advertise, then you must also advertise on Contracts Finder. There is no express provision in the Regulations permitting "batching" or "blanket" Contracts Finder adverts for separate procurements.
110 (2)	Publication on Contracts Finder	• What does "in those circumstances" mean? It means "where the university has decided to advertise a below threshold contract".

		• Where does it explicitly state that sub-central contracting authority requirements below £25,000 must be advertised on Contracts Finder? It doesn't!
110 (4) (b)	Publication on Contracts Finder	• What does "selected for that purpose" mean in practice, other than in the case of framework agreements? On our reading it simply means "chosen". • What does "ad hoc" mean in practice? On our reading it means that the suppliers have simply been chosen and approached by the university without any formal advertisement or process.
110 (9)	Publication on Contracts Finder	• What does "a sufficient but not disproportionate period of time" mean in practice. The CCS guidance states that: "*This period must be sufficient to enable interested suppliers to respond to the opportunity and proportionate to the value of the procurement. (Where the contracting authority is seeking a tender response, it is recommended that the minimum time required to submit a tender response is 10 working days.)*" • Is there any correlation with Regulation 28 (8)? See above; the CCS recommendation is that the 10 day minimum period of Regulation 28(8) is used for Regulation 110(9).
111 (1) – (3)	Assessing Suitability	• What do these Regulations mean in practice (e.g. in terms of advertising on Contracts Finder and including a pre-qualification stage in the procurement) where a sub-central contracting authority requirement is a public works contract? If it is below the EU threshold for works (i.e. £4,322,012) then there is no obligation to advertise it, but if you choose to advertise, you must also advertise on Contracts Finder. If it is below the EU threshold for services and supplies for non-central government bodies (i.e. £172,514) then the Regulation 111 ban on a separate PQQ stage will apply. Note that if the works contract is above the latter threshold then a separate PQQ stage is permitted.

112	Publication on Contracts Finder	• What information should be provided to unsuccessful candidates? Is there any correlation with Regulation 55 (2)? Regulation 112 simply covers notices of contract award on Contracts Finder, which must be placed for all £25k plus contracts regardless of whether they were originally advertised on Contracts Finder or not. The information that must be provided to unsuccessful candidates and tenderers must be done on an individual basis (not via an award notice) and is covered by the remedies regime which has not changed in any material way from what it was under the 2006 regulations. Regulation 55(2) and the award and standstill regime sit separately from Regulation 112.
114 (1)	Failure to Comply	• What are the remedies/sanctions against contracting authorities that fail to advertise Below-Threshold Procurements in Contracts Finder? Regulation 91 states that a bidder can bring an action in the High Court for a breach of the duty set out at Regulations 89 or 90. When you look at Regulations 89 and 90, they state that the scope of that duty is limited to the provisions of Part 2 and any other EU obligation in relation to an over-threshold contract covered by Part 2. On that basis, our view is that the "applications to court" regime at Regulations 88-104 does not apply to the Part 4 "Contracts Finder" and the "Suitability Assessment" provisions at Regulations 109-112. We suspect that litigation over this is very unlikely because a bidder would have to show that if a contract opportunity had been published on Contracts Finder it would have won and there is obviously uncertainty around that. Also, new court fees have come into effect which have increased the fee for issuing proceedings to 5% of the damages claimed up to a ceiling of £10K, so if that legislation stands then it would simply be uneconomic to bring this kind of claim. Note that the position is less clear for the Contracts Finder and qualitative selection obligations for **above**-threshold contracts (Regulations 105 to 108). While these form part of Part 4, there is a sub-heading at the start of Chapter 7 that states that these are "Additional Rules for Part 2 Procurements" and it is possible that a court, if required to make a judgment on the issue, could decide that this wording was sufficient to bring Regulations 105 to 108 within the scope of the remedies regime of regulations 88-104. Finally, we note the statement at Regulation 114 that a material failure to comply with Part 4 will not of itself affect the validity of a contract once it has been entered into. However, this of course stops short of preventing, for example, a claim by a bidder for damages. Notwithstanding all the above, we should emphasise that universities have a statutory obligation to meet the below-threshold Contracts Finder requirements in the Regulations.

	General	• what do the new regulations mean for Universities responding to NHS tenders – what will the NHS do differently that we should be aware of? - Light Touch regime for "old Part B" services (other than clinical health services) – if over £626k these will have be advertised and opened up to competition, and a procurement process followed. For example, if a university is looking to provide education or training services to an NHS Trust and the value of these is over the £626k threshold, there will be an obligation on the NHS Trust to advertise in the OJEU and hold a competitive process (although it will have some flexibility as to the design of that process). The university will no longer simply be able to be appointed as the NHS Trust's partner in these circumstances without any competition. - Provision of Clinical Services (e.g. if a university medical school contracts to supply clinical services to an NHS Trust) – these are excluded from the scope of the PCR 2015 for the moment and will continue to operate under the Part B services regime of the 2006 Regulations until April 2016. • When entering into academic agreements with non-educational (HE/FE) providers like law providers , the zoo (yes the zoo) do the new regs appy? We assume that as it is an "academic agreement" it will be for "education services" and so will be covered by the Light Touch regime to the extent that it is over the £626k threshold for the application of that regime. Please see paragraph 3.2 of this briefing for more details about the Light Touch regime. • What can you negotiate on and when e.g. in the competitive procedure with negotiation? Three procurement processes allow negotiation with bidders – the competitive with negotiation, the competitive dialogue and the innovation partnership. In all three, there is a general principle that the minimum requirements and award criteria as originally stated are not negotiable. In the competitive with negotiation process it is possible to negotiate the initial tender and all subsequent tenders submitted, provided equal treatment and confidentiality are preserved. However, once final tenders are submitted, no further negotiation is possible with the winning/preferred bidder (see Regulation 29(21)). It is possible to reserve the right in the OJEU notice not to negotiate and to simply award on the basis of the initial tender; it seems sensible for universities to choose this option to preserve flexibility. In contrast, in the competitive dialogue process, it is possible to negotiate even after the winning bidder has been selected, subject to this not modifying essential aspects of the winning bid or the procurement generally, or causing distortion of competition/discrimination (see Regulation 30(20)).

		• How does the innovation process really work i.e. can you go out for a collaborative partner and how do you then work with them? Please see paragraph 4.3 of this briefing for details. • What reporting is necessary e.g. no of contracts awarded to SMEs, payment performance against the 30 days etc.? There are three separate categories of reportable requirements: • the first is derived from the requirements in the parent Directive and are set out at Regulation 84 (please see paragraph 3.5 for details of these); • the second is the national-level requirements set out in Part 4 (Regulations 105 to 114) and include: ○ obligations to publish details of contract awards over £25k on Contracts Finder, regardless of whether these were initially advertised there or not; note that in relation to below-threshold contracts this must also include data on whether the winning bidder is an SME or a "VCSE" (that is, a non-governmental organisation which is value driven and re-invests profits in the organisation) (see Regulation 112); ○ requirements to comply with reporting obligations on payment of invoices within 30 days (please see paragraph 3.1.6 for details of these); and ○ requirements to report any deviations from the CCS guidance around qualitative selection (see paragraphs 3.1.4 and 3.1.5 for details); it is possible the CCS could add to these by issuing further guidance or procurement policy notes in the future); and • the third is any internal reporting requirements imposed by the university itself or other higher education bodies. • Now that awarding on cost/price is gone and you can only award on MEAT how does that work? Regulation 67(2) provides some amplification here and expressly permits use of a cost-effectiveness approach in determining the most economically advantageous tender, such as life cycling costing (see Regulation 68). This can include the best price-quality ratio (note that Regulation 67(3) provides considerable flexibility on how the quality element is assessed and that Regulation 67(4) contemplates the possibility that the price/cost element is

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		fixed and competition is run on the basis of the quality element only). • If you finish (1) a procurement, or (2) a framework before the 26th Feb 2015 and you have been buying from those on payment terms of 30 days after month end via POs what happens now? I.e. Do you pay on the same terms or are you forced to change your payment terms to 30 days? We have looked at Regulation 113 on payment of invoices and also at the recent guidance on this topic issued by the Cabinet Office. Neither of them specifically provide an answer to this question. Nonetheless, Regulation 118(3) states that "nothing in these Regulations" (including the Regulation 113 rules around payment of invoices within 30 days) affects the award of any contract called off from a framework where that framework agreement was concluded before 26 February 2015. If the framework was concluded before 26 February 2015, the new rules on invoice payment do not apply to the purchase orders (call-off contracts) made under it.

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