

## Robert Walton QC

### Overview of the Public Procurement Rules

# What is public procurement law?

- Law governing the award of public contracts and concessions by public bodies to third parties
- EU law based:
  - The Public Contracts Directive 2014/24/EU
  - The Concessions Directive 2014/23/EU
  - The Utilities Contracts Directive 2014/25/EU
  - EU Defence and Security Procurement Directive 2009/81/EC
- Implemented by:
  - Public Contracts Regulations 2015
  - Concession Contract Regulations 2016
  - Utilities Contracts Regulations 2016
  - Defence and Security Public Contract Regulations 2011
- Also note:
  - Other forms of public auctions/franchising: Radio spectrum auctioning, energy subsidy auctions (Low Carbon Contracts), rail franchise and competitions for major licence grants (eg National Lottery etc).

## The scope of the rules

- **PCRs:**
  - **A public contract:** a contract for executions of works, supply of products, or provision of services.
  - Applies to all “**contracting authorities**”: “bodies governed by public law”
  - Detailed contract thresholds but also note the application of general TFEU principles of equal treatment, non-discrimination and transparency can still apply to sub-threshold contracts.
- **UCRs:**
  - **A utility** is a contracting authority/public undertaking/an entity which carries out a relevant activity by virtue of being granted “special and exclusive rights” to do so. But where it has been granted those rights under a compliant process run under the UCRs/PCRs/CCRs then it is not caught.
  - **Relevant activity:** Energy/water/transport, fuel extraction (see Regs 9-15)
  - Detailed thresholds/exemptions applying to in-house contracts and affiliated undertakings
- **CCRs:**
  - **A concession** is a contract for pecuniary interest between a contracting authority and economic operator where the consideration is either:
    - Where the contract gives the right to “exploit” the works / services the subject of the contract; or
    - Where the contractor has the right together with some payment from the contracting authority/utility

## Who is caught by the public procurement rules (1): what is a contracting authority?

- A contracting authority is “means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law”: Reg 2 PCRs
- What is a “commercial character”? See eg *Alstom Transport v Eurostar International Ltd* [2012] EWHC 28 (Ch):
  - *“If the body operates in normal market conditions, aims to make a profit, and bears the losses associated with the exercise of its activity, it is unlikely that the needs it aims to meet are not of an industrial or commercial nature.”*
  - Existence of competition and substantial State aid a significant but not determinative factor in showing commerciality: so finding by competition authority of dominant position in market was not decisive.

“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;

# What kind of contracts are caught by the public procurement rules? (1) The relevant thresholds

- The relevant thresholds for 2020:

Public Contracts			
Thresholds are exclusive of VAT.			
	Supply, Services and Design Contracts	Works Contracts	Social and other specific services
Central Government	£122,976	£4,733,252	£663,540
	€139,000	€5,350,000	€750,000
Other Contracting Authorities	£189,330	£4,733,252	£663,540
	€214,000	€5,350,000	€750,000
Small Lots	£70,778	£884,720	n/a
	€80,000	€1,000,000	

Utility Contracts			
Thresholds are exclusive of VAT.			
	Supply, Services and Design Contracts	Works Contracts	Social and other specific services
Utility Authorities	£378,660	£4,733,252	£884,720
	€428,000	€5,350,000	€1,000,000

Concession Contracts	
Thresholds are exclusive of VAT.	
	Concession Contracts
Authorities	£4,733,252
	€5,350,000

## Exclusions / Specific situations

- Complex rules on exclusions and specific situations:
- Exclusions (regs 7 – 12):
  - Utilities
  - Electronic communications
  - International rules
  - Service Contracts
  - Contracts between public sector entities
- Specific situations (regs 13 – 17): e.g. mixed procurement involving defence.

## The scope of the procurement rules: three problematic areas

- Detailed/complex **aggregation rules** in Regulation 6 of the PCRs designed to prevent bypassing of the rules either through successive awards in a calendar year/artificial sub-division or use of lots
- Exemptions for “**in-house**” **public contracts** (the *Teckal* exemption) or contracts “subsidised by public bodies”
- **What is a concession?** Key features set out in Reg 3: right to exploit the services that are the subject of the contract and transfer of operating and market risk
- See Ocean Outdoor UK Limited v London Borough of Hammersmith and Fulham [2019] EWCA Civ 1642 (8 October 2019): leases on publicly owned land to support advertising structures. The services to be entrusted must be for the benefit of the contracting authority “in respect of its public obligations” and should be “in the public interest”. So mere commercial exploitation of assets absent a public service element will not be caught.

## What are the primary procurement principles?

- Regulation 18 PCR:
  - (1) Contracting authorities shall treat economic operators **equally** and **without discrimination** and shall act in a **transparent** and **proportionate** manner.*
  - (2) The design of the procurement shall not be made with the intention of excluding it from the scope of this Part or of artificially narrowing competition.*
  - (3) For that purpose, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators”*
- Similar principles at Reg 36 UCRs and Reg 8 CCRs



# What are the main procurement procedures in the PCRs and UCRs?

- For all public contracts:
  - The open procedure
  - The restricted procedure
  - The competitive dialogue procedure
  - The negotiated procedure
  - An innovation partnership
  
- Much greater procedural flexibility for concession contracts: “*the contracting authority or utility shall have the freedom to organise the procedure leading to the choice of concessionaire subject to compliance with these Regulations*” (Reg 30). Basic requirement to advertise via a concession notice, and transparent application of objective award criteria.