

Delivering savings, better outcomes and growth

Using the new EU procurement
rules – a guide for councillors
and senior managers

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Why this guide?

Councils in England are facing an unprecedented set of challenges and leadership by councillors and senior managers has never been more important than now.

The drive to provide better outcomes for citizens in key public services and to promote local economic growth must continue at the same time as realising savings on a very large scale.

As a consequence, public services are being 'rewired' and innovative new models of service delivery are being developed ('commercialisation'). This includes the devolution of further responsibilities to the local level, increased integration of services across health and social care and beyond and the creation of vehicles for trading and income generation.

This guide provides a briefing for councillors and senior managers on some recent changes to the public procurement rules (the 'EU rules') which will help councils and their partners respond boldly to the challenges which lie ahead. The guide has been produced to support implementation of the 'National Procurement Strategy for Local Government in England 2014' and the modernisation theme in particular.

The EU procurement rules were reformed in 2014 and the changes for councils (goods, services and works contracts) have been implemented in this country in the Public Contract Regulations 2015 ('PCR 2015').

The reform was carried out with a number of objectives in mind:

- simplify the rules for bidders and contracting authorities and make them more flexible
- enable 'strategic' use of public procurement (delivering social and environmental objectives, supporting SMEs, stimulating innovation)
- incorporate European case law (exclusion of 'in house' contracts between public bodies, limits on changes to contracts)
- introduce stronger measures on conflicts of interest, procurement fraud and corruption etc.

New options and flexibilities are now available which councils can make use of. These are outlined in the guide.

The guide is in the form of a checklist that councillors and senior managers can use to check whether their own council is taking full advantage of the new rules to secure better outcomes and savings and to promote local economic growth. An annex explaining the EU rules 'in a nutshell' has been included for those less familiar with the procurement rules.

A toolkit is being launched in parallel with this guide to provide more in depth coverage of the topics. Its audience is those in service delivery, programme and project management roles who need to be familiar with procurement routes as well as procurement and commissioning professionals.

Councillors and senior managers who would like to explore the new possibilities in further depth can access the toolkit through: www.local.gov.uk/web/lg-procurement. Look for 'PCR 2015 – Local Government Toolkit'. In addition they can access the Government's guidance and training slides through: www.gov.uk/guidance/transposing-eu-procurement-directives

However, the EU rules are complex and the first point of contact for councillors and seniors managers should be the council's own procurement team.

More general guidance for councillors on good practice in local government procurement can be found in 'A councillor's guide to procurement' (LGA/LP, 2013).

Note that the information provided here is intended to be only a general guide to opportunities presented by PCR 2015. It is not legal advice. Councils should take their own legal advice.

How are we working with others?

What is the challenge?

Councils need to consider whether they are making use of the best available models for joint working on procurement.

By working together on procurement and on contract and supplier management councils and their public sector partners can make best use of commercial skills, benefit from economies of scale, achieve efficiencies in the use of resources and realise savings.

A lot has been achieved already, but councils need to review their use of joint procurement models including:

- professional buying organisations (PBOs) like the local government PBOs like YPO, ESPO, NEPO and CBC and the Government's Crown Commercial Service (CCS)
- shared management and shared services models for procurement (for examples, see: www.local.gov.uk/shared-services-map)
- occasional joint procurement projects, eg for waste management.

In any model, the keys to success are joint planning (across council departments and across authorities and other public sector organisations), including early stakeholder and user involvement, and a joint approach to market engagement. This can then inform a joint procurement strategy as part of the business case for the procurement.

Traditionally, much collaborative activity has been focused on the buying of 'commodities' (commonly-used goods and services). The challenge for the future is for councils and others to work together to a greater extent on strategic requirements including infrastructure projects, back office functions and social care (a national category strategy for social care is being developed as part of the 'National Procurement Strategy').

The establishment of combined authorities together with the devolution of further responsibilities to the local level and the continuing integration of services (including health and social care) provides a further opportunity to consider city-region and county-region models for procurement including the joint commissioning of major projects in the region (see **What are our options for major projects?**).

How can we use the new EU rules?



Choose the best model for joint working on procurement

PCR 2015 is clear about the importance of public authorities working together on procurement and they enable the full range of models for joint working to be used.

Councils and other public authorities can:

- buy goods and services directly from a 'central purchasing body' (CPB)
- buy goods, works and services through contracts, framework agreements and 'dynamic purchasing systems' (see How should we use technology?) set up by a CPB.

CPBs are contracting authorities that carry out centralized purchasing on a permanent basis. PCR 2015 also clarifies roles and responsibilities where authorities undertake 'occasional joint procurement' and where authorities in different countries work together on international procurement.

What improvements can we make to the way we buy?

What is the challenge?

Councils need to be sure that they are focusing their efforts in the right places and keeping the procurement process itself as simple as possible.

In the public sector the importance of 'procurement' in the narrow sense (the stage between the contract notice and contract award) has often been overstated.

Overall, the real keys to commercial success (striking a good deal and making sure it is delivered) are pre-procurement planning (including being clear about the outcomes you want), good contract design and specification, effective market engagement and robust contract and supplier management.

The main objective in the procurement phase should be to minimise the time, cost and effort to procure for both the authority and bidders including, in particular, SME bidders.

The pre-procurement focus should be on:

- signalling of future requirements to the marketplace
- market shaping ('market facilitation' in the social care context) to stimulate activity where there are gaps
- two-way engagement with potential suppliers ('market engagement')
- getting the contract design, specification and other procurement documents right.

All the benefits of this planning will be lost without effective contract and supplier relationship management once the contract has been awarded. This includes performance management, continuous improvement and cost control (see, for example, LGA: 'Making savings from contract management').

As mentioned above, all of this activity can be undertaken by authorities working together. Among other things, a joint approach enables councils to take a more strategic approach to the management of key suppliers to the local government sector.

Finally, councils need to have confidence that they have appropriate strategies and internal controls in place to manage the risk of fraud and corruption in both procurement and contract management as the losses in this area can be significant not to mention damage to the council's reputation (see LGA/CIPFA: 'Managing the risk of procurement fraud').

How can we use the new EU rules?



Focus on market engagement

PCR 2015 now expressly allows market engagement ('preliminary market consultations') as part of pre-procurement planning and describe appropriate measures to be taken to prevent competition being distorted.

This confirms the value-adding role of market engagement and provides reassurance that it does not conflict with the EU rules.



Use a PIN instead of a contract notice

There are new options for the notices used to advertise contracts in Europe ('OJEU notices'). Under PCR 2015 councils can now choose to publish a prior information notice (PIN) to advertise requirements (a contract or group of contracts) and invite interested suppliers to confirm their interest in bidding for specific contracts at a later date. This does away with the need for individual contract notices.

This use of a PIN is allowed when the council is using the restricted procedure or the competitive procedure with negotiation to award the contract (see below on new procurement routes).

A PIN can also be used to advertise requirements for Light Touch Regime services (see below on designing special procedures for social care).

Normally, a PIN used in this way is valid for up to 12 months but when used for Light Touch Regime services it can cover a longer period.

The period between publication of the PIN and the invitation to confirm interest is an opportunity to carry out a type of market engagement before deciding on the final approach to the market.

This can be particularly helpful in social care and health with all the complex changes that are taking place.



Speed up procurement

Minimum time limits for procurement procedures relating to time limits for suppliers to respond to tenders have been reduced by approximately one third in most cases. Of course, councils would make a decision on timescales based on the procurement in question.

As the procurement phase is now short, effort can be focused on the value-adding parts of the process:

- pre-market engagement and getting the contract design and specification right
- effective contract and supplier management.

<p> Choose the best procurement route</p>	<p>Councils can continue to use the familiar open procedure or restricted procedure for 'off the shelf' requirements.</p> <p>The restricted procedure is most useful where there is a genuine need to pre-qualify bidders or there are potentially a very large number of bidders in the market (this will be confirmed through market engagement).</p> <p>Otherwise, the open procedure is fastest and simplest route.</p> <p>However, there is now greater flexibility to use negotiation for complex or innovative requirements. There are three different routes to choose from:</p> <ul style="list-style-type: none"> • competitive procedure with negotiation (CPN) • competitive dialogue (CD) • innovation partnership (IP). <p>For more information on those routes see What are our options for major projects?</p>
<p> Design appropriate procedures for social care</p>	<p>There is now a requirement to advertise contracts for social care in Europe (meaning competition for the contracts).</p> <p>However, provided that councils stick to certain general principles (equal treatment, transparency etc) there is an opportunity to design procurement procedures which are appropriate to these services. There is no obligation to use the main EU procedures for social care.</p> <p>This is referred to as the Light Touch Regime. It applies to social care procurements above a Euro 750,000 threshold (currently £625,050). It applies in the same way to health, education, cultural and certain other services.</p> <p>As mentioned above, advertising can take the form of a prior information notice (PIN) which remains valid for a considerable period of time.</p>
<p> Tackle poor performance by suppliers</p>	<p>PCR 2015 has clarified that references can be taken up to establish whether bidders have the necessary professional and technical ability to perform a contract (ie they meet 'selection criteria').</p> <p>In addition, councils have discretion to exclude bidders which have shown 'significant or persistent deficiencies' in performance ('exclusion grounds').</p> <p>In order to take advantage of these new opportunities it will be important for councils to record supplier performance, including the use of sanctions under contracts, and for councils to be willing and geared up to provide references to others.</p>



Improve control of sub-contracting

Councils have the right to receive information on sub-contractors and can carry out checks on sub-contractor suitability.

This includes the sub-contractor's past performance.

Where necessary, a main contractor can be required to replace a sub-contractor.



Control changes to contracts

A series of European Court cases created uncertainty about the extent to which contracts can be varied without triggering an obligation to go back out to tender. The case law has been incorporated into PCR 2015.

The new clearer rules on changes to contracts ('modifications') will give councils confidence to make necessary changes to the way services are delivered in order to achieve better outcomes or make savings.



Combat procurement fraud and corruption

The new flexibilities in the rules have been balanced with stronger controls which councils can use to help combat procurement fraud and corruption.

There are strengthened 'audit trail' requirements including documenting the progress of procurement procedures.

A report must be prepared on every contract, recording information such as the reason for using certain procedures (CPN, CD and negotiation without prior advertising) and decisions that have been taken. It must also identify any conflicts of interest and the measures that were taken in response.

Suppliers convicted of offences such as bribery must be excluded from bidding for council contracts and councils have discretion to exclude suppliers where there is a conflict of interest, anti-competitive agreement or the like.

What are our options for major projects?

What is the challenge?

Councils need to choose the best procurement route for high value, high risk projects ('major projects').

Increasingly, councils are responding to local needs and budget pressures by taking a more commercial approach which involves major projects ('commercialism').

For example, councils are creating local authority companies and joint ventures and are exploring innovative funding mechanisms.

The formation of property companies to buy-to-rent or build-to-rent is a recent example where councils are seeking new solutions to the problem of homelessness.

When set up to trade, local authority companies and joint ventures can be an important means of generating income to help close the gap in council finances (although risks must be understood and mitigated). See LGALP: 'Enterprising councils'.

Shared services are being created for a wide variety of functions in order to realise economies of scale (see www.local.gov.uk/shared-services-map).

Services are also being transferred to social enterprises and spun-out 'public service mutuals' and the financial position of councils may result in further outsourcing or competing of services.

Private Finance 2 (PF2) projects may become an option in the infrastructure area, alongside more conventional construction contracts, although activity is at much lower levels than under the old PFI regime due to the absence of additional government funding to support financing.

In major projects the development of a business case including a procurement strategy is established best practice. In spin out/outsourcing situations, it is important that the business case addresses the viability of the services which remain in house as well as those to be transferred out.

The procurement strategy needs to be informed by early market engagement to establish the viability of the project and should determine the procurement route for the project taking account of the EU rules as discussed below.

How can we use the new EU rules?



Contract with other public bodies

PCR 2015 incorporates rules on contracts between public bodies which were first established in European Court cases (ie rules on when contracts count as being 'in house' and therefore excluded from the procurement rules).

In the process of incorporating the rules, certain things have been clarified.

This greater certainty should help clarify the choices available and enable councils to be bolder for example when setting up local authority companies and shared services arrangements.

The Regulations exempt contracts from procurement in three situations:

- contracts with a controlled body (eg a local authority company)
- contracts with a jointly controlled body (eg jointly controlled company)
- contracts concerning cooperation between councils (no separate controlled body).

There are limits on trading. In the first two cases, the controlled body can undertake up to 20 per cent outside activity (ie not with the controlling authority or authorities).

In a cooperation arrangement the participating authorities can perform up to 20 per cent of the activities concerned on the open market.



Reserve contracts for social enterprises and mutuals

Under the new rules, contracts for certain Light Touch Regime services can be 'reserved' for organisations with a public service mission, reinvested profits and a degree of employee or stakeholder participation (provided they haven't been awarded a reserved contract for the services in the past three years).

Both social enterprises and public service mutuals that meet the criteria can qualify for these reserved contracts.

The contracts must be advertised but the council is otherwise free to design the procurement procedure provided that principles such as equal treatment and transparency are observed (see **How can we improve the way we buy?**).

The contracts can last for up to three years.



Choose the best procurement route for a major project

PCR 2015 offers a broad range of procurement routes. For complex or innovative projects, councils can now choose any of the following procedures:

- competitive dialogue (CD)
- competitive procedure with negotiation (CPN)
- innovation partnership (IP).

Councils already have considerable experience of using CD. However, there have been some changes.

There is no longer an obligation to specify minimum requirements at the outset and PCR 2015 now expressly allows negotiations to be carried out with the preferred bidder (within certain limits) in order to confirm financial commitments or other terms before contracts are finalised.

CD continues to be the most suitable procedure for highly complex procurements including those which involve third party finance (PF2 and the like).

Alternatively, in the same circumstances councils can choose to use CPN. A version of this procedure has existed for some time but PCR 2015 has introduced changes.

CPN allows councils to negotiate on initial tenders, including on price. However, councils can choose to reserve the right to award a contract on the basis of an initial tender without negotiation.

CPN has been made available for use in a much wider set of circumstances than before and is therefore likely to be used more frequently for requirements that are not 'off the shelf'. These need not necessarily be major projects.

The IP procedure is completely new. An IP is set up using a modified version of the competitive procedure with negotiation.

The IP procedure enables the council to develop innovative products, works or services where no suitable solution exists in the market (sharing the risk with suppliers) and then to purchase the resulting products, services etc.

An IP could be used to develop new medical or environmental technologies, for example. But it could equally well be used to develop and purchase a new delivery model for a public service.

How should we use technology?

What is the challenge?

Technology plays an important role in reducing the time, cost and effort to procure ('e-procurement') and councils need to have confidence that they have the right solutions in place (see above on **What can we do to improve the way we buy?**).

Larger councils use electronic tools for sourcing (advertising opportunities, making procurement documents available, receiving pre-qualification questionnaires and tenders, running online electronic auctions etc).

Electronic tools for tender evaluation and contract management are less widely used and electronic invoicing is not widespread at the present time. Electronic invoicing is an important development as it can both help reduce costs and drive compliance.

Smaller councils may have access to electronic sourcing tools (for example, those made available via regional portals) but overall face a bigger challenge moving to fully electronic procurement.

Councils have made good use of electronic auctions but have found so-called 'dynamic purchasing systems' as defined in the old EU rules too cumbersome to use. The new rules have brought major improvements. As outlined below, the use of dynamic purchasing systems is likely to increase as a consequence.

The new EU rules make electronic communications mandatory for sourcing (including electronic submission of pre-qualification questionnaires and tenders) from 18 October 2018 and smaller councils in particular need to gear up for this deadline.

There are earlier deadlines for some other new obligations. Most importantly, it is already a requirement that procurement documents are made available on the internet from the date of publication of the OJEU notice (or invitation to confirm interest where a PIN is used).

It will not become mandatory to use electronic tools for tender evaluation or contract management. However, as part of a broader strategy for end-to-end e-procurement, it has been agreed at EU level that a new European data standard for core electronic invoices will be developed and councils will be required to accept invoices received in this form.

This will not happen before 2018 (and the UK Government has discretion to postpone it for another year for councils).

How can we use the new EU rules?



Open up markets and get better prices with ‘dynamic purchasing systems’

In the old rules, the ‘dynamic purchasing system’ (DPS) was too cumbersome to use and take up was minimal. The rules have been greatly simplified and councils are likely to find many new uses for the DPS.

Essentially, the DPS is an electronic database of pre-qualified suppliers that can be invited to tender for goods, works or services contracts.

It differs from a framework agreement in that new suppliers can be admitted at any time. It is not the same as an approved list because all suppliers on the system (or all suppliers in the relevant category) must be invited to tender every time.

The DPS is an efficient way of meeting EU advertising obligations while sustaining competition at the local level. Applications could include minor works, facilities management and agency staff.

An important feature of the DPS is that it enables new entrants to challenge dominant suppliers.

Modified versions of the DPS are already being used for social care placements. Social care now comes under the Light Touch Regime meaning that modified versions of the DPS can still be used as appropriate (see section above on designing appropriate procedures for social care).



Speed up procurement

It is possible to reduce further the time taken to procure if electronic submission of tenders is requested or allowed (shorter time limits are permitted in the open procedure and restricted procedure).



Ensure specifications are ready for inclusion in the procurement documents

The legal obligation to make specifications available electronically as part of the procurement documents from the time the contract notice is published (or invitation to confirm interest is sent where a PIN is used) reflects good practice and is a good discipline on specifiers.

Gone are the days when specifications were still being written after the procurement process had started.

How do we maximise social value?

What is the challenge?

Councils want to maximise the value of every pound they spend including in terms of promoting jobs, skills and supply chain opportunities in the local community (see **LGA/LP: 'Buying into communities'**).

This is established practice in regeneration projects and construction and infrastructure projects more generally. It is being extended to other services.

The Public Services (Social Value) Act 2012 provides a framework for considering, pre-procurement, how the social, economic and environmental wellbeing of the area could be improved when buying goods and services.

The Act sits alongside the public sector equality duty in the Equality Act 2010.

The old EU rules have sometimes hampered implementation of the preferred approach. One of the main objectives of the new EU rules is to enable authorities to use procurement more 'strategically'. Social and environmental issues can now be taken into account at many points in a procurement procedure. For short, this is referred to as a 'cross-cutting social clause'.

This stops short of allowing preferential treatment of UK nationals or UK suppliers (including 'local' suppliers within the authority's boundary) but it represents an important change to the rules.

The new opportunities to consider 'social value', including SME-friendly procurement and contracts with businesses employing disabled and disadvantaged people, are outlined below. See also **What are our options for major projects?** on procurement from social enterprises and mutuals.

How can we use the new EU rules?



Take a cross-cutting approach to social value

Under PCR 2015 social, economic and environmental considerations can now be addressed in many different parts of the procurement procedure (a 'cross-cutting social clause') including:

- specifications including specification of production processes and social and environmental labels
- special contract performance conditions
- selection criteria, including references and environmental management systems, and exclusion grounds (which also apply to sub-contractors)
- contract award criteria including lifecycle costing and rejection of abnormally low tenders.

This provides an extensive opportunity to implement plans developed using the Public Services (Social Value) Act framework.



Make contract packaging SME-friendly

The new rules challenge councils to consider whether requirements should be divided into lots. This can be used as an opportunity to stimulate thinking on innovative procurement models including those which increase the flow of contracts to SMEs where this provides value for money.



Reserve contracts for social businesses employing disabled/disadvantaged people

It is now possible to reserve contracts for businesses whose main aim is the social and integration of disadvantaged and disabled people (it was previously only disabled people) or to provide for the contracts to be performed in the context of supported employment programmes.

Only 30 per cent of the workforce need qualify as disadvantaged or disabled (it used to be 50 per cent) if the main test is met.

'Disadvantaged' is not defined. It could include, for example, the unemployed, members of disadvantaged minorities or otherwise socially marginalised groups.

What do the Lord Young rules say?

Note also that PCR2015 includes national rules intended to improve SME access to public contracts, particularly lower value ones. These follow a review by Lord Young and do not come from the EU.

The Lord Young rules:

- introduce a standardised approach to pre-qualification questionnaires (PQQ) for above-threshold procurement
- oblige councils to publish information on the Government's Contracts Finder portal when above-threshold opportunities and below-threshold opportunities valued £25,000 or more are advertised and when the contracts are awarded
- abolish the pre-qualification stage for below-threshold procurements
- require payment of invoices within 30 days (including payments along the supply chain).

Annex:

The EU rules in a nutshell

There are three elements to the EU public procurement rules:

- Treaty rules and principles (currently the Treaty on the Functioning of the European Union, TFEU, and the principles derived from it)
- procurement directives (implemented in the UK through statutory instruments, principally, for councils in England, the Public Contracts Regulations 2015 but note that a new directive on concession contracts must also be implemented before April 2016)
- case-law of the Court of Justice of the European Union (and increasingly case-law of the UK courts).

The Internal Market (originally the 'Common Market') is founded on the 'four freedoms' which form the core of the Treaty – the free movement of goods, labour and capital and the freedom to provide services/freedom of establishment.

EU Member States cannot obstruct the operation of the four freedoms (ie the Internal Market) by direct or indirect means. The Court of Justice, in its case-law, has derived a number of 'general principles' of EU law from the Treaty that have now been incorporated into the procurement directives. These include:

- non-discrimination
- equal treatment
- transparency
- proportionality.

Procurement directives first began to be introduced in the 1970s. Their purpose is to harmonise procedures in use in the Member States to ensure that Treaty rules and principles are followed when there is likely to be cross-border interest in the contract (ie high value contracts in particular markets) and to provide effective remedies for suppliers where they are not (in England council decisions can be challenged in the High Court and the remedies include damages and fines).

For English councils the rules are now those set out in the Public Contracts Regulations 2015, PCR 2015, which implements the 2014 Public Contracts Directive. A further new directive on concession contracts above a €5,186,000 threshold (currently £4,322,012) must be implemented before April 2016 (when new rules on utility contracts replacing the existing utilities regime must also be brought into force). The concessions regime is light touch and based largely on the EU general principles.

The EU rules contained in PCR 2015 applies only to contracts and framework agreements exceeding certain threshold values (currently £172,514 for services and goods and £4.3 million for works; note that the sterling values will be revised in January 2016). However, the regulations also include Lord Young rules on below-threshold contracts.

For the procurement of certain services (including health and social care) above a specific threshold value (currently £625,050) there is a 'light touch regime' (LTR) which allows councils greater freedom to design an appropriate procurement procedure provided the general principles are followed. In specified circumstances contracts between public bodies are exempt.

The rules allow the use of framework agreements, dynamic purchasing systems (a type of electronic database that new suppliers can join at any time and be invited to bid for contracts as they come up) and electronic auctions.

The main objective of the EU rules is to ensure that above-threshold requirements are advertised in the Official Journal of the European Union (OJEU) so that suppliers from across the EU (and beyond) are aware of the opportunity and can tender for it (transparency principle).

The remainder of the EU rules concern the procedures that can be used to award contracts and framework agreements with the objective that all suppliers should receive equal treatment and face no discrimination on nationality grounds. Time limits and the information which can be sought from suppliers (selection criteria and exclusion grounds) are regulated as are the criteria that can be used to award contracts. In addition there are rules on specifications.

The main procedures in PCR 2015 are:

- open procedure (a single stage procedure: any supplier can tender)
- restricted procedure (a two-stage procedure: only suppliers selected by the council can tender)
- competitive procedure with negotiation (for use in complex and innovative procurements and use must be justified: permits negotiation prior to final tenders)
- competitive dialogue (for use in complex and innovative procurements and use must be justified: permits dialogue before final tenders and negotiation with preferred bidder)
- innovation partnership (a way to both commission R&D and purchase the resulting services or products)
- negotiated procedure without prior advertising (an exceptional procedure involving no OJEU notice: for use in tightly controlled circumstances including extreme urgency).

Court of Justice cases have helped clarify many aspects of the procurement rules by applying the Treaty rules and principles. PCR 2015 'codifies' much of this case-law including rules on contracts between public bodies and rules on the modification of contracts during their term. However, the Court of Justice of the EU will continue to clarify the rules and in some cases it may create further new rules.

For example, the law on the treatment of development agreements under the EU rules is complex and continues to evolve through decisions of the European and UK courts.



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