

Public procurement law reform: highlights of the Government's transforming public procurement green paper

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The proposals indicate a significant move away from some aspects of the current regime with the Government proposals seeking to introduce greater flexibility for contracting authorities.

In this note we provide you with the key highlights from the Paper which include a re-scoping of the underlying principles of public procurement, a streamlining of the recognised procurement procedures, a focus on transparent and open contracting, the creation of a new oversight body and some potentially controversial proposals in relation to remedies.

At the outset it is worth noting that the Government proposals include consolidating what are currently the Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016 into a single set of regulations going forward.

Public procurement principles

The Paper proposes that future public procurements will be conducted on the basis of a set of six core principles:

- public good
- value for money
- transparency
- integrity
- fair treatment of suppliers
- non-discrimination

The introduction of the principle of "public good" is consistent with the recently launched 'Social Value' model which aims to use public procurement to harness wider societal benefits, although it may give contracting authorities scope to go further and, of course, has wider application than the Social Value Model. The Government's priorities in this area will be captured in a new National Procurement Policy Statement to which contracting authorities must have regard. This suggests there will be a greater level of direction and intervention into public sector purchasing than is currently the case and it will be interesting to watch how this develops and the level of compulsion there will be to comply. For now, the priority themes and policies areas in the Social Value model are likely to be a good indication of key focus in any National Statement.

The introduction of "value for money" as a principle is significant and it remains to be seen how this will sit alongside the revised approach to evaluation which will be based on the "Most Advantageous Tender". For many this may not appear that much different to the current

“Most Economic Advantageous Tender” approach although there are some key differences (this is explored further below). It is also worth noting that the Government intends to publish a revised Green Book to make clearer ways in which value of money is assessed at the point of the investment decision.

The proposed principles are as notable for the omissions as they are for the new additions. The principle of acting in a manner which is “proportionate” which currently features in Regulation 18 of the PCR does not feature in the new list. There is no explanation for this but it could be as a result of the later proposals that evaluation criteria need not be completely linked to the subject matter of the contract. The rephrasing of the current “without discrimination” principle to “non-discrimination” could, on the basis of the explanation for that principle, result in a narrowing of this principle but this is perhaps one for clarification.

National procurement policy statement

The proposal for a new national policy statement and the suggestion that government will seek to have more direction on the procurement of all contracting authorities (including local government, Arms’ Length Bodies and the NHS) is not totally new. However, procurement policy has historically not seen this level of direction and compulsion before. The issues picked up, the Government argue, are critical levers for the Government in the post Covid, post EU direction of the country.

The national procurement policy statement will, however, go beyond just addressing the social value priorities of the Government and also address commercial delivery including publishing pipelines of future procurement and commercial capability including benchmarking performance.

There is no getting away from the fact that a national procurement policy statement signals a shift towards there being more central direction over public procurement and possibly a shift in power. It will be interesting to see whether local government and the health sector, particularly, will accept this or whether it will prove controversial. It can also be reasonably assumed that national priorities may change over time and this raises the question of how a level playing field and consistency in procurement can be maintained if there are such changes.

A new oversight body

The Paper includes a proposal to establish a new unit to oversee public procurement. This unit, supported by an independent panel of experts, will have powers to review the commercial capability of contracting authorities but is not intended to be a forum for providing redress in individual situations.

It is understood that the unit’s primary focus would be to generally improve procurement practice and the commercial capability of contracting authorities. That said, the unit’s proposed powers of intervention – to issue improvement notices and potentially impose spending controls on contracting authorities – where the practices of contracting authorities fall below the required standards, means the unit will have very real powers to intervene in local situations. It remains to be seen how such a move will be viewed by sub-central authorities particularly local authorities who have historically had much greater autonomy and the NHS.

A streamlined set of procurement procedures

The notable proposals in this area include the abolition of the Light Touch Regime (LTR) and a reduction in the number of recognised procedures. The impact of this is that contracts for health and social care services (as well as others currently subject to the LTR) will be treated the same as other services contracts. Practically speaking this will mean that the threshold at which the obligation to advertise and competitively tender a contracting opportunity will be significantly lower than that currently in place for LTR services.

Going forward instead of the seven different procurement procedures which currently exist it is proposed that there are three:

- the open procedure – for simpler, more straight forward procedures
- a new competitive, flexible procedure – giving contracting authorities the freedom to negotiate and innovate to get the best results
- the limited tendering procedure – the new name for the negotiated procedure without prior publication (direct awards).

The impact of these proposals will be that all contracts caught by the public procurement regime, will be able to benefit from what are currently viewed as the flexibilities of the current LTR procedure. Whilst many contracting authorities may welcome this, there could be understandable concern amongst bidders many of whom have limited resources for participating in procurement procedure and who

value the certainty of the current structure. For them this flexibility may cause concern that every procedure will be different and bidding may become an overly burdensome exercise.

It should be noted that the Paper does not address the question of whether the commissioning of health care services should be subject to this regime. The Government has, instead, left that issue to be considered by DHSC in the context of possible NHS legislation.

Procurement in a time of ‘crisis’

The Paper includes a proposal to legislate for a fourth scenario in which contracts can be awarded without prior publication of a notice and that is in times of ‘crisis’. The Government believes this will provide contracting authorities with the necessary flexibility to respond to local and national emergencies. A ‘crisis’ will be:

- an event which clearly exceeds the dimensions of harmful events in everyday life and which substantially endangers or restricts the life or health of people;
- where measures are required to protect public morals, order or safety; or
- where measures are required to protect human, animal or plant life or health.

A contracting authority may only rely on this ground where the Minister for the Cabinet Office has declared a ‘crisis’ and only then to address immediate requirements.

In addition the Paper outlines a tightening on the rules around publishing notices and standstill periods in connection with contracts which are awarded without prior publication. The Government proposes making it mandatory for contracting authorities to publish a notice before entering into a directly awarded contract as well as a contract award notice. Furthermore, with the exception of contracts awarded due to extreme urgency or crisis situations contracting authorities will be required to observe a ten day standstill period before entering into any such contract.

The ‘most advantageous tender’

The Government proposes to alter the basis on which tenders are evaluated from the current “Most Economically Advantageous Tender” basis to that of the “Most Advantageous Tender” which is in line with the requirement of the Government Procurement Agreement (GPA). Dropping reference to “economic” should not be taken as implying the commercial aspects of evaluation will no longer be important but rather that it will allow for a greater range of factors to be taken into account as part of evaluation. This does potentially cause a risk that these wider elements may lead to overly burdensome obligations without any control over proportionality.

Furthermore, under these proposals it will no longer be necessary for a contracting authority to evaluate tenders solely from its own point of view, wider benefits may be taken into account. However, this will only be permitted in a limited range of circumstances and guidance would be issued to support this.

Whilst there is no suggestion of any material departure from the fundamental principle that evaluation criteria must be linked to the subject matter of the contract there is a proposal to introduce exceptions for certain situations that are set out in statutory guidance by the Minister for the Cabinet Office. The Paper suggests this would be to assess how suppliers are operating across the whole of their business including, for example, in relation to the payment of its supply chain.

Grounds for exclusion

The Government proposes to take this opportunity to make changes to the current mandatory and discretionary grounds for exclusion. This includes introducing the following new mandatory grounds: criminal convictions relating to fraud and non-disclosure of beneficial ownership. New discretionary exclusion grounds relating to tax evasion and where a deferred prosecution agreement has been entered into (where it would be proportionate in the procurement to allow this ground to be included) will also be considered. From more of a housekeeping perspective technical changes are proposed to the existing mandatory and discretionary grounds to bring the grounds for exclusion relating to the non-payment of tax elements within Regulations 57(1) and 57(8) as appropriate.

The final proposed change in this area is to extend the obligation to exclude to those circumstances where the person/entity is convicted is a beneficial owner.

For many involved in procurement evaluation determining whether or not grounds for exclusion apply can be complex and uncertain. To assist contracting authorities in managing the exclusion process going forward the Government is looking to investigate the feasibility of

setting up a centrally managed debarment list for mandatory exclusions. A single point of reference for contracting authorities to refer to when considering whether or not to exclude bidders from a process. This proposal is not without its challenges, however, as it would require the collation of a substantial amount of information including for overseas suppliers which would likely prove even more taxing to collate. It is difficult to see how such a system could be implemented in the short term.

Past poor performance

Whilst contracting authorities already have the ability to exclude suppliers from procurement procedures on the basis of poor past performance the Government proposes amending this discretionary exclusion ground to make it easier for contracting authorities to make assessments and exclusions for this reason. Of particular importance is the proposal that past poor performance need not have led to termination, damages or comparable sanctions in order for contracting authorities to rely on this ground as is currently the case. The Government has considered examples of best practice from other jurisdictions and is proposing that contracting authorities evaluate contract performance on a set KPIs considered suitably important and included in contracts. Suppliers' performance against these KPIs will then be published or held on a central database which may assist contracting authorities in assessing past performance. A failure on the part of suppliers to deliver against these thresholds could lead to their exclusion from public tender opportunities for a set period of time or until any required self-cleaning has been carried out.

There is no proposal to remove the self-cleaning provisions in relation to this ground nor the three year window within which the behaviour must have occurred and the Government would look to provide guidance to support contracting authorities in making these determinations.

Selection and award criteria

The current distinction between selection and award criteria will remain the same going forward to ensure compliance with obligations under the GPA. However, to make evaluation at selection stage more streamline the Government is proposing the creation of a supplier registration system which will hold basic supplier information that can be used to conduct selection stage evaluation and avoid the need for suppliers to repeatedly submit the same information to different contracting authorities. If this proposal is taken forward there will be a significant piece of work to be carried out to ensure that the information is verified and accurate.

The Government is also looking to address the current uncertainty as to the types of information contracting authorities can rely on to conduct selection stage evaluation by removing the limitations currently set out in regulation 60.

A revised approach on frameworks and DPSs – commercial purchasing tools

Framework agreements and dynamic purchasing systems (DPS) are recognised as useful commercial purchasing tools, providing quick access to the market for contracting authorities and the proposals seek to make them an even more attractive basis on which to conduct procurement.

The Government proposes replacing the current DPS provisions and those on Qualification Systems under the Utilities Regulations with a new system - the DPS+. This new commercial purchasing tool is intended to be highly flexible and available for all types of contracts not just off the shelf goods which are currently associated with DPSs.

Contracting authorities will need to advertise an intention to establish a DPS+ describing the conditions for participation and those notices must remain continuously open so that suppliers are able to submit an application for inclusion at anytime with that application being evaluated on receipt. All suppliers who meet the selection criteria must be admitted to the relevant DPS+. The DPS+ tool will not be time limited although any right to terminate it must be detailed in the original advert. Contracts under a DPS+ could only be awarded after a procurement exercise run using the new competitive flexible procedure and must be followed up with a contract award notice.

The closed nature of framework agreements is considered by many to be too restrictive, locking new entrants out of markets whilst they wait for re-procurement opportunities. The Government reform proposals address this directly with a proposal to have two categories of framework agreements: open and closed. The rules on the former will remain much the same as they are now with a four year limit on the term of the framework. The new 'open' framework, however, would allow for frameworks with a duration of up to eight years. Following an initial closed period of three years new suppliers would be able to apply for a place on the framework at predetermined points in its lifecycle. Under the proposed rules existing suppliers would have the opportunity to submit new bids when the framework is reopened

allowing them to refine and update their offers as the market changes. Where there is a cap on the maximum number of operators on a framework existing suppliers' bids will be evaluated alongside those of any new applicants when the framework is re-opened. This approach will allow for the innovative approaches currently being adopted in LTR framework procurements to be adopted more widely.

The Government's proposal for increased transparency in public procurement extends to establishing a central register which maintains details of all available commercial tools (frameworks and DPS+) to enable easier comparison between available options for contracting authorities. There will also be a requirement for contract award notices to be registered on this new central platform.

Open and transparent contracting

The Paper acknowledges the information imbalance that exists between contracting authorities and bidders during a procurement process. To address this and ensure that there is transparency throughout the commercial lifecycle of a procurement exercise and to ensure that contracting authorities themselves have access to relevant data from other procurements the Government proposes introducing the following measure:

- an obligation to publish basic information at the same time as the contract award notice. Such information must include the information required by Regulation 84 of the PCR.

This information will also be required in the case of awards under framework agreements and a DPS+. This latter move will bring a level of transparency to the award of such contracts which is not currently seen in the majority of cases. However, the importance the Government is attaching to these transparency provisions is evident from the proposal that absent this publication of this information neither contract award steps nor standstill obligations may commence. The inclusion of such an obligation negates the otherwise detrimental effects of the proposal remove the mandatory obligation to issue de-brief/standstill letters.

Readers will recognise that such an obligation would lead to the publication of the information regularly requested by aggrieved bidders when seeking to challenge the award decision of a contracting authority. Regular publication of such information in a transparent manner may result in the number of challenges that are brought reducing as bidders will have a better understanding of why their bid was not successful. However, there will, understandably, be some concern as to how contracting authorities would balance such obligations with respecting the commercially sensitive information of bidders, in particular a winning bidder. The Paper highlights that the release of information should remain consistent with the rules in the Freedom of Information Act 2000, the Environmental Information Regulations 2004 and the Data Protection Act 2018. To support contracting authorities in meeting their obligations in this regard the Government intends to publish guidance.

From a technical perspective, it is the Government's intention that contracting authorities will be required to publish all data in a format which is compliant with the Open Contracting Data Standard – making sure it is held and available in OCDS-compatible, open non-proprietary reusable formats. If the proposal is taken forward a timetable will set out the dates by when all e-procurement and related systems will need to be OCDS compliant and interoperable with other systems. This change would also lead to the development of a new set of public procurement notices.

Central platform

Readers will, by now, have noted that a number of the proposals in the Paper relate to the collation and holding of information relating to both suppliers and public procurement processes on a central platform. Assuming proposals for such a platform are taken forward contracting authorities will be expected to ensure that their systems are capable of sending the relevant data to the Government's central platform.

The central platform will, in addition to the classes of information already noted here, also maintain a register of complaints and legal challenges. This latter proposal will no doubt provoke much debate.

Access to justice

The current procurement review system is known to be both very expensive and lengthy something the Government's proposals aim to address. The proposals do, however, go further than many may have expected and in other regards stop short of some of the reforms that many commentators expected to see.

Very few procurement challenges that are brought under the PCR actually result in a hearing. Many are settled or abandoned long before that point. Factors leading to this include the costs (which can be unaffordable for many organisations and for contracting authorities

detrimental to the taxpayer) and the delay which can be caused to implementation of a contracting authorities' plans. For both parties an early settlement can be an unsatisfactory conclusion and one or other may be adversely or unfairly impacted by it. The Government, therefore, proposes introducing changes to the court system which will:

- allow for matters to be dealt with on an expedited basis through use of a tailored fast track system
- allow for certain categories of challenge to be dealt with on papers dispensing with the need, in those cases, for hearings to be held
- introduce new rules/guidance on disclosure
- introduce common timescales for certain stages of proceedings including the submission of pleadings.

These proposed changes whilst in principle sensible and not overly problematic could see a seismic change in the approach to procurement challenges which are currently almost all dealt with via oral hearings once a claim is issued.

The Government proposes to work closely with the Ministry of Justice and Technology and Construction Court to design these new rules which will also look at utilising the TCC's District Registries to greater effect.

It had been thought that any reform proposals may include a proposal to establish a procurement tribunal. The Government has indicated it will work with Her Majesty's Courts and Tribunals' Service to investigate the possibility of a tribunal being introduced for certain sub-sets of challenges possibly those relating to low value claims and/or ongoing processes. If the wider procedural changes, outlined above, fail to deliver the required benefits of quicker, cheaper access to justice a tribunal system may also be called on to hear further classes of claims.

It is widely recognised that aggrieved bidders are rarely motivated by the prospect of a damages claim when bringing a challenge, what they really seek is the contract itself and the reform proposals are designed to put more emphasis on pre-contractual remedies. It is believed that proposed changes to the hearing of procurement cases will result in matters being heard on a quicker basis and in a more streamlined manner. As such the Government proposes amending the legislation to specifically reference a preference for pre-contractual remedies over damages. In support of this there is a proposal that, subject to some limited exceptions, any award of damages as a result of procurement litigation be capped at legal fees plus 1.5 x bid costs making speculative claims less attractive. The Government has stated that it is still investigating how to calculate bid costs in a fair and transparent manner and are planning to develop a modelling tool which will assist with this. This proposal is likely to be the most contentious and is expected to provoke much debate and criticism.

Procedural changes aside the Paper also sets out a proposal to change the test for the lifting of an Automatic Suspension. Currently the test used is that established by the American Cyanamid case for the lifting of an injunction. The Government believes this test should have a stronger procurement focus and is inviting comments on what this could look like as part of the consultation.

In looking at this the Government is seeking to make it easier for a claimant to keep the Automatic Suspension in place. At present it is nearly always lifted on application leaving aggrieved bidders with two options: abandonment or pursuing a damages action. Given the Government focus is on pre-contract remedies and a move away from damages is this can only work if the court system does become quicker. If it doesn't, contracting authorities could be left in limbo waiting for a trial to be held.

Contract modifications

The Government's proposals for reform also address aspects of ongoing contract management. Key proposals include:

- amending Regulation 72 to provide contracting authorities with more flexibility to modify contracts including in time of crisis and extreme urgency
- revising Regulation 72 to make it easier to follow
- mandating the publication of contract modification notices in all but a limited number of circumstances. The driver for this being to increase transparency beyond just that relating to initial award procedures
- except where a modification is driven by extreme urgency or a crisis situation that a ten day standstill period apply in the case of all contract modifications which require the publication of a contract modification notice.

One of the direct effects of pursuing such an approach is that it will render VEAT notices redundant going forward. For a while now it has been apparent that VEAT notices offer little in the way of legal protection and this new approach will remove the need for them altogether. The publication of the relevant contract amendment notice will trigger the usual thirty day limitation period for claims arising out of the amendment in question.

The Government is also seeking to legislate to cap the level of profit suppliers can make under a contract when it is extended by a contracting authority as a result of a new award procedure being suspended. The rationale for such a move is to ensure that incumbent

bidders who have lost out on re-tender cannot make excessive profit from its existing contracting by spuriously challenging the process and engaging the Automatic Suspension in order to extract maximum profit from its existing contract.

Let's talk

We are hosting a series of general webinars and sector/organisation focused working groups through December and January to further discuss and analyse the impact of the proposals for individual organisations.

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