



The [LexisPSL Local Government team](#) explain a new procedure created under The *Public Contract Regulations 2015 – the innovation partnership procedure*.

As from 26 February 2015 a contracting authority must use one of the five permitted procurement procedures set out in [The Public Contracts Regulations 2015](#), SI 2015/102 (PCR 2015) unless an exemption applies, such as where the value of the contract is below the relevant threshold.

Public procurement procedures – legal background

The innovation partnership procedure derives from the Public Procurement Directive ie [Directive 2014/24/EU](#) of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing [Directive 2004/18/EC](#).

Confusingly in the PCR 2015, the Public Procurement Directive (as it is typically known) is referred to as the 'Public Contracts Directive'.

The Public Procurement Directive was published in the Official Journal of the European Union (OJEU) on 28 March 2014. It came into force on 17 April 2014.

The Public Procurement Directive was then implemented into English law by the PCR 2015, most of the provisions of which came into force on 26 February 2015. All procurements started after that date must comply with the new rules. Any procurements started before that date were (and continue to be) governed by The [Public Contracts Regulations 2006](#), SI 2006/5 (PCR 2006).

Background

The innovation partnership procedure is a new procedure introduced under the Public Procurement Directive and the PCR 2015.

In this context, the term 'partnership' is not used in a legal sense (such as LLPs, partnerships or limited partnerships) and should be distinguished from [European Innovation Partnerships](#) (EIPs).

The aim of the innovation partnership is to develop 'an innovative product, service or works' and to subsequently purchase 'the resulting supplies, services or works' (provided that they correspond to the performance levels and maximum costs agreed between the contracting authority and the participants).

The Public Procurement Directive, recital 49 states that the procedure is designed to be used:

'where there is a need for the development of an innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works cannot be met by solutions already available on the market.'

The European Commission states that the [new procedure](#) is designed to enable contracting authorities to:

'select partners on a competitive basis and have them develop an innovative solution tailored to their requirements.'

It goes on to say:

'the competitive phase will take place at the very beginning of the procedure, when the most suitable partner(s) are selected on the basis of their skills, abilities and price;

the partner(s) will develop the new solution, as required, in collaboration with the contracting authority. This research and development phase can be divided into several stages, during which the number of partners may be gradually reduced, depending on whether they meet certain predetermined criteria;

the partner will then provide the final solution (commercial phase).'

For more information on this procedure and innovation in procurement generally, ICLEI- [Local Governments for Sustainability \(ICLEI\)](#) has developed the [Procurement of Innovation Platform](#)

The project is supported by the European Commission. The platform is designed to be an online hub that 'helps public authorities, procurers, policy makers, researchers and other stakeholders harness the power of public procurement of innovation (PPI) and pre-commercial procurement (PCP)'. It is worth keeping an eye on this website for developments in the [use of this new procedure and for guidance](#)

Procedure – request to participate (pre-qualification)

Under the innovation partnership procedure any economic operator may submit a request to participate in response to a call for competition by providing the 'information for qualitative selection that is requested by the contracting authority' (in other words, by providing the responses to the selection criteria requested by the contracting authority as part of the tender process). The PCR, reg 31(2) sets out the requirement for the contracting authority to do the following in the procurement documents:

- identify the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market, and
- indicate which elements of this description define the minimum requirements to be met by all tenders.

The above information must be 'sufficiently precise' so that potential bidders can identify the nature and scope of the required solution and decide whether to participate (PCR 2015, reg 31(3)).

An 'economic operator' means any 'person or public entity or group of such persons and entities, including any temporary association of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market' (PCR 2015, reg 2(1)). The contracting authority may also decide to set up the innovation partnership with one partner or with several partners conducting separate research and development activities (PCR 2015, reg 31(4)).

The minimum time limit for the requests to participate (ie during the pre-qualification stage) is 30 days from the date on which the contract notice is sent (PCR 2015, reg 31(5)) ('contract notice' means the notice given under the PCR 2015, reg 49 (or, where relevant, reg 75(1)(a)). This is the notice published in the OJEU.

Importantly, unlike the open procedure, only candidates invited to submit a tender by the contracting authority, following its assessment of the information provided, may do so (PCR 2015, reg 31(6)).

A contracting authority may also limit the number of suitable candidates that it *intends* to invite to tender in accordance with reg 65 (PCR 2015, reg 31(7)). The minimum number of candidates is three (PCR 2015, reg 65(4)). In any event the number of candidates eventually invited must be sufficient to ensure genuine competition (PCR 2015, reg 65(5)).

Procedure – development of a solution

The innovation partnership is typically structured in successive phases (in order to reduce the amount of tenders) following the sequence of steps in the research and innovation process (which may include the manufacturing of the products, the provision of the services or the completion of the works). Contracting authorities must set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments (PCR

2015, regs 31(10)-(11), 31(18)).

Based on those targets, the PCR, reg 31 (12) states the contracting authority may decide after each phase to either:

- terminate the innovation partnership, or
- reduce the number of partners in the innovation partnership by terminating individual contracts (ie if the innovation partnership has several partners).

There is also an ongoing obligation on the contracting authority to negotiate with tenderers 'the initial and all subsequent tenders submitted by them' (except for the final tender) in order to 'improve their content' (PCR 2015, reg 31(13)).

The minimum requirements and the award criteria may not be negotiated (PCR 2015, reg 31(14)).

When negotiating, a contracting authority needs to take great care to ensure that all bidders are treated equally. In particular, the PCR 2015, reg 31(15) clarifies that a contracting authority must ensure equality of treatment among all participants and, to that end, they shall not provide information in a discriminatory manner which may give some participants an advantage over others. The Regulations also specify what information should be provided and reiterate that 'contracting authorities shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate' when changes to technical specifications or other procurement documents are made.

A contracting authority also needs to take care with confidential information. The PCR 2015, reg 31(16) states that contracting authorities must not reveal to the other bidders confidential information communicated by a bidder participating in the negotiations without its agreement. A contracting authority may not get around this obligation by arranging for bidders to sign a general waiver (PCR 2015, reg 31(17)). Importantly, a contracting authority should also be aware of its obligations under freedom of information legislation. Moreover, in the case of an innovation partnership with several partners, a contracting authority is obliged to keep confidential solutions proposed or other confidential information communicated by a partner in the framework of the partnership unless it has that partner's agreement to do otherwise (PCR 2015, reg 31(23)). Again, a contracting authority may not get around this obligation by arranging

for bidders to sign a general waiver (PCR 2015, reg 31(24)).

Negotiations may take place in successive stages in order to reduce the number of tenders to be negotiated (reduction of solutions taking place by applying the award criteria (PCR 2015 reg 31(18)). The contracting authority may take advantage of this option to negotiate in successive stages but only if it states that it may do so in the contract notice, the invitation to confirm interest or in another procurement document (PCR 2015, reg 31(18)). This flexibility may be useful for the contracting authority. Therefore, a contracting authority should take care to include this provision in any tender documents if there is the likelihood (however small) that it will be used.

In selecting candidates, a contracting authority has a duty to apply the criteria concerning the candidates' capacity in the field of research and development and of developing and implementing innovative solutions. Only those economic operators invited by a contracting authority (following its assessment of the requested information) may submit research and innovation projects aimed at meeting the needs identified by the contracting authority that cannot be met by existing solutions (PCR 2015, reg 31(20)-(21)).

Given the importance of intellectual property in many innovative projects, the PCR 2015 have imposed a duty on a contracting authority to 'define the arrangements applicable to intellectual property rights' in the procurement documents (PCR 2015, reg 31(22)).

Tenders must be awarded on the sole basis of the award criterion of the best price-quality ratio in accordance with the PCR 2015, reg 67. The contracting authority must also ensure that the structure of the innovation partnership and, in particular, 'the duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market'. Moreover, the estimated value of supplies, services or works shall not be 'disproportionate in relation to the investment required for their development' (PCR 2015, regs 31(8), 31(25)-(26), 67)).

Issues arising when using the innovation partnership procedure

There are a number of issues which can arise in practice when using the innovation partnership

procedure. Some of these issues are set out below:

- this is a new procedure so care should be taken to ensure that the rules are scrupulously followed and applied (it is wise to have up-to-date copies of the Public Procurement Directive and the PCR 2015). All steps should be documented carefully by a contracting authority so that there is a solid audit trail should the procedure ever be challenged. For example, how much research has been done to determine that the relevant products, services or works are not 'already available on the market'? How has the market been defined? Have all of the duties on the contracting authority in connection with innovation partnerships (ie in the PCR 2015, reg 31) been considered carefully as there are requirements within this Regulation which are not set out in any of the other four procedures (eg the PCR 2015, reg 31(22) has imposed a duty on a contracting authority to 'define the arrangements applicable to intellectual property rights' in the procurement documents--has this been done?).

- preparation and scoping of the project is critical in terms of running a successful and focused negotiation procedure.

- the optimal approach to the procedure is to use it in a consultative way that requires a contracting authority to have a clear understanding of the strengths and weaknesses of potential solutions; pre-procurement activity is usually key if the innovation procurement procedure is to be used.

- the contracting authority needs to appreciate that to run a successful innovation procurement procedure it will need to be well-resourced with good project management in place. Clear decision-making processes are vital and the areas for negotiation should be well-thought-through in advance of procurement (ie there is no need to have a dialogue with bidders on every single aspect of a project).

- timetables need to be realistic and allow sufficient time for bidders to prepare responses. Allow sufficient time for decision-making processes and evaluation and allow time for documents to be revised after dialogue meetings have been held.

- the PCR 2015 do not specify the manner in which the negotiation is to be run. A contracting authority will need to decide how many stages it will have (usually progressing from outline solutions to more detailed solutions, further refinement and then final tenders) and at which stages bidders and/or solutions may be removed from the process. The contracting authority will also need to decide which methods are to be used in the negotiation phase (eg meetings, presentations or written submissions).

- a contracting authority needs to ensure confidentiality of all proposals and must not 'cherry pick' aspects of bidders' solutions.

- a contracting authority will need to determine what in fact it considers a 'solution' to be and when it will close the negotiations, thus effectively ending the dialogue/negotiation stage of the procurement process.

- ensure well-developed bid documentation and clear evaluation methodologies linked to the bid requirements as the lack of transparency in evaluation methodologies is a major source of complaints and potential challenge.

This article was originally published in [LexisPSL Local Government](#) . Find out more on

the

[LexisNexis hub](#)

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This is part of a fantastic content set that explains how the other four procurement procedures operate under the Public Contracts Regulations 2015, including the: open procedure, restricted procedure, negotiated procedure and competitive dialogue procedure. These notes are a great tool which will enable practitioners to ascertain which procedure is best suited for their particular scenario, setting out the new Regulations in a digestible format.

Additionally, a note on the key considerations provides a useful guide with comprehensive information for bidders to consider when procuring goods or services under the 2015 Regulations. This is excellent for practitioners wanting to quickly gain a holistic understanding of the process in the most time efficient way.