



Crown
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A BRIEF GUIDE TO THE 2014 EU PUBLIC PROCUREMENT DIRECTIVES

October 2016

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1. Introduction

- 1.1 A package of three Public Procurement Directives set out the EU legal framework for procurement by public authorities and utilities: the Public Contracts Directive 2014, The Concessions Contracts Directive 2014, and the Utilities Directive 2014. This guidance focusses on the new Public Contracts Directive, but also refers to the similar changes that have been made by the 2014 Utilities Directive, which is covered in section 24 below. This guidance does not cover the procurement of contracts for defence and security requirements¹. A separate guide covers the Concessions Contracts Regulations 2016 (**provide link when on gov.uk*). The rules on concessions are relevant to public authorities and utilities.
- 1.2 The Public Contracts Directive sets out procedures which must be followed before awarding a contract to suppliers (i.e. providers of works, supplies or services) when its value exceeds set thresholds, unless it qualifies for a specific exclusion - e.g. on grounds of national security. Details of the thresholds in force from 1 January 2016 to 31 December 2017 can be found at: <https://www.gov.uk/government/publications/procurement-policy-note-1815-new-threshold-levels-2016>.
- 1.3 This guidance summarises the main provisions of the Public Contracts Directive. It does not set out all the relevant rules. It is not intended as a substitute for project specific legal advice, which should always be sought by a contracting authority where required.
- 1.4 The EU procurement regime, based on the Treaty principles of transparency, non-discrimination, equal treatment and proportionality and described by the Public Contracts Directive and Regulations referred to in this guidance, is not static. It is subject to change, driven by evolving European and domestic case law, European Commission communications, new and revised Public Contracts Directives and amendments to the existing UK Regulations.

2. Public Procurement Directives in national law

- 2.1 This guidance is based on the published text of the new Public Contracts Directive (2014/24/EU) and the Utilities Directive (2014/25/EU) which can be viewed at <https://www.gov.uk/transposing-eu-procurement-directives#the-directives>. These Directives have been transposed into UK law by the following Regulations²:
 - The Public Contracts Regulations 2015
(SI 2015 No. 102)
<http://www.legislation.gov.uk/ukxi/2015/102/contents/made>
 - The Utilities Contracts Regulations 2016
(SI 2016 No. 274)
http://www.legislation.gov.uk/ukxi/2016/274/pdfs/ukxi_20160274_en.pdf
- 2.2 These Regulations do not extend to Scotland, where separate, but similar Regulations came into effect in April 2016. Any authority entering into a contract that is to be carried out in Scotland would need to consider the application of the Scottish Regulations.

3. Purpose

¹ More details at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35925/dsd_govt_awareness_guide.pdf

² SI 2016/275 (the Public Procurement (Amendments, Repeals and Revocations) Regulations 2016) made minor but necessary consequential amendments related to the coming into effect of the Utilities and concessions SIs

3.1 The purpose of the EU procurement rules, underpinned by the Treaty principles, is to open up the public procurement market and to ensure the free movement of supplies, services and works within the EU. In most cases they require competition. The EU rules reflect and reinforce the value for money (vfm)³ focus of the Government's procurement policy. This requires that all public procurement must be based on vfm, defined as "the best mix of quality and effectiveness for the least outlay over the period of use of the goods or services bought", which should be achieved through competition, unless there are compelling reasons to the contrary.

4. Reform of the EU rules – The 2014 Public Procurement Directives

4.1 On 20 December 2011 the European Commission published proposals to revise and update the public sector and utilities procurement Directives (2004/18/EC and 2004/17/EC respectively) plus a proposed new directive on the award of concession contracts⁴.

4.2 Following negotiations between Member States, the European Parliament and the Commission the texts of the Public Procurement Directives came into force on 17 April 2014. Member States were required to transpose these Directives into national law by 18 April 2016.

4.3 The new rules support UK Government priorities of economic growth and deficit reduction by making the public procurement process faster, less costly, and more effective for business and procurers alike. They represent an excellent outcome from the UK's extensive negotiations in Brussels.

4.4 These changes provide a much more modern, flexible and commercial approach compared to the existing regime. Outdated and superfluous constraints have been removed, and many new features have been added to streamline and modernise public procurement. 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.

5. New provisions

5.1 This guidance outlines the requirements of the new Public Contracts Directive, drawing attention to a number of changes to procedures and requirements for public procurement.

5.2 A list of the key changes follows immediately below, with additional detail in the subsequent sections:

General

5.3 Contracting authorities will be able to reserve the award of certain services contracts to mutuals/social enterprises for a time-limited period.

5.4 Although the thresholds of application of the rules will not change immediately, the Public Contracts Directive includes a binding commitment on the Commission to review the economic effects of the thresholds on the internal market. This review must be completed by 2019.

Facilitating SME involvement

³ See Managing Public Money at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212123/Managing_Public_Money_AA_v_2_-_chapters_annex_web.pdf.

⁴ Concessions contracts are currently subject to minimal EU regulation; the proposed new legislation aims to ensure that concessions are competed effectively. Concessions contracts involve giving exploitation rights as part of the supplier's reward for delivering a public service or building – examples include toll bridges and car parks built on public-authority-owned land. Risk-transfer is also a significant feature of concessions.

- 5.5 Contracting authorities are encouraged to break contracts into lots to facilitate SME participation.
- 5.6 A turnover cap has been introduced to facilitate SME participation. Contracting authorities will not be able to set company turnover requirements at more than two times contract value except where there is a specific justification.
- 5.7 A central, on-line point called “E-certis” where suppliers can find out the type of documents, certificates etc which they may be asked to provide in any EU country, even before they decide to bid. This should help suppliers to bid cross-border, if they are unfamiliar with these requirements.

Selection of Suppliers

- 5.8 A much simpler process of assessing bidders’ credentials, involving greater use of supplier self-declarations, and where only the winning bidder should have to submit various certificates and documents to prove their status.
- 5.9 Poor performance under previous contracts is explicitly permitted as grounds for exclusion.
- 5.10 Various improved safeguards from corruption:
- Requirements on contracting authorities to put in place appropriate safeguards against conflicts of interest. The rules are not prescriptive on what the safeguards should be, but compliance could be achieved, for example, through a common current practice amongst many UK contracting authorities, where declarations are signed by procurement staff to confirm they have no outside interests with bidders etc;
 - Time limits for the exclusion of suppliers (not more than 3 or 5 years depending on the reason for the exclusion);
 - Suppliers who have been excluded from public procurement for bad practice can have the exclusion ended if they effectively “self clean”.

Procedure changes

- 5.11 Preliminary market consultations between contracting authorities and suppliers are encouraged, which should facilitate better specifications, better outcomes and shorter procurement times.
- 5.12 More freedom to negotiate. Constraints on using the competitive procedure with negotiation have been relaxed, so that the procedure will generally be available for any requirements that go beyond “off the shelf” purchasing.
- 5.13 The distinction between Part A and Part B Services has been removed, and a new light-touch regime introduced for social and health and some other services. There is an OJEU advertising requirement and other specific obligations for this new light-touch regime, but a much higher threshold has been agreed (EUR 750,000 for public sector authorities, EUR 1m for utilities).
- 5.14 A new procedure, the “Innovation Partnership” procedure, has been introduced. This is intended to allow scope for more innovative ideas. The supplier bids to enter into a partnership with the authority, to develop a new product or service.
- 5.15 The statutory minimum time limits by which suppliers have to respond to advertised procurements and submit tender documents have been reduced by about a third. This flexibility could be helpful for speeding up simpler or off-the-shelf procurements, but still permits longer timescales for requirements where suppliers will need more time to respond.

Electronic procurement

- 5.16 Electronic versions of the procurement documentation must be available through an internet URL immediately on publication of the OJEU contract notice.
- 5.17 Full electronic communication (with some exceptions) will become mandatory for public contracts 4.5 years after the Public Contracts Directive comes into force (i.e. October 2018). For central purchasing bodies the deadline is three years (April 2017).
- 5.18 The rules on “Dynamic Purchasing Systems” (DPS) have been greatly simplified, with the removal of the onerous obligation to OJEU-advertise call-off contracts made under the DPS.
- 5.19 Electronic catalogues for public procurement are expressly permitted, removing any doubt as to their legality.

Contract award

- 5.20 Improved rules on social and environmental aspects, making it clear that:
- social aspects can now also be taken into account in certain circumstances (in addition to environmental aspects which have previously been allowed);
 - contracting authorities can require certification/labels or other equivalent evidence of social/environmental characteristics, further facilitating procurement of contracts with social/environmental objectives;
 - contracting authorities can refer to factors directly linked to the production process.
- 5.21 The full life-cycle costing can be taken into account when awarding contracts; this could encourage more sustainable and/or better value procurements which might save money over the long term despite appearing on initial examination to be more costly.
- 5.22 Legal clarity that contracting authorities can take into account the relevant skills and experience of individuals at the award stage where relevant (e.g. for consultants, architects, etc).

Other

- 5.23 Contracting authorities no longer have to submit detailed annual statistics on their procurement activities. The Commission will collect this information directly from the online system, thereby freeing up valuable time and resources for contracting authorities.

6. Concessions

- 6.1 Works concessions contracts are excluded from the Public Contracts Directive. The new Concessions Directive applies to both works and services concessions for both public sector bodies and utilities. A Handbook for Concession Contracts Regulations can be found at: <https://www.gov.uk/guidance/public-sector-procurement-policy>

7. Geographical coverage – which countries have access to the EU rules?

- 7.1 In addition to the 28 EU Member States and the 3 states of the European Economic Area (Iceland, Liechtenstein and Norway) the benefits of the EU public procurement rules also continue to apply to suppliers from a number

of other countries where the EU has entered into an agreement. The main agreement is the one negotiated through the World Trade Organisation (WTO) titled the Government Procurement Agreement (GPA) http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm#govt.

- 7.2 Compliance with the EU rules ensures compliance with the GPA, where it applies, and suppliers from GPA countries have the same rights as EU suppliers. The non-EU countries who are signatories to the GPA are:
- Armenia; Aruba; Canada; Hong Kong, China; Iceland; Israel; Japan; Liechtenstein; Montenegro, New Zealand; Norway; Republic of Korea; Singapore; Switzerland; Taipei; Ukraine; and the USA.
- 7.3 The EU has similar Free Trade Agreements with some other countries, and contracting authorities should check to see if any of these apply if they receive expressions of interest or bids from suppliers in other, non-GPA countries. Information about free trade agreements which include public procurement can be found at: <http://ec.europa.eu/trade/policy/accessing-markets/public-procurement>

8. Contracts outside the scope of the Public Contracts Directives

- 8.1 Even when a tender process is not subject to the Public Contracts Directives, (for example because the estimated value of a contract falls below the relevant threshold), EU Treaty-based principles of non-discrimination, equal treatment, transparency, mutual recognition and proportionality apply. Where the authority considers that a contract is likely to attract cross-border interest it is obliged to publish a sufficiently accessible advertisement to ensure that suppliers in other Member States can have access to appropriate information before awarding the contract. This is in line with the UK objective of achieving value for money in *all* public procurement - not just those covered by the Public Contracts Directives. Some degree of advertising, (appropriate to the scale of the contract), is likely to be necessary to achieve transparency where the contract is likely to attract cross-border interest.
- 8.2 The UK regulations also include some specific UK rules to support growth by improving suppliers' access to public contracts below the EU thresholds ("sub-threshold contracts"). These rules include requirements for advertising all public contracts below the EU thresholds, but over certain other threshold values, on Contracts Finder. They also include a requirement for contracting authorities to have regard to Crown Commercial Service guidance on the selection of suppliers and the award of contracts and to ensure that suppliers pay their sub-contractors within 30 days (as is already required of contracting authorities).

9. Does the Public Contracts Directive apply to the contract?

9.1 The Public Contracts Directive applies in principle to all contracts awarded by a contracting authority. However, there are some specific exclusions where there is a relevant defence or security dimension, see Annex A, Flowchart 1. **The Public Contracts Directive also exempts certain contracts between contracting authorities where they are effectively meeting genuine 'in-house' requirements within a number of contracting authorities.** This could be through the form of a 'vertical' arrangement under shared control (so-called '*Teckal* bodies' from the lead case in the European court, Case C-107/98). Or it might be through a 'horizontal' arrangement, where a number of contracting authorities genuinely co-operate with each other to meet a shared legal obligation (as in the *Hamburg* case in the European court, Case C-480/06).

10. Mixed contracts

10.1 In some cases contracts awarded by contracting authorities will contain elements that are covered under the rules in the new public sector regulations, the new utilities regulations, the new concessions regulations and/or the Defence and Security Public Contracts Regulations. See Annex A, Flowchart 2 for mixed procurements involving the new public sector regulations, the Defence and Security Public Contracts Regulations and/or Article 346 of the Treaty.

11. Reservation of certain contracts: mutuals and sheltered workshops

11.1 Mutuals

11.2 **One of the UK priorities in the negotiations was to secure flexibility to enable fledgling public service mutuals to gain experience of delivering services before being exposed to EU-wide competition.** The new Public Contracts Directive permits competition for certain contracts, listed by CPV code, mainly in the social and health sectors, to be "reserved" to organisations such as mutuals and social enterprises meeting certain limited criteria described in Article 77 of the Public Contracts Directive. The reservation works in practice by requiring an OJEU competition for those services using the 'light touch regime' referred to at paragraph 12.1 below but only allowing bids from organisations meeting the mutual or social enterprise criteria.

11.3 The reservation has time-based conditions to prevent misuse, so contracting authorities cannot reserve contracts for organisations that have been awarded contracts within the last 3 years, and contracts cannot be longer than 3 years.

11.4 Sheltered workshops

11.5 **The Public Contracts Directive also expands the scope of the existing reservation for sheltered workshops/employment programmes** by allowing reservation of any contract for disadvantaged as well as disabled workers, and reducing the minimum proportion of those workers in the supplier's workforce required for a supplier to be eligible to bid for a reserved contract. The reservation works in practice by requiring an OJEU competition for those services but only allowing bids from organisations meeting the criteria.

12. The 'light touch regime' for certain services

12.1 **Under the 2006 Regulations there are different rules for so-called 'Part A and Part B' services. In the new Public Contracts Directive, the position for services contracts has changed significantly.**

12.2 The main changes include:

- A new “light-touch regime” for a smaller number of categories of services contracts in the health and social service areas listed at Annex XIV to the Public Contracts Directive. Some contracts that were formerly “Part B” but are not listed in the Annex, will be subject to the *full* EU procurement rules;
- A significantly higher threshold than for supplies and for other services (EUR 750,000 for public sector authorities, EUR 1m for utilities);
- A new obligation on contracting authorities to publish a call for competition in the OJEU, as well as a contract award notice, for above-threshold contracts covered by the light-touch regime.

12.3 Member States have flexibility to design their light touch rules. To preserve as much of the existing flexibility as possible the UK rules will be much less stringent than the full EU rules regime. As well as the OJEU advertising requirements the UK rules will require compliance with the basic Treaty principles (transparency, equal treatment, non-discrimination) and publication in OJEU of contract award notices. Otherwise, there will be considerable flexibility for contracting authorities to use procedures, tools and techniques of their own choosing, whether analogous to those in the main rules or not.

13. Aggregation rules and thresholds

13.1 The threshold levels for the application of the Public Contracts Directives will be unchanged because of GPA commitments but **the Commission has made a commitment to review, by 2019, the** economic effects of the thresholds on the internal market. The Public Contracts Directive’s rules on determining the value of a contract are unchanged.

13.2 Where a single work involves more than one contract, the estimated value of all the contracts must be aggregated to decide whether the threshold is reached. Where the threshold is reached, each of the works contracts will be covered by the rules except small contracts (known as small lots) the value of which falls below the de minimis level provided for in the Public Contracts Directive.

13.3 In determining whether the threshold has been or is likely to be reached for public supplies or services contracts, the rules require aggregation:

- of the estimated value of separate contracts for meeting a single requirement; and
- where a series of contracts or a renewable contract is entered into for supplies/services of the same type during a twelve month period.

13.4 Where an authority is divided into a number of separate operational units (SOUs) with authority to decide independently whether to enter into procurement contracts, then aggregation need only be applied to each unit. In other cases the authority as a whole must be considered for aggregation purposes. The Public Contracts Directive provides greater detail as to when aggregation can be carried out at the SOU level.

14. Electronic procurement

14.1 **The Public Contracts Directive requires electronic submission of OJEU notices, electronic availability of procurement documents at the time of notice publication, and electronic communication and information exchange for all communication under the Public Contracts Directive, subject to specified exclusions.** Contracting authorities must ensure that the tools and devices used for electronic communication meet certain requirements set out in the Public Contracts Directive. Contracting authorities must decide and apply to these communications, appropriate electronic security, guided by a high level framework in the Regulations.

14.2 **The Public Contracts Directive reforms the DPS to remove the previously burdensome need for OJEU advertising of “call-off” contracts to be awarded using the system.** Under the new rules, only the DPS itself will need to be OJEU-advertised, with call-off contracts being subject to much more straightforward procedures,

similar to the established process for awarding call-off contracts under a framework agreement by mini-competition. A key advantage of a DPS compared to a framework, which it resembles, is that suppliers can be added at any time to a DPS provided that they pass the exclusion criteria and minimum capacity requirements. This will greatly streamline the system and allow greater competition to be maintained.

- 14.3 **The Public Contracts Directive also provides helpful confirmation that electronic catalogues can be used as a basis for tenders for contracts or frameworks. Some safeguards are required where contracting authorities intend to compare offers without seeking re-submission of catalogues by suppliers.**

15. Central purchasing bodies

- 15.1 Contracting authorities may purchase through Central Purchasing Bodies (CPBs). CPBs may act as a 'wholesaler' – supplying an authority on the basis of contracts it has itself awarded and/or provide contracting authorities with access to framework deals or dynamic purchasing systems it has established.

16. Frameworks

- 16.1 The Public Contracts Directive introduces minor clarifications of the rules on frameworks relating mainly to transparency. Thus contracting authorities must not use a framework unless clearly identified in the notice as permissible users and contracting authorities must be transparent about the methods of call off to be used. It does however confirm that a contract awarded under a framework may have a completion date after the end of the framework.

17. OJEU advertising requirement

- 17.1 Generally contracts covered by the Regulations must be the subject of a 'call for competition' published in the OJEU. **In most cases this will be a Contract Notice but in a change from the current rules contracting authorities other than central government (e.g. local authorities) will also be able to use the Prior Information Notice (PIN) for this purpose in certain defined circumstances.** A number of detailed changes have also been made to the information that must be included in the notice forms.

18. Shorter minimum time limits

- 18.1 **The minimum time allowed for responses or tenders is reduced to allow flexibility where the current minimum time limits are unnecessarily long.** In certain circumstances these can be shortened further where the requirement is urgent or where sufficient information has already been provided by a prior information notice to allow suppliers to respond quickly. See Annex B for a summary of the time limits in the new Public Contracts Directive.

19. Choice of procurement procedure

19.1 The new Public Contracts Directive provides for five award procedures, rather than the existing four:

- the open procedure, under which all those interested may respond to the advertisement in the OJEU by submitting a tender for the contract;
- the restricted procedure, under which a selection is made of those who respond to the advertisement and only they are invited to submit a tender for the contract.
- the competitive dialogue procedure, under which a selection is made of those who respond to the advertisement and the contracting authority enters into dialogue with potential bidders, to develop one or more suitable solutions for its requirements and on which chosen bidders will be invited to tender. **The new Public Contracts Directive provides greater freedom to use this procedure than do the existing rules** (see below);
- the competitive procedure with negotiation under which a selection is made of those who respond to the advertisement and only they are invited to submit an initial tender for the contract. The contracting authority may then open negotiations with the tenderers to seek improved offers. **The new Public Contracts Directive provides greater freedom to use this procedure than the existing rules** (see below).
- the innovation partnership procedure, under which a selection is made of those who respond to the advertisement and the contracting authority uses a negotiated approach to invite suppliers to submit ideas to develop innovative works, supplies or services aimed at meeting a need for which there is no suitable existing 'product' on the market. The contracting authority is allowed to award partnerships to more than one supplier.

19.2 In certain narrowly defined circumstances the contracting authority may also award a contract using the 'negotiated procedure without prior publication'. Here the contracting authority would approach one or more suppliers seeking to negotiate the terms of the contract. One of the permitted circumstances is where, for technical or artistic reasons or because of the protection of exclusive rights, the contract can only be carried out by a particular supplier.

19.3 Contracting authorities have a free choice between the open and restricted procedures. **The competitive dialogue procedure and the competitive procedure with negotiation are available where certain criteria are met, including where the contract is complex or cannot be purchased 'off the shelf'**. The 'negotiated procedure without prior publication' may only be used in the limited circumstances described in the Public Contracts Directive.

19.4 Contracting authorities using the restricted procedure, competitive dialogue procedure and the competitive procedure with negotiation must aim to select a number of suppliers sufficient to ensure genuine competition. Provided there are sufficient suitable candidates, the Public Contracts Directive requires a minimum of five for the restricted procedure, and three for competitive dialogue and competitive procedure with negotiation.

20. Stages in the procurement process

20.1 The Public Contracts Directive includes procedural requirements designed to ensure all suppliers established in countries covered by the rules are treated on equal terms, to avoid national discrimination. The rules in particular cover the following:

- Specification stage - how requirements must be described, avoiding brand names and other references which would have the effect of favouring or eliminating particular providers, products or services and the requirement to accept equivalence. The use of performance specifications is encouraged. **The new Public Contracts Directive also makes clear that there is some scope for building into the specification equality issues (e.g. access issues for the disabled) and social/environmental issues (e.g. a requirement to**

conform to social or environmental labels). Regarding social/environmental issues, contracting authorities also may specify production processes and methods as long as they are linked to the subject matter of the contract.

- Selection stage - there are a number of grounds for the exclusion of suppliers based on evidence of unsuitability, some of which are mandatory. Reasons include criminal conviction for certain offences (mandatory), failure to pay taxes (mandatory) **and previous poor performance which has led to early termination, damages or other comparable sanctions (discretionary)**. Some of the grounds for mandatory exclusion are subject to account being taken of remedial action by the supplier, e.g. organisational changes. **There are statutory limits to the duration of any exclusion period.**
- Those suppliers not excluded can then be assessed on the basis of their economic and financial standing, e.g. whether they meet proportionate levels of financial soundness. **The Public Contracts Directive requires that where this is judged on the basis of turnover this should not normally exceed twice the value of the contract.**
- **Suppliers may also be assessed on their technical capacity and ability e.g. that they will be adequately equipped to do the job and that their track record is satisfactory.**
- **Award stage - the award of contract must be based on the tender most 'economically advantageous' to the authority (MEAT).** This can however include assessment on the basis of price/cost only as well as other methods including the 'best price/quality ratio' (equivalent to value for money), which can include social and environmental requirements provided they relate to the contract.

20.2 **The Public Contracts Directive also places a duty on the contracting authority to investigate tenders it considers abnormally low and to disregard those that are based on approaches in breach of international environmental or social law.**

20.3 To allow suppliers to seek effective review of contracting authorities' decisions, contracting authorities will as previously be required to include a 10-15 day standstill period⁵ between the point when the decision on the award of the contract is made and the signature of the contract. The standstill letter must provide certain information about the contracting authority's decision. There are detailed requirements for this process, which are set out in the Public Contracts Directive.

21. Changes to contracts once awarded

21.1 **The Public Contracts Directive provides useful clarity about the extent to which a contract can be changed after award without the need to re-advertise in OJEU.** Permissible grounds for modification include the existence of suitable "clear, precise and unequivocal" review clauses in the contract; a need for additional supplies or services where a change of supplier is impossible and would cause significant inconvenience, or a need for additional deliveries due to unforeseen circumstances (both subject to 50% maximum increase in initial contract value); where a new supplier replaces the existing supplier because of insolvency, genuine restructuring; and where the amendment, irrespective of its value, is not substantial.

⁵ At least 10 days, when the notice is communicated using electronic means, or when using non-electronic means, there is a choice between either 15 days from date of sending; or 10 days from date of receipt

22. Termination of contracts

22.1 The Public Contracts Directive contains provisions to ensure that Member States' contracts allow termination in circumstances where there has been a breach of EU law on public procurement, particularly where this results from a change in an awarded contract.

22.2 The contracting authority must have the right to terminate a contract should any of the following three grounds occur:

- Where the contract has been subject to a substantial modification that constitutes a new award;
- Where it is discovered after contract award that the contractor should have been excluded on mandatory exclusion grounds;
- Where the Court of Justice of the European Union (CJEU) has declared a serious infringement by the contracting authority of its obligations, meaning the contract should not have been awarded to the contractor.

22.3 The Regulations specify that contracting authorities must include a condition in contracts allowing them to terminate if any of the grounds are found to apply. As a fallback, the Regulations also include a deeming provision to ensure this possibility exists where a contract fails to include a termination condition.

23. Enforcement

23.1 The enforcement regime will be included in the Regulations, and derives from the Remedies Directives, which have not changed. The principal means of enforcement for a breach of the Regulations and other enforceable EU law such as the Treaty are:

- action by suppliers against individual contracting authorities in the High Court; and
- action by the Commission against the Member State in the Court of Justice of the European Union (CJEU).

23.2 The High Court's powers include both pre-contractual remedies (i.e. those that can be imposed before the contract is entered into) and post-contractual. Pre-contractual remedies include the power to suspend an incomplete contract award procedure (an injunction) or the setting aside of a decision in an incomplete contract award procedure. The High Court also has powers to award damages as a pre-contractual remedy.

23.3 Post-contractual remedies (for contracts that have already been awarded) include contractual ineffectiveness (i.e. cancellation, but only for very serious rule breaches,) contract shortening, and civil financial penalties (fines). A properly applied standstill period gives good protection against post-contractual remedies.

23.4 Cases can also be pursued via the European Commission, for breach of the relevant European Directive and/or the EU Treaties. These cases, where accepted by the Commission, trigger infraction proceedings against the Member State, and can lead to a CJEU hearing, substantial fines, and potentially other CJEU imposed orders against the Member State if the breach is not satisfactorily resolved by other means.

24. Utilities Directive: changes specific to utilities and differences from the Public Contracts Directive

24.1 The 2014 Utilities Directive and the 2016 Utilities Contracts Regulations (UCR 2016) apply to bodies that carry out specified activities in the energy, water, transport and postal services sectors, which include:

- public authorities;
- public undertakings; and
- private utilities which operate on the basis of special or exclusive rights.

24.2 The definition of special or exclusive rights has been amended in the 2014 Utilities Directive. Where a utility's activities are exercised pursuant to rights which have been granted following a procedure in which adequate

publicity has been ensured and where the granting of these rights was based on objective criteria, these do not constitute special or exclusive rights. In these circumstances, such activities would be out of scope of the Utilities Directive and the UCR 2016.

24.3 The mechanism whereby utilities can apply for an exemption from the rules, where they operate under competitive conditions and where access to the market is not restricted, has been maintained, but minor changes have been made to improve the process following an application for exemption. It should be noted that the three previous successful UK applications for exemption in the fields of electricity generation, energy supply and exploration for and exploitation of oil and gas continue to apply where appropriate. Exploration for oil and gas is no longer a regulated activity, as it is subject to competitive conditions.

24.4 As previously, there is a free choice between the open, restricted and competitive negotiated procedures, but competitive dialogue has been included as an additional procedure, as has the new innovation partnership approach.

24.4 The following covers certain differences in the utilities rules from the public sector rules:

- the maximum duration of a framework agreement is set at 8 years;
- utilities do not have to explain the main reasons for not splitting a contract into lots;
- under the 2014 Utilities Directive, utilities which are not contracting authorities are not required to apply the grounds for exclusion under the articles 57(1) and 57(2) of the Public Contracts Directive, but could do so, whereas contracting authorities are required to apply the mandatory exclusions, such as criminal conviction for certain offences and failure to pay taxes; and
- the threshold for the light touch regime is EUR £1m (£785,530).

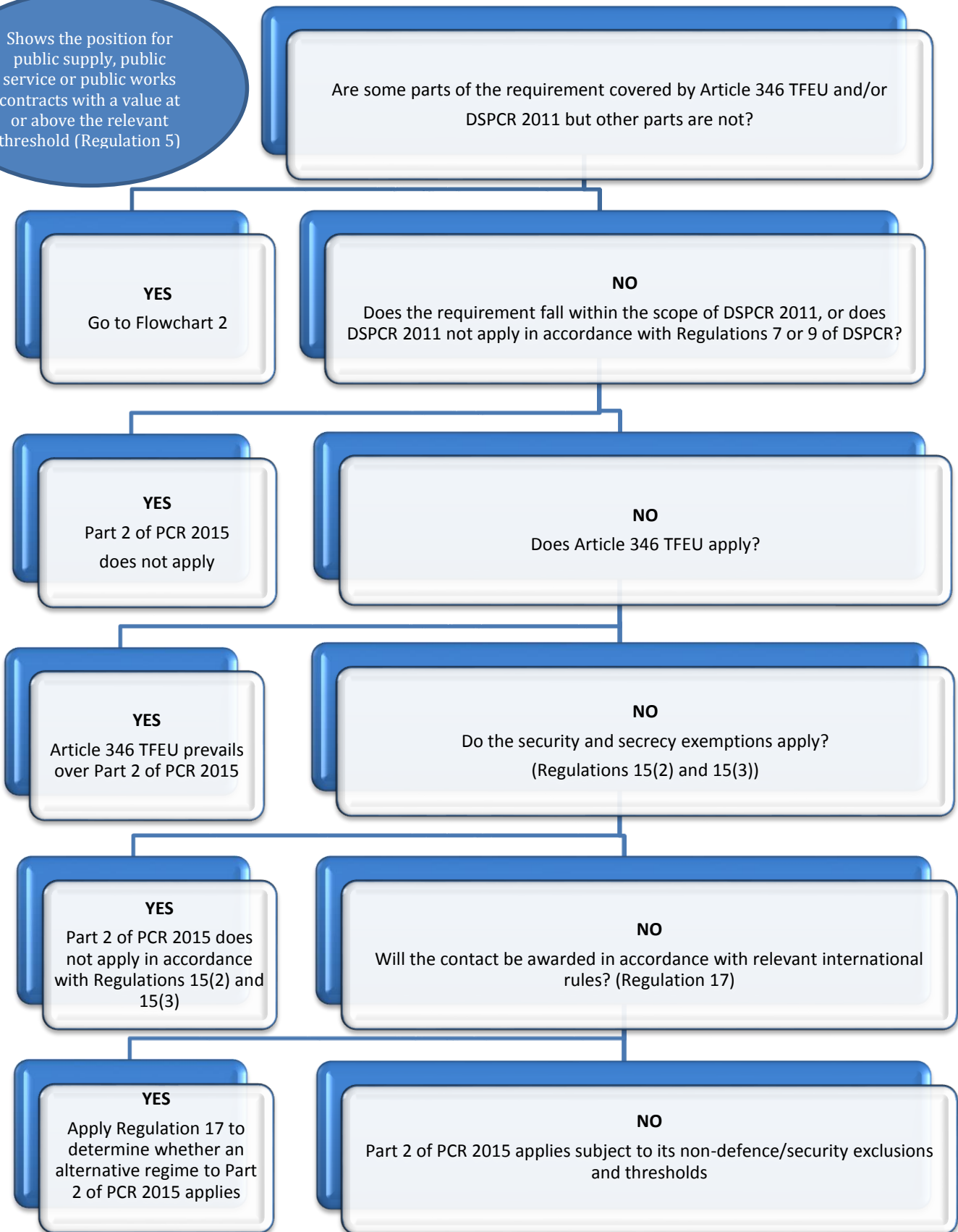
Further information

25.1 For further detailed information on public procurement policy, including the training materials for the contracts regulations and guidance on specific topics, see <https://www.gov.uk/guidance/public-sector-procurement-policy>

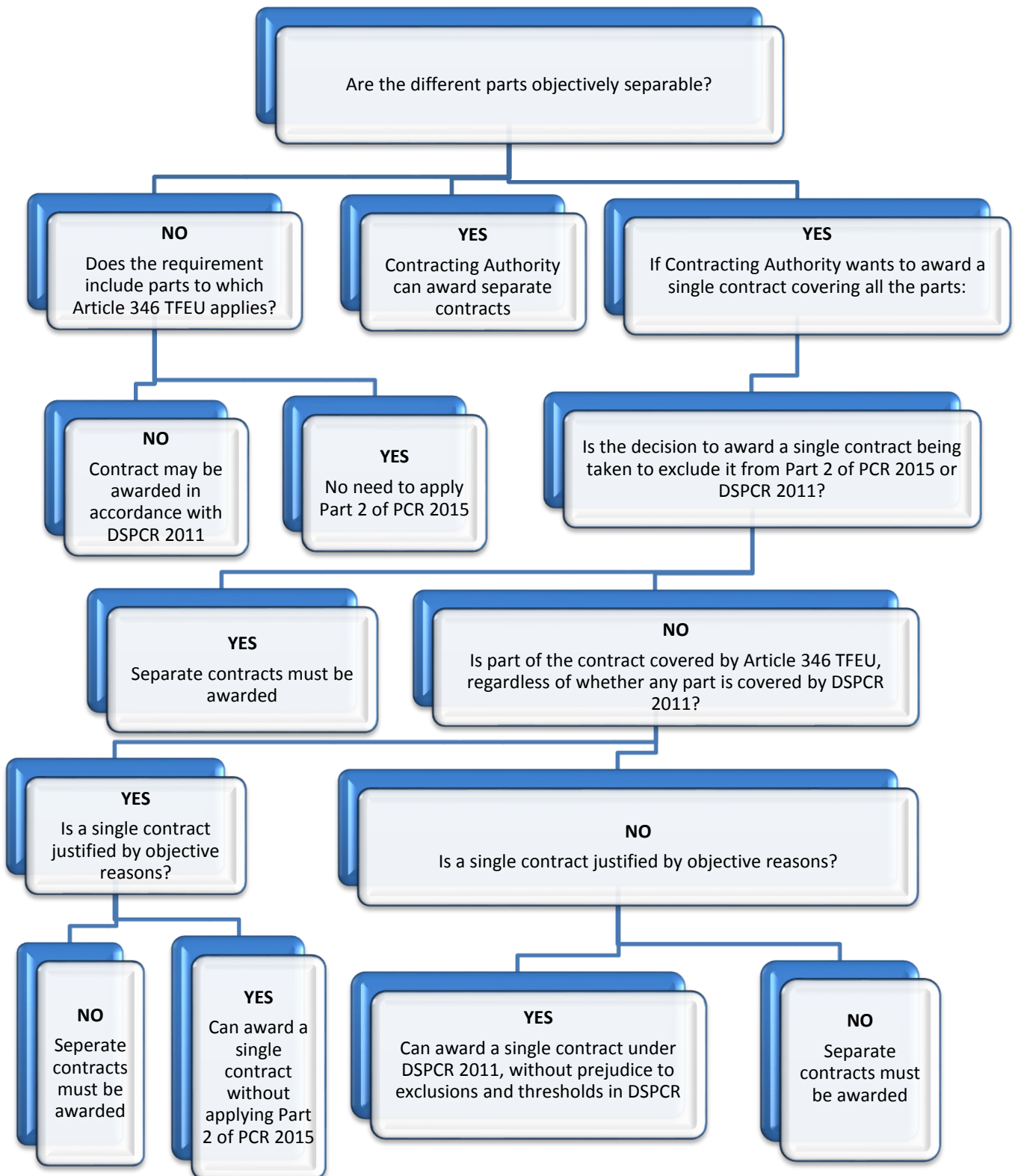
25.2 Enquiries should be addressed to: Crown Commercial Service, Customer Service Desk: 0345 410 2222 info@ccs.gsi.gov.uk

Defence and Security Exclusions – Part 2 of the Public Contract Regulations 2015 Flowchart 1

Shows the position for public supply, public service or public works contracts with a value at or above the relevant threshold (Regulation 5)



Defence and Security Exclusions – Part 2 of the Public Contract Regulations 2015
Flowchart 2 - Mixed Procurement



Annex B

OJEU advertising time limits

Minimum OJEU time limits for the Public Contracts Directive

NORMAL MINIMUM TIME	IF ELECTRONIC TENDER PERMITTED	IF URGENT+	WHERE PIN PUBLISHED*	IF SUB CENTRAL AUTHORITY**
Open procedure				
Minimum time limit for receipt of tenders 35 days	Minimum time limit for receipt of tenders 30 days	Minimum time limit for receipt of tenders 15 days	Minimum time limit for receipt of tenders 15 days	-
Restricted procedure				
Minimum time limit for requests to participate 30 days	-	Minimum time limit for requests to participate 15 days	Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days
Minimum time limit for tenders 30 days	Minimum time limit for receipt of tenders 25 days	Minimum time limit for tenders 10 days	Minimum time limit for tenders 10 days	Minimum time limit for tenders to be set by agreement with tenderers. In the absence of agreement minimum time limit 10 days
Competitive procedure with negotiation and innovation partnerships				
Minimum time limit for requests to participate 30 days	-	Minimum time limit for requests to participate 15 days	Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days
Minimum time limit for initial tenders 30 days	Minimum time limit for receipt of initial tenders 25 days	Minimum time limit for tenders 10 days	Minimum time limit for tenders 10 days	Minimum time limit for tenders to be set by agreement with tenderers. In the absence of agreement minimum time limit 10 days
Competitive dialogue				
Minimum time limit for requests to participate 30 days	-	-	-	-
No explicit time limits for submission of initial/subsequent tenders	-	-	-	-

Notes

- # These are minimum time limits. When fixing the time limits for the receipt of tenders and requests to participate, contracting authorities must take account of the complexity of the contract and the time required for drawing up tenders
- + This shorter time limit is allowed where a state of urgency duly substantiated by the contracting authorities renders the minimum impracticable
- * This shorter tendering time limit is allowed where contracting authorities have published a prior information notice which was not itself used as a means of calling for competition, provided that all of the following conditions are fulfilled:
 - (a) the prior information notice included all the information required in section I of the PIN notice referred to in the Public Contracts Directive, insofar as that information was available at the time the prior information notice was published;
 - (b) the prior information notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.
- ** 'sub-central contracting authorities' means all contracting authorities which are not central government authorities