MILLS & REEVE

briefing

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Utilities Contracts Regulations 2016 in force from 18 April 2016

The Utilities Contracts Regulations 2016 are in force from 18 April 2016, replacing the 2006 regulations of the same name for all in-scope procurements commenced on or after that date. In this article, of interest to both purchasers and suppliers in the utilities sector, we look at the main changes brought in by the new regulations.

On 18 April 2016, the Utilities Contracts Regulations 2016 (UCR 2016) came into force, replacing the 2006 regulations of the same name (UCR 2006) for all in-scope procurements commenced on or after that date.

Scope of the UCR 2016

Scope - As under the UCR 2006, the UCR 2016 apply to the award of contracts by "Utilities" which are carrying out one of the relevant utility "activities".

Utilities - Unlike the UCR 2006, which contained a list of named Utilities, the UCR 2016 simply relies on the definitions of a Utility (at Regulation 5) to determine whether a body is caught. A Utility may be:

- A "contracting authority" (ie, broadly speaking, a public body).
- A public undertaking (ie, a body over which a contracting authority exercises a dominant influence).
- An entity that carries out the relevant activity by virtue of being granted "special and exclusive rights" to do so.

Relevant utility activities – There is no change here and, as for the UCR 2006, these include energy, water, transport, ports, airports, postal services and fuel extraction (see Regulations 9-15).

As under the UCR 2006, certain types of contract are excluded from the scope, and the regime will only apply if the contract value is over £328,352 (for supplies or services contracts) or £4,104,394 (for works contracts).

Key changes under the UCR 2016

"Special and exclusive rights" – the UCR 2016 include a clarification on when a body will be subject to the regime following the grant to it of special and exclusive rights. The UCR 2016 expressly state that, where the body is selected and granted the right to carry out the activity following a procedure which involved adequate publicity and based on the application of objective selection criteria, then the body to whom such rights are granted will not be subject to the UCR 2016. A compliant process run under any of the UCR 2016, the Public Contracts Regulations 2015 (PCR 2015) or the Concession Contracts Regulations 2016 will be sufficient for these purposes.

Frameworks (Regulation 51) – the UCR 2016 bring changes to the rules on the use of framework agreements in the Utilities context. Previously, frameworks were subject to very limited regulation and the UCR 2006 was silent on the rules for making call offs. Under the UCR 2016, however, there is for the first time a limit on the maximum term of a framework agreement (eight years, unless exceptional circumstances justify a longer term). There are also express requirements on the method for making call offs. The procurement documents must set out the objective rules and criteria for how call-offs will be made, with the possibility of both direct call offs and mini-competition. There are requirements for mini-competitions including: on timescales for these; and the need to award the contract to the framework supplier submitting the best mini-tender based on the award criteria for mini-competitions which the Utility must have set out in the framework agreement.

New procedures and shorter timeframes – in the Utilities context (contrasted with the public procurement context) there are no restrictions as to which procurement procedure may be used, meaning that historically the Negotiated procedure (with notice) has been a popular choice for Utilities (with the Open and Restricted procedures also having been available). These options all remain. In addition, two extra procedures are now available; the **Competitive Dialogue** process and the **Innovation Partnership**.

The Competitive Dialogue process, a well-established procedure under the PCR 2015 (and the predecessor 2006 Regulations) is available to Utilities for the first time (see Regulation 48). The process in the UCR 2016 broadly follows that under the PCR 2015 and is designed to allow a Utility to have dialogue with short-listed bidders (which can be carried out in stages) to identify the solution(s) which will best meet its needs; and thereafter to invite final tenders based on these. As is now allowed under the PCR 2015, it is possible to negotiate with the preferred bidder provided that this does not materially modify the nature of the procurement or distort competition.

The **Innovation Partnership** (Regulation 49) was first introduced in the PCR 2015 and is now available to Utilities too. There are no restrictions on the types of contracts for which it can be used in the Utilities context. It has yet to be used extensively under the PCR 2015 and so, unlike the Competitive Dialogue procedure, it is hardly a tried and tested route. However, it is intended to allow for both the research and development and also the eventual purchase of an innovative product or service to take place within the same single procurement process, during which the number of partners may be reduced in stages (with transparency and other safeguards built in).

It will be interesting to see whether Utilities rush to use these two new procedures or stick with what they know and their old friends the Open, Restricted or Negotiated routes.

Light Touch Regime for certain health, social and other services – Broadly speaking, services that were previously classed as Part B Services under the UCR 2006 (including, for example, legal services and certain transport services) are now listed at Schedule 3 of the UCR 2016 and fall under the so-called "Light Touch Regime". The significant change here is that, where these service contracts exceed the threshold of £785,530, they must now be advertised in the OJEU and a fair and transparent procurement process followed. A small but important point to note is that the old category of "other services" at the end of Part B of Schedule 3 in the UCR 2006 has been removed in Schedule 3 of the UCR 2016, thus narrowing the scope of the services listed. The Crown Commercial Service has issued (in the public procurement context) this guidance on its view of the design of a light touch procurement, including the recommendation that a standstill period be held. We presume it would recommend a similar approach in the Utilities context.

Other features of the UCR 2016

Call for competition – there has been little change here. Utilities continue to have a choice of three different ways to call for competition:

- The individual contract (OJEU) notice

- The periodic indicative notice
- The qualification system notice

The rules for using qualification systems have changed slightly; Regulation 77(10) makes it explicit that: "any charges that are billed in connection with requests for qualification or with updating or conserving an already obtained qualification pursuant to the system shall be proportionate to the generated costs".

The new format OJEU notices and forms to be used are all available on the simap website and e-senders of notices should, by now, have converted their systems to reflect the new standard forms.

Exemptions for "In-house contracts" and "joint co-operation" plus "in-group companies" and joint ventures – the UCR 2016 codify into statute the *Teckal* and *Hamburg* cases. Note, in particular that these provisions only apply to Utilities which are also contracting authorities. For those that are, the UCR 2016 will not apply to:

- **So called "in-house" contracts** - awarded to an entity which is controlled by the contracting authority Utility (or a number of Utilities) and which does more than 80 per cent of its business with that controlling contracting authority Utility(s). The same principle applies in reverse for contracts awarded by the controlled entity to its controlling Utility(s).
- **Joint co-operation between contracting authority Utilities** - where the contract is being awarded exclusively between two or more contracting authority Utilities and which implements co-operation between those Utilities with the aim of ensuring the public services they have to perform are provided. The co-operation must be governed solely by considerations in the public interest and the participating Utilities cannot perform more than 20 per cent of the activities concerned on the open market.

For (private sector) Utilities the existing exemption for **affiliated undertakings** (ie, in-group companies) also applies under the UCR 2016; a contract awarded by a Utility to an "affiliated undertaking" is not covered by the UCR 2016 if at least 80 per cent of the affiliated undertaking's turnover (in the preceding three years) derives from provision of works/services/supplies to the Utility or other companies within its group. Likewise, the existing exemption for the award of a contract by a Utility to a joint venture the members of which are all Utilities (or vice versa) continues (subject to certain conditions) to be available in the UCR 2016.

Pre-market engagement – it has always been open to Utilities to engage the market prior to making a call for competition, but this is now expressly set out at Regulation 58. Provided that the general principles of transparency, equality of treatment and non-discrimination are respected, information gained as part of a pre-market engagement exercise may be used in the design of the subsequent procurement process.

Prior involvement of bidders/Conflict of interest – given the application of the general EC Treaty principles, there has always been a duty on a Utility to take steps to prevent conflicts of interest and prevent unfair advantage (to the extent possible) when running a procurement process. The UCR 2016 now give express voice to these obligations.

Regulation 42 (relating to conflicts of interest) - requires a Utility to take steps to prevent, identify and remedy conflicts of interest.

Regulation 59 (prior involvement of bidders) – requires the Utility to take appropriate measures, to "level the playing field" and ensure competition is not distorted, where a bidder has had prior involvement in the preparation of the procurement or its strategy (eg, through the pre-market engagement permitted under Regulation 58). Such measures to include: the provision of information which was available to those previously involved and fixing adequate time limits to allow others not involved to catch up. Note that exclusion of a bidder, based on its prior involvement, is only possible as a final resort where no other remedial measures suffice.

Electronic publication of procurement documents – Regulation 73 requires the procurement documents (a broad definition that would include the OJEU notice, technical specifications, PQQ, ITT, evaluation scheme, draft terms and conditions) to be made available electronically (free of charge, on an unrestricted, full direct access basis) from the date of the OJEU notice. Given that Utilities have historically tended to prepare procurement documents in a linear fashion (eg, to publish the call for competition and then prepare the ITT documentation while awaiting expressions of interest) this represents a step change in practice. A similar provision appears in the PCR 2015, and the Crown Commercial Service has issued guidance suggesting that, in some circumstances at least, there may be some latitude around how this obligation is interpreted. Further detail on this is available at our blog post here.

Selection criteria – Utilities that are contracting authorities, must include the up to date mandatory exclusion criteria as set out in Regulation 57(1)-(5) of the PCR 2015 (note that from 18 April this is itself updated to include reference to offences under the Modern Slavery Act 2015 (see here for more details)). Private sector Utilities may include these exclusion criteria but need not.

All Utilities may, but are not obliged to use the discretionary exclusion criteria and other selection criteria available under the PCR 2015 but note must take care that where these are used they must be used under the same conditions as the PCR 2015 (including the new provisions on "self-cleaning"). So for example, where turnover is used as a measure of financial capacity this must not exceed twice the value of the contract except in justified cases (eg, where the contract is considered high risk). These justifications must be declared in the procurement documents or in the utility's reports under Regulation 99 (see below). Subject to the point above, it remains the case that Utilities enjoy much more flexibility in the design of selection criteria than do contracting authorities in the public procurement context and, for example, are not required to adopt the use of the Crown Commercial Service standard form pre-qualification questionnaire.

Award criteria – The changes here mirror those introduced in the PCR 2015. In particular, all contracts must now be awarded on the basis of the most economically advantageous tender (MEAT) which takes on a new meaning, ie, this could be price or cost alone (adopting a cost-effectiveness approach eg, life-cycle costing) or based on a best price-quality ratio (the latter being the old interpretation of MEAT). If using life-cycle costing there are specific rules to follow (as set out in Regulation 83). There is also greater flexibility in the interpretation of criteria linked to the subject matter as this can now include any stage of the product, service or works' life-cycle. Further, the experience of staff to be engaged in delivering the contract can be used as a valid award criterion if the quality and experience of the staff proposed will have an impact on the performance of the contract.

Modification of Contracts (Regulation 88) – the UCR 2016 codify and clarify the previous case law on permitted variations to contracts that will not trigger the requirement to re-run the procurement. Under Regulation 88, modifications may be made to the extent that they are clearly, unequivocally and precisely set out in the original contract, provided that the conditions for making the modification, and the scope and nature of permitted modifications are included and there is no overall change to the nature of the contract. Of course many desirable changes may well not fall into this category, and a Utility may need to fall back on one of the other "safe harbours" set out in the remainder of Regulation 88.

Termination of Contracts (Regulation 89) – all contracts awarded by a Utility must now include provisions allowing for termination in certain circumstances including where there has been a substantial modification (not falling within a safe harbour under Regulation 88). If not expressly included, a power to terminate in these circumstances is deemed to apply.

Regulation 99 Report - Regulation 99 requires Utilities to draw up a report containing the information it specifies at Regulation 99(1). In addition, Regulations 99(7) and (8) state that the progress of all procurement procedures must be documented, keeping sufficient documentation to justify decisions taken in all stages of the procurement, including communications with bidders, drafting of the procurement documentation, negotiations with bidders, selection and award of the contract (suggesting contemporaneous record keeping). This documentation must be kept for at least three years from the date the contract is awarded.

Remedies – the remedies regime is essentially unchanged from that in the UCR 2006.

Conclusion

The introduction of the UCR 2016 is the biggest change in a decade in the regulatory framework for Utilities procurement. It introduces certain new flexibilities (for example, new procedures, shorter timeframes and greater flexibility when setting award criteria) and some welcome clarifications (eg, on permissible contract modification or variation). That said, it also imports across from the PCR 2015 a number of new requirements and obligations for Utilities (including tightening up the rules for establishing and using framework agreements, electronic publication of procurements on day one, specific rules on life-cycle costing (where this is used as part of the award criteria) and reporting requirements, as well as the requirement to advertise above-threshold Light Touch Regime services). This somewhat more prescriptive approach to the regulation of Utility contracts may not be quite so welcome.

While the UCR 2016 do represent a major change for the Utility sector, as many of their provisions flow from the PCR 2015, which have already been in force for over a year, to that degree at least, the trail has already been blazed and some custom and practice established. Utilities seeking to understand the UCR 2016 therefore benefit from some of the guidance, expertise and consensus around the practical application and interpretation of some of these new provisions which has built up over the last twelve months or so in the public procurement context.

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