nalc
National Association of Local Councils

t: 020 7637 1865
e: nalc@nalc.gov.uk
w: www.nalc.gov.uk
a: 109 Great Russell Street, London WC1B 3LD

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LTN 87 | PROCUREMENT

Introduction

1. This LTN applies to local councils in England and Wales except for paragraphs 11 to 16 below which apply only to local councils in England.

2. In the context of local councils, "procurement" is the process by which they award contracts to third parties (frequently individuals or companies) to provide goods, services or to undertake works. A procurement process is designed to source the most suitable contractors based on factors such as cost and their knowledge, experience, quality, capability, and financial standing.

3. A procurement exercise by a local council is subject to the requirements in s. 135 of the Local Government Act 1972 ("the 1972 Act") and the Public Contracts Regulations 2015 ("the 2015 Regulations"). These legal requirements are summarised in the table below.

Contract value (net of VAT)	**Legal requirements**		
	The council's standing orders required by s.135 of the 1972 Act (and financial regulations)	The Contracts Finder/ find a tender website and other light touch rules in the 2015 Regulations	Complex requirements in the 2015 Regulations
Low value contracts (in England only, this means up to £25,000).	✓		
All contracts over £25,000 but below the threshold below (England only).	✓	✓ Use of the Contracts Finder/ find a tender website (see paragraph 11 to 16 below).	

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Public service or supply contract over £213,477 or public works contract over £5,336,937	✓		✓ Follow most complex procedure (see paragraphs 17 to 21).

4. The requirement for councils in England and Wales to have standing orders with respect to procuring and entering into contracts is set out in s.135 of the 1972 Act. This Note provides (A) an explanation of councils' responsibilities under the 1972 Act (England and Wales), (B) an explanation of the bodies and contracts which are subject to the 2015 Regulations (England and Wales), (C) an explanation of the Contracts Finder/ find a tender provisions and other light touch requirements for procuring and awarding contracts covered by the 2015 Regulations which are valued over £25,000 (England only) and (D) an overview of the complex requirements for procuring contracts covered by the 2015 Regulations which are valued over £213,477 for a public supply or public service contract or £5,336,937 for a public works contract (England and Wales).

A. Standing Orders (s. 135 of the 1972 Act)

5. S.135 of the Local Government Act 1972 provides:

- A local authority (which includes local councils in England and Wales) may make standing orders with respect to the making of contracts by them or on their behalf.
- A local authority shall make standing orders with respect to the making by them or on their behalf of contracts for the supply of goods or materials or for the execution of works.
- Standing orders made by a local authority with respect to contracts for the supply of goods or materials or for the execution of works shall include provision for securing competition for such contracts and for regulating the manner in which tenders are invited, but may exempt from any such provision contracts for a price below that specified in standing orders and may authorise the authority to exempt any contract from any such provision when the authority are satisfied that the exemption is justified by special circumstances.
- A person entering into a contract with a local authority shall not be bound to inquire whether the standing orders of the authority which

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apply to the contract have been complied with, and non-compliance with such orders shall not invalidate any contract entered into by or on behalf of the authority.

6. S.135 (3) confirms that, in England or Wales, a local council may adopt standing orders which exempt contracts from a tendering exercise if they are below a certain value or if specific circumstances apply. The Contracts Finder/ find a tender and other light touch provisions of the 2015 Regulations apply in England only to contracts valued above £25,000. This means that councils in England may have standing orders which confirm that contracts valued at £25,000 or below are exempt from a tendering or procurement exercise. Councils in Wales are not subject to this limit but this figure is included in NALC's model standing orders and financial regulations for Wales. A council's standing orders (and financial regulations) need to confirm the procurement requirements (if any) that will apply for the award of a new contract, which will be dependent on its value (or special circumstances). It is recommended that a council's standing orders (and financial regulations) confirm if contracts below a certain value (for councils in England, this means contracts valued at £25,000 or below) are exempt from a tendering or procurement exercise. It is also recommended that the council's standing orders and financial regulations confirm that the procurement of contracts over a certain value (for councils in England, this means contracts over £25,000) will be subject to the requirements in 2015 Regulations.

B. Which bodies are covered by the 2015 Regulations?

7. The 2015 Regulations imposes procurement requirements on "contracting authorities" which include local authorities (and therefore includes local councils), associations formed by one or more such authorities (e.g. County Associations) and "bodies governed by public law" (e.g. government departments, NHS trusts, maintained schools and Academy schools) (Regulation 2 of the 2015 Regulations). "Bodies governed by public law" includes an organisation set up for the general as opposed to commercial interest, with its own legal status, and which is financed or managed by a local authority. If a local council is the sole or managing trustee of a charity, appoints most of the trustees or grants the majority of the charity's income that charity will be subject to the 2015 Regulations.

Which contracts are covered by the 2015 Regulations?

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8. The 2015 Regulations apply to "public contracts" which are defined as "contracts…. having as their object the execution of works, the supply of products or the provision of services." Regulation 2 of the 2015 Regulations defines each of those three contracts as follows:

"public service contracts" meaning public contracts which have as their object the provision of services other than those referred to in the definition of "public works contracts";

"public supply contracts" meaning public contracts which have as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products, whether or not the contract also includes, as an incidental matter, siting and installation operations;

"public works contracts" meaning public contracts which have as their object any of the following:—

- the execution, or both the design and execution, of works related to one of the activities listed in Schedule 2 (see paragraph 9 below);
- the execution, or both the design and execution, of a work;
- the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work;

9. The activities in Schedule 2 to the 2015 Regulations which are included in the definition of a "public works contract" include site preparation, demolition of buildings, construction of new buildings, erection of roofs, bricklaying, scaffolding, insulation work, plumbing, plastering, joinery installation, floor and wall covering and painting and glazing, civil engineering works and construction of highways, roads, airfields and sport facilities.

Public contracts which are exempted from the 2015 Regulations

10. Regulations 7 to 12 provide that certain public contracts are exempted from the requirements of the 2015 Regulations. Regulation 10 confirms, for example, that contracts for the acquisition of land and buildings, legal services (legal advice and representation), bank services are exempted. In the context of local authorities, Regulation 12, for example, excludes:

- a contract with an incorporated body, controlled by a local authority, where more than 80 % of the body's activities are controlled by the

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local authority and there is no private sector ownership of the body, with certain exceptions;

- a contract between two or more local authorities who come together to provide a public service to achieve objectives they have in common and that the joint venture is governed solely by considerations relating to the public interest (e.g. where a parish council enters into arrangements with a principal council) and
- an incorporated body which is a contracting authority awards the contract to its controlling local authority or to an incorporated body controlled by the same local authority;

C. Advertising requirements

Brexit – transitional advertising arrangements

31 December 2020 marked the end of the transition period for the purposes of leaving the EU. There are new advertising requirements, with the introduction of "find a tender". Government guidance, which also includes procurement policy notes, FAQs and a flow chart, sums up the main points https://www.gov.uk/guidance/public-sector-procurement-from-1-january-2021

Below is a summary of the post 31 December 2020 changes:

1. Find a Tender went live at the end of the transition period (23:00 on 31 December 2020) -https://www.find-tender.service.gov.uk/Search

2. Procurements on OJEU/TED that were commenced prior to the end of the transition period must be concluded on OJEU/TED.

3. New procurements commenced after the end of the Transition Period must be advertised on Find a Tender.

4. Requirements to advertise on ContractsFinder and Sell2Wales remain unchanged (see below).

The Contracts Finder website and other light-touch rules in 2015 regulations (England only)

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11. Where the estimated value of a public contract exceeds £25,000 a local council in England must comply with Articles 109 to 114 of the 2015 Regulations (in addition to section 135 of the 1972 Act). Regulation 110, which concerns the advertisement of a contract opportunity, is summarised below.

- Subject to the above paragraph on the changes post 31 December 2020, a council must advertise the contract opportunity on the "Contracts Finder" website when it advertises the contract opportunity elsewhere. A council will have advertised a contract opportunity elsewhere if it does anything to put the opportunity in the public domain or bring the opportunity to the attention of economic operators generally or to any class or description of economic operators which is potentially open-ended, with a view to receiving responses from economic operators who wish to be considered for the award of the contract (e.g. places details of the opportunity on its website, in a newspaper or a trade paper);

- A council does not advertise an opportunity where it makes the opportunity available only to a number of particular economic operators who have been selected for that purpose (whether ad hoc or by virtue of their membership of some closed category such as a framework agreement), regardless of how it draws the opportunity to the attention of those economic operators (i.e. if a council has an arrangement with a limited number of approved organisations to undertake work for the council); Regulation 33 defines a "framework agreement" as an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged. Contracting authorities may conclude framework agreements if they apply the procedures in Part 2 of the 2015 Regulations. Regulation 33 provides that framework agreements should not exceed 4 years except in exceptional circumstances. A council must advertise the contract opportunity on Contracts Finder within 24 hours of advertising it elsewhere;

- The information to be published on Contracts Finder shall include at least the following: — (a) the time by which any interested economic operator must respond if it wishes to be considered; (b) how and to whom such an economic operator is to respond; and (c) any other requirements for participating in the procurement;

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- Where a council publishes information on Contracts Finder it must — (a) by means of the internet, offer unrestricted and full direct access free of charge to any relevant contract documents; and (b) specify in the information published on Contracts Finder the internet address at which those documents are accessible;

- A council may advertise the contract opportunity on the "Contracts Finder" website when it does not advertise the contract opportunity elsewhere;

- It must have regard to guidance issued by the Minister for the Cabinet Office.

12. Regulation 111 provides that councils cannot include a pre-qualification stage. A "pre-qualification stage" is defined as "a stage in the procurement process during which the contracting authority assesses the suitability of candidates to perform a public contract for the purpose of reducing the number of candidates to a smaller number who are to proceed to a later stage of the process." A council may ask tenderers to answer "suitability assessment question" which is defined as relating "to information or evidence which the contracting authority requires for the purpose of assessing whether candidates meet requirements or minimum standards of suitability, capability, legal status or financial standing" if the questions are relevant to the subject-matter of the procurement; and proportionate. Councils must have regard to guidance issued by the Minister for the Cabinet Office which can be accessed via www.gov.uk/government/collections/procurement-policy-notes

13. Regulation 113 provides that councils must ensure that contracts contain suitable provisions stating that valid undisputed invoices will be paid by within 30 days. Public contracts must also contain a condition requiring contractors to include similar provisions in their contracts, and so on down the supply chain. Councils shall have regard to any guidance issued by the Minister for the Cabinet Office.

14. When a contract is awarded, a council, having regard to guidance issued by the Minister for the Cabinet Office, must publish on the Contracts Finder the information set out in Regulation 112. This includes:

- the name of the contractor;

- the date on which the contract was entered into;

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- the value of the contract;
- whether the contractor is a SME (defined as an enterprise falling within the category of micro, small and medium-sized enterprises) or VCSE (defined as a non-governmental organisation that is value-driven and which principally reinvests its surpluses to further social, environmental or cultural objectives).

15. A council may withhold information in paragraph 14 above from publication where its release

- would impede law enforcement or would otherwise be contrary to the public interest,
- would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or
- might prejudice fair competition between economic operators

16. The above is a summary of the main requirements in relation to use of the Contracts Finder website. Councils are recommended to read the 2015 Regulations which can be accessed via www.legislation.gov.uk/uksi/2015/102/contents/made

D. Complex requirements in the 2015 Regulations for high-value contracts

17. The 2015 Regulations incorporated the Public Contracts Directive 2014/24/EU ("the Public Contracts Directive"). In its simplest terms, the Public Contracts Directive facilitates the award of certain contracts to any business entity in the EU.

Financial thresholds

18. Even if the procurement and award of a contract is covered by the 2015 Regulations (see paragraphs 8 and 9 above) and is not an exempted contract (see paragraph 10 above) it will not be subject to the full requirements of the 2015 Regulations unless its estimated value exceeds the thresholds issued by the UK Government in the form of Policy Procurement Note 10/21. As a result of Brexit, the UK Government and devolved administrations must now ensure procurement thresholds are aligned with the World Trade Organisation's thresholds, which are contained in its Government Procurement Agreement ("GPA"). One of the most notable impacts of this change to GPA alignment is that contract value estimations must now be inclusive of VAT. Under previous EU rules, procurement

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thresholds were net of VAT. As a result of this change local councils will need to carefully consider whether or not VAT will apply to relevant contracts. The figures below apply from 1 January 2022. As already mentioned in paragraphs 3 and 4 above, the current thresholds are:

Type of contract	Threshold
Public works contracts	£5,336,937
Public service contracts	£213,477
Public supply contracts	£213,477

19. Few contracts to be awarded by local councils will exceed the thresholds above but, if they do, they will be subject the requirements summarised in paragraph 21 below.

20. As noted above, contracts procured by councils in England which are worth over £25,000 but less than the thresholds in paragraph 18 above will still be subject to the Contracts Finder website and other light touch provisions in the 2015 Regulations summarised in paragraphs 11 – 16 above.

Procedural requirements

21. Contracts awards exceeding the thresholds in paragraph 18 above are detailed and complex. It is likely that councils considering such high value contracts will require technical and or legal advice from those who specialise in public procurement. Set out below is a very brief overview of the full requirements of the 2015 Regulations – where they apply.

- Procurement must take one of five forms; the open procedure, the restricted procedure, competitive dialogue, the innovations partnership procedure; and competitive procedure with negotiation;
- Accelerated forms of the open procedure and competitive procedure with negotiation and the restricted procedure in situations of urgency that a local council can duly substantiate;
- There is a pre-qualification stage;
- Councils will need to comply with the requirements in respect of tenders;

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- Contracts should be awarded on the "most economically advantageous tender (Regulation 67);
- Contracts can be varied without going through a new procurement exercise in specified situations. (Regulation 72); and
- Contracts should be advertised on the Find a Tender/ Contracts Finder website (Regulation 106) – see paragraph 10 above and for the guidance on publishing in the Official Journal of the European Union (OJEU);

N.B. Central purchasing activities (where one body does purchasing for a series of organisations) are covered by the 2015 Regulations.

Other Legal Topic Notes (LTNs) relevant to this subject:

LTN	Title	Relevance
15	Legal Proceedings	Useful for threatened or actual legal proceedings relating to contract disputes.
29	Basic Charity Law	Explains responsibilities of council as a charity trustee.
35	Contracts	Guide to basic contract law.

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