

# **REFORMING THE RELATIONSHIP**

Guidance for charities and procurement teams on the  
Public Contracts Regulations 2015

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## Executive summary

The new European Directive of 26 February 2014 on public procurement, among other things, seeks ‘a better integration of social and environmental considerations in the procurement procedures’.<sup>1</sup> Certain changes have been widely publicised, but many may not be aware of the extent of its impact on the ability of purchasers to take social and environmental issues into account—nor of the implications for charitable organisations when bidding for public contracts. This briefing aims to prepare both parties for the opportunities it offers.

The new Directive came into force in April 2014 and requires EU Member States to implement the majority of its provisions by 18 April 2016. The UK government has now implemented these provisions into domestic law, publishing the Public Contracts Regulations 2015 (the 2015 Regulations) on 5 February 2015.<sup>2</sup> The 2015 Regulations repeal the Public Contracts Regulations 2006 (subject to certain transitional provisions) and came into force on 26 February 2015.

Overall, the 2015 Regulations aim to remedy some of the perceived deficiencies of existing rules by simplifying the regime and providing more flexibility. The 2015 Regulations offer a less bureaucratic approach and the opportunity to negotiate more with providers, to encourage purchasers to take non-economic factors into consideration when carrying out their procurements, and to make it easier for smaller organisations such as charities to participate in the bidding process.

In summary, the new rules aim to:

- Simplify procurement laws and make them more flexible by:
  - Providing more opportunity to use negotiation in procurement procedures
  - Repealing the existing regime in respect of so-called “Part B services” and introducing a new light touch regime for certain social services
  - Simplifying public tendering by making the documents available online
  - Reducing administrative burdens for both purchasers and providers
- Make public procurement opportunities more accessible to small and medium sized enterprises (SMEs) by:
  - Encouraging purchasers to split contracts into smaller ‘lots’
  - Reducing financial requirements providers must meet before they can bid for a contract

The 2015 Regulations have the potential to promote more efficient buying and to allow greater scope for social issues to be addressed in the award of public contracts. In this way, it complements the Public Services (Social Value) Act<sup>3</sup> (that sits alongside procurement law) and does not seek to replace it.<sup>4</sup>

Indeed, a number of commentators note that a primary aim of the 2015 Regulations is simply to clarify areas within the Public Contracts Regulations 2006 that offered flexibility but which purchasers were hesitant to use. This is achieved to some extent, but it is important to recognise that remaining ambiguity in certain areas may mean that purchasers and charities continue to take a cautious approach. In some places, the new provisions are limited to such an extent that they are unlikely to apply to charities.

<sup>1</sup> Recital (97) of the Directive

<sup>2</sup> <http://www.legislation.gov.uk/ukxi/2015/102/contents/made>

<sup>3</sup> <http://www.legislation.gov.uk/ukpga/2012/3/enacted>

<sup>4</sup> A review of the Social Value Act was published in February 2015, with recommendations of how to develop the social value agenda: <https://www.gov.uk/government/consultations/social-value-act-review>

To inspire confidence when interpreting and applying the regulations, further clarity is required. After all, innovation thrives when the rules are clear, and no one wants to be a test case. We may need case law to remove some of this uncertainty. Yet, in time, as both the 2015 Regulations and the Social Value Act are applied more frequently, we hope all actors embrace the opportunities they present.

When charities and commentators within the charity sector discuss commissioning, the focus is often on what charities can offer and the challenges they face working with commissioners; the legal procurement framework, and the role of procurement professionals in shaping procurement processes, is often neglected. The aim of this briefing is two-fold: to help charities understand the changes brought about by the new regulations, and to illustrate to commissioners and procurement professionals how certain provisions can be used to help them achieve their outcomes by working effectively with charities and other SMEs. As a result, we hope that:

- **Charities and other voluntary sector providers** anticipate and adjust to changes in existing procurement practices.
- **Charities and other voluntary sector providers** better understand the framework within which commissioners and procurement teams are working, and engage with them in informed discussions about appropriate commissioning practices.
- **Procurement teams** who see that certain practices make it harder for small providers, including charities, to participate in a procurement exercise, become aware that the new regulations provide flexibility that could work to expand the pool of potential providers.
- **Procurement teams** recognise that the regulations present opportunities to improve the quality of services, by making it easier to consult on the service specification and assess bids based on quality as well as cost.

We follow the chronological order of a procurement process throughout this briefing:



This briefing is a joint publication between NPC and Linklaters. Linklaters offered pro-bono support to interpret the new procurement regulations, with a specific focus on the possible opportunities they could offer the charity sector. NPC added further thoughts on the implications of the new rules, also providing introductory and concluding remarks. Please note that we cover only the procurement rules that apply to public contracts and not those that apply to contracts awarded by utilities or to concession contracts.

## Introduction

Good commissioning matters to the voluntary sector. Government funding is the second most important source of income for charities both large and small<sup>5</sup>: almost 40% received money from government in 2011/12<sup>6</sup>, with over £11bn coming from contracts.<sup>7</sup> Public sector purchasing decisions therefore have a major influence on how charities operate; they affect their ability to access public funding and the scale of resources available in furtherance of their mission.

Charities are mission-driven organisations and are motivated by the needs of users rather than by profit maximisation. For many, having access to public funds may help guarantee organisational survival, but there is a second consideration: that of service quality. When delivering a contract (as distinct from a grant), charities, like other providers, must follow the service specification set by the public authority. This may affect the way in which resources are deployed, and a charity may choose not to bid for a contract if it feels the service will fail to meet the real needs of its users as a result.

If people in need are to get the best support available, then charities need to be able to compete in the contracting process. Much has been written about charities' experiences of commissioning, and the challenges faced by providers and commissioners in working together effectively. But discussion rarely addresses the effect of procurement practice on commissioning, including the legal framework within which it operates.

Commissioning is the process through which a public body decides what public services it wants to see delivered; it is the entire cycle of assessing the needs of people in a local area, designing services and then securing them. Procurement covers the specific activities within the commissioning cycle that focus on the process of buying those services—from the initial advertising through to the final contract arrangements.

Procurement is a technical process governed by a legal framework. A key concern of procurement teams is to ensure that services are obtained in line with public procurement law, rooted in EU law, so that their purchasing decisions cannot be challenged in court. EU law is based on the presumption of a fair procurement process that is open on an equal basis to all qualified providers. It is for this reason that procurement teams often prefer a competitive tender, rather than a more co-developed approach. Nervousness about undermining fair competition can lead them to advertise a contract without prior consultation—thereby proving that they do not favour any particular bidder. A competitive approach is also attractive since it seems to drive towards lower cost.

One feature of the expansion of public sector commissioning has been the creation and consolidation of procurement units separate to commissioning teams. Commissioning teams consist of specialists who understand need and design services to meet that need. Procurement units are staffed by individuals with legal and technical expertise who are responsible for outlining the contract specification, drawing up selection and award criteria.

The risk of this separation is that contract specifications are one step removed or even divorced from commissioner intent, and may not, therefore, accurately reflect need. Bidders only need to demonstrate that they meet the specification. Once this is drawn up, it can be difficult to select those who challenge the specification or reward those who can deliver above and beyond what is required.

Previous Public Contracts Regulations 2006 (and the EU Directive on which they are based) allowed purchasers to talk to providers before and after the procurement process—yet the fear of legal challenge by other providers can hold them back, and there is relatively little case law to clarify exactly what is and is not permitted. A key thrust of the 2015 Regulations is to make this flexibility more explicit. For charities and other SMEs,<sup>8</sup> it offers a

<sup>5</sup> NCVO (2014) UK Civil Society Almanac; analysis of data provided to NPC for the [Cultural Commissioning Programme](#)

<sup>6</sup> 39% of those with an income over £10,000

<sup>7</sup> NCVO (2014) UK Civil Society Almanac

<sup>8</sup> In this paper we have focused primarily on charitable providers, but much of the information and many of the implications apply equally to social enterprises and other SMEs

range of opportunities to exert influence before the specification is established, to bid for smaller 'lots', and push for recognition of social value and the importance of buying quality over cheapness. This paper aims to give charities the tools to better understand procurement, so that they can be bolder in their discussions with commissioners, engaging with them earlier on to ensure they design commissioning and procurement processes in a way that enables charities to bid effectively to deliver services.

## Pre-procurement

### New rules encourage preliminary market engagement

The 2015 Regulations place greater emphasis on pre-procurement dialogue, allowing purchasers to carry out preliminary market consultations to ensure they know their market:

*'Before commencing a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements. For this purpose, contracting authorities may for example seek or accept advice from independent experts of authorities or from market participants...'*

The 2015 Regulations go on to say that:

*'Such advice may be used in the planning and conduct of the procurement procedure, provided that it does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.'*<sup>9</sup>

Gathering advice from a number of providers to gain a rounded perspective is therefore acceptable (and indeed should be best practice); but taking the perspective of one provider and developing a specification according to their particular solution is not.

The increased opportunity for pre-procurement discussion will enable potential providers to propose and discuss new ways of delivering existing services. For purchasers, it will encourage a change in the procurement process order and present an opportunity to procure services that are more fit for purpose.

However, some purchasers are likely to approach this with caution to avoid breaching the core principles of non-discrimination (ie, not favouring a particular provider) and transparency (ie, ensuring access to timely, easily understood information). Furthermore, it is unclear how this rule should be applied to iterative procurement processes; for example, the restricted and competitive dialogue procedures (see page 13). As a result, purchasers may use these provisions less often than we would like. Charities should feel confident that this early engagement with the market is permitted, and encourage procurement professionals to take advantage of this opportunity to gather insights before confirming contract scope.

## Procurement

Under the previous Public Contracts Regulations 2006, service contracts were divided into Part A priority services (subject to the full procurement regime, including the requirement to follow one of the formal tendering procedures such as the open procedure or the negotiated procedure) and Part B non-priority services (subject to less onerous, more flexible requirements). Many contracts for services typically provided by the charity sector were covered by Part B.

The new procurement regime removes the distinction between Part A and Part B. Many of the services that were previously deemed Part B services will instead be governed under a new light touch regime, which will cover

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<sup>9</sup> Regulation 40, 2015 Regulations

certain administrative, cultural, health and education services, such as *'provision of services to the community'* (where the contract value is £625,050 or more).<sup>10</sup> As a result, some services that currently fall under Part B will become fully regulated, while others will be incorporated into the new light touch regime. The majority of contracts that charities would be interested in bidding for will fall within the light touch (also referred to as carved out) regime, so this may simplify their experience. In a minority of cases, charities may have been delivering activity that was previously Part B and will become fully regulated—and are therefore likely to experience more complicated procurement than they have been accustomed to.

However, in respect of those contracts that do not meet the required thresholds in the 2015 Regulations, there is a *new* requirement to advertise these so-called below-threshold contracts on the Contract Finder portal unless the contract value is below £10,000 (for contracts awarded by central government) or below £25,000 (for contracts awarded by sub-central government, eg, local government, police, fire services).<sup>11</sup>

The full procurement regime introduces more flexibility in the choice of procurement procedures involving direct negotiations with tenderers prior to the award of the contract.

## Less onerous procedure for contracts falling within the light touch regime

The government has decided to adopt a minimalist approach to implementing the light touch regime; in essence, purchasers must only advertise a contract opportunity in the Official Journal of the European Union (OJEU) and, once awarded, publicise the award of that contract also in the OJEU. Individual purchasers are left to determine the procedures that are to be applied in connection with the award of these contracts, provided that they are at least sufficient to ensure compliance with the principles of transparency and equal treatment. Purchasers of these carved-out services will therefore have more flexibility in determining the ultimate award process, creating an opportunity to develop an approach that better suits these types of services and which, coupled with the other provisions to be introduced under the new regime, will encourage participation by new entrants, such as social enterprises and charities, for the provision of administrative, social, educational, healthcare and cultural services.

The minimum requirements under the new light touch regime therefore involve the advertisement of the contract opportunity and the subsequent publication of the award of that contract. There is no specific requirement to tender; however, in practice, the award of such contracts is likely to require some sort of competitive tender (although not in full compliance with one of the detailed procedures set out in the 2015 Regulations). The government intends to produce guidance on certain issues where further clarification is required, including the new light touch regime.

## New procedures for contracts falling within the full regime

For contracts that are not covered by the carve out for certain services, the full procurement regime may apply and the contract must be awarded using one of several different procurement procedures.

Many of the existing arrangements will remain: the open and restricted procedures, the competitive dialogue procedure (which will no longer be restricted to complex cases) and the negotiated procedure without prior publication (but only in specified circumstances).<sup>12</sup> More importantly, **two new procedures** will be introduced: the competitive dialogue with negotiation, and the innovation partnership procedure.

<sup>10</sup> Appendix 2 sets out the full list of services that fall under the light touch regime

<sup>11</sup> Part 4 of the 2015 Regulations

<sup>12</sup> This exceptional procedure allows purchasers to negotiate directly with providers in order to avoid a contract. It should only be used in limited circumstances; for example, in cases of extreme urgency or where it is clear that publication would not trigger more competition or better procurement outcomes, often because only one party can objectively deliver the contract

- **Competitive procedure with negotiation**

The competitive procedure with negotiation makes it easier for purchasers to talk to the market. Under the new procurement regime, they will be fundamentally free to choose this procedure in cases where, broadly, prior negotiations are required because the purchaser's needs: (a) cannot be met by products already on the market; (b) include design/innovative solutions; (c) are complex or risky.

Purchasers feel most comfortable issuing contracts that are familiar and therefore easiest to manage. This means that a new contract period or even a new provider will often mean the same service is being delivered to users—and that service may not be the best which could be delivered with the money available. The increased ability to negotiate contracts means that there may be more scope for charities to propose new terms rather than simply signing up to those awarded in the past. It is hoped that this permission to negotiate with the market will make it easier for purchasers to review and improve their specifications.

Until this procedure is applied and its limits tested in practice, it remains unclear whether or not human welfare services might benefit from this procedure; the example cited by the 2015 Regulations are the purchase of sophisticated IP products such as major information and communications technology projects.

In the current economic climate, commissioners need to demonstrate that funds are being spent to generate the maximum benefit. Purchasers should therefore be encouraged to use these flexible procedures, as increased negotiation will ultimately lead to more targeted, efficient and innovative services. However, if the outcome of these negotiations results in a contract that is materially different from the contract put out to tender in the original procurement documents, this will result in a requirement to re-advertise the revised contract. This might include a scenario where, for example, the scope of services awarded is significantly more than those advertised.

- **Innovation partnership procedure**

The innovation partnership procedure can be used where the market does not offer a solution that meets the purchaser's needs. It allows the purchaser to invite providers to establish a partnership and develop a new, innovative service or product, and to subsequently purchase the results of that development process from the contractor. This appears to be an opportunity for charities—and it may be—but the potential use of this procedure to pursue social objectives is somewhat unclear.

There are three aspects to this uncertainty:

Firstly, in the recitals to the 2015 Regulations, "innovation" is defined as *'the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations, including with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth'*. However, the specific rules relating to "innovation partnership" use a more restrictive definition: they limit the scope for the use of partnership to the need for *'an innovative product, service or works that cannot be met by purchasing products, services or works already available in the market'*.<sup>13</sup> This is more profit-oriented, and the conflict of definitions gives rise to legal uncertainty over the conditions for its use.

A second potential area for concern is that the procedural rules require that, when selecting the providers to be invited to submit a proposal, the purchaser should pay special attention to the candidates' capacity to research and develop innovative solutions. Charities often lack the resources to carry out extensive research, and purchasers risk overlooking them as a result.

Finally, because the potential for unequal treatment is inherent in any dynamic negotiation process (e.g. through the provision of information in a discriminatory manner which gives some an advantage over others), there may be an initial resistance to using this currently untested procedure.

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<sup>13</sup> Regulation 31 (2)(a), 2015 Regulations

## Mandatory publication of electronic documents

Under the new procurement regime, e-procurement is mandatory; all notices and procurement documents will need to be transmitted in electronic form. In reality, most procurement in the UK is already managed in this way, but where this does introduce change is in the requirement for tender documents to be available in electronic form at the time the contract notice is published (subject to certain exemptions). Previously, this was not essential.

This is likely to have implications for the planning process: purchasers will be required to have much greater certainty of the whole process before the OJEU contract notice or expression of interest is sent, particularly because any substantial changes to the tender documents may require a new procurement procedure. This will place greater onus on the purchaser to carry out preliminary market consultations, which will encourage purchasers to test the market and enter into an early dialogue with potential providers.

## Procurements for sub-central purchasers

It should also be noted that “sub-central” purchasers, such as local authorities, will be able to use a lighter procurement regime which should reduce administrative burden. This will include use of a prior information notice (PIN) as call for competition, permitting purchasers to advertise one or more contracts up to a year in advance of the start of the procurement. Following publication of the PIN, there is no further obligation to publish a contract notice in the OJEU. However all procurement documents should be available online when the PIN is issued. The implication for the potential provider is that they will be able to see the plans of the purchaser, and the items likely to be procured in advance, and can express an interest in these contracts.

The use of PINs is likely to be reserved for small, off-the-shelf contracts only. Purchasers will not be able to rely on a PIN as a call for competition if their requirements change substantially after the PIN has been published. For complicated contracts the level of planning and discussion required makes it unlikely that the purchasing authority will be ready to advertise the contract so far in advance—it is often only once an authority is ready to proceed with a procurement process and following market consultation that it can be confident of the details it puts in its contract notice.

## Encouraging small and medium-sized enterprise (SME) participation

A number of measures have been introduced to encourage SMEs to bid for public contracts; a category that encompasses most charities and non-profits.

- **Splitting large contracts into smaller lots:** The new procurement regime encourages purchasers to divide contracts into smaller “lots” to level the playing field for SMEs, social enterprises, charities and public sector mutuals. This has the potential to help SMEs bid for certain elements of a contract rather than an entire, complex contract that requires considerable financial capacity and technical expertise which they cannot meet (particularly where considerable risks are involved).

However, the 2015 Regulations ask purchasers only to explain where they do not divide a contract into lots. So this is an encouragement for purchasers to recognise the benefits that small providers can bring, but does not compel the purchaser to make contracts available that are suitable for small providers.

- **Turnover requirements:** Charities are sometimes excluded from participation in procurements because purchasers ask for high annual turnover figures when evaluating tenderers’ financial status—even for contracts of a low monetary value. Under the new rules, minimum annual turnover requirements will be limited to twice the estimated contract value, except in justified cases. By keeping turnover requirements proportional to contract size, this provision prevents the use of excessively risk-averse requirements which would disadvantage small providers. As a result it should open up more opportunities to smaller providers such as charities.

- **Abnormally low tenders:** The 2015 Regulations impose an obligation on purchasers to seek an explanation regarding the price or cost of any tender that appears to be abnormally low, and to assess the information provided in response. A purchaser is also entitled to reject the tender where the evidence supplied does not satisfactorily account for the low level of price or cost. Some commentators considered whether this provision (although not new) may help new entrants and smaller social enterprises compete against national providers, because it makes it more difficult for large bidders to under-price their activity and cross-subsidise from other sources in order to win the work. It has also been considered whether this provision could encourage purchasers to look beyond price alone when awarding contracts (although whether a tender is “abnormally low” remains a judgement call for the purchaser).

However, the UK High Court has recently held that these rules do not require a purchaser to reject a bid that is “abnormally low”, but only to require purchasers to consult a bidder before rejecting its bid as “abnormally low”; in other words, it offers bidders some protection.<sup>14</sup>

## Encouraging broader award criteria beyond a focus on price

Under previous Public Contracts Regulations 2006, a purchaser could choose whether to award a contract on the basis of either the most economically advantageous tender (MEAT) or the lowest price. The new procurement regime provides that all contracts have to be awarded to the provider that offers MEAT, without specifically referring to the option of the lowest price only.

This appears positive, but it is in fact still possible to award a contract based on lowest price; for the definition of MEAT has been changed to cover awards that include non-price criteria and awards that are based solely on price. Specifically, MEAT must be identified on the basis of the price or cost, and ‘*may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject matter of the public contract in question*’.<sup>15</sup>

The removal of the “lowest price only” as an award criterion may therefore not be enough to bring about new purchasing practices. However, by establishing the MEAT as the sole overarching criterion, the legislation encourages purchasers to procure in a quality-oriented (rather than price-oriented) way. Indeed, the EU Parliament press release states that: ‘*Thanks to the new criterion of the MEAT in the award procedure, public authorities will be able to put more emphasis on quality, environmental considerations, social aspects or innovation while still taking into account the price and life-cycle-costs of what is procured.*’<sup>16</sup> This seems to fit well with the requirement of the Public Services (Social Value) Act 2012 to consider the ‘social value’ at the pre-procurement stage.<sup>17</sup>

## Broader powers to reserve contracts for certain services

Under the new regime, purchasers can reserve certain health and social service contracts (many of which are likely to be of interest to charities) to public service (or employee) mutuals. This means that participation in the tender process for such contracts can be limited to mutuals, shielding them from competition from larger private sector organisations outside the sector.<sup>18</sup> To qualify for such reserved contracts, certain cumulative conditions must be met:

a) *its objective is the pursuit of a public service mission*

<sup>14</sup> [NATS \(Services\) Ltd v Gatwick Airport Ltd \[2014\] EWHC 3728 \(TCC\)](#) (12 November 2014)

<sup>15</sup> Regulation 67, 2015 Regulations

<sup>16</sup> EU Parliament [press release](#), dated 15 January 2014

<sup>17</sup> [The Public Services \(Social Value\) Act 2012](#) requires, among other things, contracting authorities to consider the environmental and social well-being of their ‘relevant area’ during the pre-procurement stage of the procedure

<sup>18</sup> This was a concession obtained by the UK to further its policy of facilitating the establishment of start-up staff mutuals by sheltering them from the procurement regime

*b) profits are reinvested with a view to achieving the organisation's objective*

*c) the structures of management or ownership of the organisation are (or will be, if and when it performs the contract)*

*(i) based on employee ownership or participatory principles, or*

*(ii) require the active participation of employees, users or stakeholders<sup>19</sup>*

*d) the organisation has not been awarded, pursuant to this regulation, a contract for the services concerned by the contracting authority concerned within the past 3 years.*

It is not entirely clear whether this provision could apply to charities. This question was not clarified in the government's response to its consultation on the Directive, which makes no explicit reference to charities. It seems to hinge on part C—and the answer may vary based on the constitution and governance arrangements of specific charities, namely whether these enshrine participatory principles.

The new procurement regime also expands the scope of the existing reservation for sheltered workshops/employment programmes, by allowing reservation of any contract for disadvantaged as well as disabled workers, and reducing the minimum proportion of those workers in the provider's workforce required for a provider to be eligible to bid for a reserved contract from 50% to 30%. The reservation works in practice by requiring a competition for those services, but only allowing bids from organisations meeting the criteria. The government intends to provide separate guidance on the interpretation of "disabled persons", "disadvantaged persons", "sheltered workshop" and "sheltered employment programme" so it is not currently clear how widely applicable this is likely to be.

## Delivery

### Greater flexibility to amend contracts during delivery phase

As public sector contracts must remain responsive to the changing needs of local communities, contracts should be kept under continuous review and, as appropriate, amended to reflect changing needs. The 2015 Regulations provide clear parameters within which contracts may be modified without triggering a requirement to carry out new procurement procedure; an area that was unclear under the previous regime.

The significance of this particular provision is to give increased certainty and confidence to both contracting parties in terms of what amendments are permissible without the cost and expense of a new procurement process. It is this flexibility in the new procurement regime that will help purchasers to ensure long-term public sector contracts remain aligned to the needs of end-users throughout the term of the contract and therefore deliver better outcomes and value for all. For charities—where success is not just a question of winning the contract and getting paid, but of delivering a service that genuinely benefits people and helps the charity to deliver on its mission—this is an important opportunity for course-correction if the needs of service users change through the lifetime of the contract.

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<sup>19</sup> Regulation 77, 2015 Regulations

## Conclusion

The charity sector must work effectively with the public sector to deliver on its mission to transform people's lives. The 2015 Regulations offer an opportunity to reform this relationship; it encourages greater use of existing freedoms by making the flexibility that exists within procurement law more explicit and clarifying areas currently sidestepped by procurement professionals keen to avoid risk.

In summary, improvements to pre-procurement dialogue allow procurement officers a greater opportunity to engage with their market, consider service design, and understand and develop the provider base. This has the potential to deliver improved outcomes and efficiency. For charities, it clarifies some of the areas most crucial to those interested in delivering human welfare services on behalf of the public sector, and the greater flexibility to negotiate within procurement could be used to set the agenda. The new innovation partnership procedure seems to offer a particular opportunity for charities and other socially-motivated providers to come together and design joined-up solutions to some of society's most difficult problems.

For example, if charities could collaborate—whether through innovation partnerships or otherwise—to establish appropriate outcomes and measurement frameworks for the services they deliver, commissioners might feel more comfortable listening to and incorporating their suggestions into contract specifications without appearing to preference any specific provider. Standardised high-quality measurement of outcomes would also make it easier to include criteria other than cost in the assessment of bids.

However, refining and strengthening the legal framework in which charities and procurement teams operate is only part of the story; there are further structural impediments to improving procurement practices, particularly:

- **The incentives for individual procurement officers remain unchanged.** Asked to deliver an efficient purchasing process that cannot be challenged in court, their role is not structured to reward an approach that seeks out flexibility and relatively untested opportunities to design innovative public services. Purchasing decisions continue to be primarily price driven—a fact that is more problematic where people with expertise have not been consulted in the design of contract specifications.
- **Procurement teams often operate independently from commissioning specialists.** Both teams are likely to be highly over-stretched following several years of budget cuts. Where they work in silos, it is far less likely that the complementary expertise of each team will be brought together to design a process that delivers the desired outcome within the legal framework. If the procurement team does not understand why the commissioner wants to take a certain approach, it may recommend an unnecessarily conservative approach. Conversely, if the commissioning team does not understand what procurement law requires, it will be unable to have an informed discussion about the best route to achieving the desired outcome.

The fact that reserved contracts do not explicitly apply to charities is a huge missed opportunity. Some charities may be eligible if they have particular governance structures in place; others may decide that the potential for reserved contracts is significant enough to consider changing their governance to incorporate participatory principles. At a time of major transition, as many struggle to adapt to the new contracting environment, a protection of this kind could have been very valuable indeed—and the sector should now come together to request guidance and clarification from central and local commissioning bodies about how the provisions apply to charitable governance.

If we are to achieve the radical transformation that is needed for charities to play a valuable role in the delivery of high-quality public services, we will need a shift in procurement that puts outcomes and service users at the centre, rather than the process itself. This will require a change in incentives for procurement professionals and braver leadership from all those involved in the commissioning and procurement cycle.

The new 2015 Regulations can significantly support this shift. We will be watching closely, and look forward to working with such ambitious leaders in the future.

## Appendix 1: Definitions

**2015 Regulations:** the Public Contracts Regulations 2015

**Bidder:** any party bidding in a procurement process for the execution of works, the supply of products or the provision of services on the market

**Competitive dialogue procedure:** a formal tendering procedure under which only a limited number of pre-selected bidders are invited to submit a final tender for an advertised contract, following a dialogue with the purchaser

**Purchasers:** the public body purchasing the goods, works or services on the market (referred to in the 2015 Regulations as Contracting Authorities)

**Contract notice:** the public advertisement and description of a contract in the OJEU

**Distortions of competition:** the unequal treatment of bidders or providers such as placing one bidder in a position of advantage over its competitors

**Directive:** Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

**Life cycle costing:** includes all costs over the lifespan of a contract, eg, research to be carried out, development, production, transport, use, maintenance and end-of-life disposal costs but can also include costs attributed to environmental externalities

**MEAT:** most economically advantageous tender

**Negotiated procedure:** a formal tendering procedure under which only a limited number of pre-selected bidders are invited to negotiate the terms of an advertised contract with the purchaser

**OJEU:** Official Journal of the European Union

**Open procedure:** a formal tendering procedure under which all interested providers can submit a final tender for an advertised contract

**Prior information notice (PIN):** this can be used as an alternative to a contract notice in some cases, pursuant to which providers express their interest for one or more contracts and are subsequently invited to confirm their interest for a specific contract in writing

**Procurement:** purchasing goods, works or services from an outside body on the best possible terms

**Provider/operator:** any party offering (but not yet bidding for) the execution of works, the supply of products or the provision of services on the market

**Public service:** a service that public bodies (such as central or local government) either provide themselves or commission others to provide

**Restricted procedure:** a formal tendering procedure under which only a limited number of pre-selected bidders are invited to submit a final tender for an advertised contract

**Subject matter of a contract:** the needs and characteristics required of the supplies, works or services to be procured and as set out in the procurement documents

**Tender:** a binding offer submitted in response to an advertised contract

**Tendering:** the process of bidding and negotiating for a contract

## Appendix 2: Services covered by the light touch regime

CPV Code	Description
75200000-8; 75231200-6; 75231240-8; 79611000-0; 79622000-0 (Supply services of domestic help personnel); 79624000-4 (Supply services of nursing personnel) and 79625000-1 (Supply services of medical personnel) from 85000000-9 to 85323000-9; 98133100-5, 98133000-4; 98200000-5; 98500000-8 (Private households with employed persons) and 98513000-2 to 98514000-9 (Manpower services for households, Agency staff services for households, Clerical staff services for households, Temporary staff for households, Home-help services and Domestic services)	Health, social and related services
85321000-5 and 85322000-2, 75000000-6 (Administration, defence and social security services), 75121000-0, 75122000-7, 75124000-1; from 79995000-5 to 79995200-7; from 80000000-4 Education and training services to 80660000-8; from 92000000-1 to 92700000-8; 79950000-8 (Exhibition, fair and congress organisation services), 79951000-5 (Seminar organisation services), 79952000-2 (Event services), 79952100-3 (Cultural event organisation services), 79953000-9 (Festival organisation services), 79954000-6 (Party organisation services), 79955000-3 (Fashion shows organisation services), 79956000-0 (Fair and exhibition organisation services)	Administrative social, educational, healthcare and cultural services
75300000-9	Compulsory social security services
75310000-2, 75311000-9, 75312000-6, 75313000-3, 75313100-4, 75314000-0, 75320000-5, 75330000-8, 75340000-1	Benefit services
98000000-3; 98120000-0; 98132000-7; 98133110-8 and 98130000-3	Other community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services
98131000-0	Religious services
55100000-1 to 55410000-7; 55521000-8 to 55521200-0 (55521000-8 Catering services for private households, 55521100-9 Meals-on-wheels services, 55521200-0 Meal delivery service) 55520000-1 Catering services, 55522000-5 Catering services for transport enterprises, 55523000-2 Catering services for other enterprises or other institutions, 55524000-9 School catering services 55510000-8 Canteen services, 55511000-5 Canteen and other restricted-clientele cafeteria services, 55512000-2 Canteen management services, 55523100-3 School-meal services	Hotel and restaurant services
79100000-5 to 79140000-7; 75231100-5;	Legal services, to the extent not excluded by regulation 10(1)(d)
75100000-7 to 75120000-3; 75123000-4; 75125000-8 to 75131000-3	Other administrative services and government services

75200000-8 to 75231000-4	Provision of services to the community
75231210-9 to 75231230-5; 75240000-0 to 75252000-7; 794300000-7; 98113100-9	Prison related services, public security and rescue services to the extent not excluded by regulation 10(1)(h)
79700000-1 to 79721000-4 (Investigation and security services, Security services, Alarm-monitoring services, Guard services, Surveillance services, Tracing system services, Absconder-tracing services, Patrol services, Identification badge release services, Investigation services and Detective agency services) 79722000-1 (Graphology services), 79723000-8 (Waste analysis services)	Investigation and security services
98900000-2 (Services provided by extra-territorial organisations and bodies) and 98910000-5 (Services specific to international organisations and bodies)	International services
64000000-6 (Postal and telecommunications services), 64100000-7 (Post and courier services), 64110000-0 (Postal services), 64111000-7 (Postal services related to newspapers and periodicals), 64112000-4 (Postal services related to letters), 64113000-1 (Postal services related to parcels), 64114000-8 (Post office counter services), 64115000-5 (Mailbox rental), 64116000-2 (Post-restante services), 64122000-7 (Internal office mail and messenger services)	Postal services
50116510-9 (Tyre-remoulding services), 71550000-8 (Blacksmith services)	Miscellaneous services

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**Increasing the impact of charities:** NPC exists to make charities and social enterprises more successful in achieving their missions. Through rigorous analysis, practical advice and innovative thinking, we make charities' money and energy go further, and help them to achieve the greatest impact.

**Increasing the impact of funders:** NPC's role is to make funders more successful too. We share the passion funders have for helping charities and changing people's lives. We understand their motivations and their objectives, and we know that giving is more rewarding if it achieves the greatest impact it can.

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