



Free Schools and the Public Contracts Regulations 2006

BRIEFING

This note has been prepared to examine whether Free Schools will need to comply with the provisions of the Public Contracts Regulations 2006 ('the Regulations'). The Regulations apply when a procuring authority enters into a contract for the receipt of certain types of works, goods or services. The aim of the Regulations is to ensure that public funds are applied in accordance with principles of fairness and transparency.

What is a Free School?

Free Schools are all-ability state-funded schools set up in response to parental demand. These new schools will have the same legal requirements as academies and will be funded on a comparable basis to other state-funded schools and will not be profit making.

What are the Public Contract Regulations 2006?

The Regulations apply wherever a "contracting authority" seeks offers and is receiving goods, works or services under a:

- Proposed public supply contract e.g. supply of goods or equipment;
- Public works contract e.g. a construction contract;
- Part A services contract (see below for a list of these);

- Framework agreement for the supply of works or services; or
- Dynamic purchasing system (DPS);

unless the contract, framework agreement or DPS is excluded from the Regulations.

The Regulations will not apply whenever a contracting authority seeks offers in relation to a contract for what are referred to as Part B services (see below for a list of these).

A "contract" means a contract in writing for consideration.

Who do the Regulations apply to?

The Regulations apply to bodies that are "contracting authorities". Under Regulation 3, a "contracting authority" includes:

"a corporation established..... for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and financed wholly or mainly by another contracting authority, subject to management supervision by another contracting authority or more than half of the board of directors or members of which, or, in the case of a group of individuals, more than half of those individuals, are appointed by another contracting authority."



Whilst individuals are not bound by the Procurement Regulations, it is likely that contracts to set up Free Schools will be entered into by an Academy Trust Company, partly in order to avoid liability for those contracts. Accordingly, an Academy Trust set up for the purposes of running a Free School and receiving funding from the Department for Education (which is a contracting authority for the purposes of the Regulations), is likely to fall within this broad category.

Exclusions

The Regulations will not apply where the contract falls within one of the exclusions, including:

- Contracts for the acquisition of land or rights over land;
- Contracts for arbitration or conciliation services; or
- Contracts for employment and other contracts of service.

The Relevant Threshold

Where the contract is not excluded from the Regulations, Free Schools will need to determine whether the estimated value of the contract is less than the relevant threshold. The thresholds are updated every two years and depend on the type of entity that is procuring the contract and whether it is an entity listed in Schedule 1 of the Regulations.

As Free Schools are likely to be classified as “any other contracting authority”, the thresholds for Part A and B contracts are currently:

- £156,442 for public supply and services contracts; and
- £3,927,260 for public works contracts.

The estimated value of the contract is the value of the total consideration payable, net of VAT, which the Free School expects to pay under the contract. The Regulations set out certain items which must be taken into account when calculating the value of the contract, such as any renewal of the contract or any prize or payment awarded by the Free School to the contractor, supplier or services provider.

Where the Free School has entered into a number of contracts for goods or services, the estimated value for the purposes of each of those contracts is the aggregate of the value of the consideration which the Free School expects to be payable under each of those contracts. This is an anti-avoidance measure and will determine whether the relevant threshold has been reached and whether each of those contracts will be covered by the Regulations.

Part A and Part B Services

The Regulations divide service contracts into two categories; Part A and Part B. Part B services are seen as having lower priority and are therefore subject to limited application of the Regulations. In general, Part B services contracts must be



advertised but not necessarily in the Official Journal of the European Union (OJEU). Contracting Authorities awarding a Part B contract must still comply with the principles of fairness, openness and equal treatment of bidders.

Relevant examples of Part A and Part B services are set out below:

Part A

- Financial services:
 - (a) Insurance services
 - (b) Banking and investment services other than financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments and central bank services
- Computer and related services
- Accounting, auditing and book-keeping services
- Market research and public opinion polling services
- Management consultancy services and related services, but not arbitration and conciliation services
- Architectural services: engineering services and integrated engineering services: urban planning and landscape architectural services: related scientific and technical consulting services: technical testing and analysis services
- Building-cleaning services and property management services

Part B

- Legal services
- Personnel placement and supply services
- Education and vocational education services
- Health and social services
- Recreational, cultural and sporting services.

Consequences of the Regulations applying

Where a contract falls within the scope of the Regulations, Free Schools will need to follow a procurement process that is fully compliant with the Regulations otherwise they could face expensive litigation if the process is challenged by an unsuccessful bidder. Those involved in the process should be mindful of the principles of fairness and transparency. For example, the School should not grant a contract that derogates from the original contract specification advertised in the OJEU notice (which alerts bidders to the tender process for the contract).

Before advertising the contract in the OJEU, Free Schools will need to adopt a procurement strategy and decide which procedure to use when carrying out the procurement process. The four main options are as follows:

- Open;
- Restricted;
- Negotiated; or
- Competitive dialogue.



The procurement options set out different ways of conducting the procurement process. There are advantages to choosing certain options for particular types of contract although the Regulations and European case law have stressed that the negotiated and competitive dialogue procedures should only be used in very limited circumstances. Accordingly, Free Schools are advised to obtain legal advice before embarking on this process.

The School will need to arrange for the specification for the OJEU notice to be carefully drafted in the prescribed form to reduce the risk of a challenge from an unsuccessful bidder.

Once the School receives bids for the contract in question, it will then need to evaluate the responses in accordance with the procedure set out in the Regulations.

What sorts of contracts would a free school be contemplating?

Listed below is a table of likely contracts that a Free School might be contemplating and an indication of whether the Procurement Regulations would apply.

No	Type of Contract	OJEU Notice Required?	Possible / likely exclusion?
1.	Free School acquiring a site to build School on	No	Land transaction exclusion applies
2.	Construction	Yes	Could be

	works		below the threshold
3.	Financial services	Yes	Could be below the threshold
4.	Education services e.g. personnel and staff support	No	Part B services exclusion applies
5.	Accountancy / Auditing	Yes	Could be below the threshold
6.	Legal services	No	Part B services exclusion applies
7.	Facilities Management	Yes	Could be below the threshold
8.	Consultancy e.g. health and safety, marketing, security and training	Yes	Could be below the threshold
9.	Procuring equipment and furniture from a supplier	Yes	Could be below the threshold
10.	Insurance	Yes	Could be below the threshold
11.	Employment of staff	No	Employment exclusion applies

Free Schools will need to be aware that separate rules apply where the contract is a mixed contract



e.g. where there are mixed Part A and Part B services or where a contractor supplies goods and also installs them.

Those setting up Free Schools should consider the use of Frameworks to procure works and services and many more now exist than there have been in the past. The terms of use and the process for placing a contract need to be considered carefully though.

Conclusion

Those who are embarking on the process of setting up a Free School should be mindful that

any contracts for works, goods or services entered into by the School where the value is equal to or exceeds the relevant threshold will be subject to the procurement procedure set out in the Regulations and appropriate legal advice should be taken.

For further information and advice please contact:

Andrea Squires

DT 020 7593 5039
asquires@wslaw.co.uk