

The new procurement regime

The Cabinet Office published its much-anticipated Green Paper on 15 December 2020. The proposals are out to consultation until 10 March 2021. We have been running a series of webinars and working groups, looking at the proposals in more detail and how different groups are affected.

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As many of you will be aware, the Cabinet Office published its much-anticipated Green Paper on 15 December 2020. The proposals are out to consultation until 10 March 2021 and we have been running a series of webinars and working groups, looking at the proposals in more detail and particularly how different groups of interested parties are affected.

I led one such working group of HE procurement professionals. Here are some of the key messages that we came away with. It should be noted that the working group did not cover all areas of the Green Paper. You can find a summary of all proposals [here](#).

Proposed principles to public procurement

There are six proposed principles of public procurement:

1. public good
2. value for money
3. transparency
4. integrity
5. fair treatment of suppliers
6. non-discrimination.

The first point is the need for clarity in relation to enforceability of these principles. What is the status of these principles? It is clear that they will be set out in the legislation and also in the National Procurement Policy Statement to which contracting authorities must have regard. It remains to be seen what the National Procurement Policy Statement will look like, whether it will be as delayed as its planning equivalent, and whether it is named as statutory guidance, giving it a stronger footing.

Contracting authorities and bidders will require further clarity about how to link the value for money and most advantageous tender concepts; what is “in” and “out” of consideration, when the Green Paper is clear that evaluation can take into account things unrelated to the subject matter of the contract to be awarded.

For universities, often as charities, there was a concern that compliance with some of the new principles may not always sit comfortably with the charitable status. However, it was also acknowledged that public good may be helpful in this regard. But when does something stop being linked to public good?

Making processes more open and flexible

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

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

Concerns were raised that in a bid to make the process simpler, a greater risk for purchasers will be created and will have the opposite impact. The main question was “what is the point of getting rid of the restrictive procedure?”. There is an issue on both the supplier and contracting authority sides and there appears to be no objective benefit. The fact that you either have to, to a certain extent, “make up” a process that allows for deselection, or use a process that may mean evaluating a high number of bids, did not feel like quite the right balance. There was a lot of talk of a “restricted plus” for simpler tenders that may attract high volumes of bidders.

The other concern raised was that suppliers may have more control in a flexible process, pushing their own agenda and T&Cs forward. However, that can be controlled by a contracting authority taking a strong stand at the beginning and producing documents that don't allow for that to happen.

New proposals around frameworks and DPS plus

The Government proposes replacing the current Dynamic Purchasing System (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.

The Government reform proposes 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 reopened. This approach will allow for the innovative approaches currently being adopted in light-touch-regime framework procurements to be adopted more widely.

Framework agreements and DPSs are recognised as useful commercial purchasing tools and the general feeling was that the proposals allow for both frameworks and DPSs to be more flexible and available for all types of contracts, not just off-the-shelf goods which are currently associated with DPSs.

The concept to supplement existing frameworks has merit. A refresh of the current framework approach is needed. This gives contracting authorities the opportunity to bring new specifications to extend current frameworks. Greater clarity is needed as to supplementing existing frameworks other than with updated pricing and new providers, otherwise the other merits of having a longer framework may be outweighed by the fact that the market has moved on considerably in three years.

There were also concerns in relation to the time it will take to extend frameworks. If revaluation of new (and possibly existing) providers and pricing is so lengthy, then it may be almost as quick to set up a new framework.

Access to Justice

The Government 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.

Currently, the review process is expensive and lengthy, meaning few procurement challenges that are brought under the Public Contracts Regulations result in a hearing. The general view was that the capping of damages wouldn't of itself make a potential claimant pause, given that the main thrust of a challenge is often to have a process re-run. In fact, a non-financial remedy can now be specifically requested.

It was felt that the proposals are still missing a light-touch solution to resolve issues during the tender process in relation to award criteria or what information is provided.

Contract management and modification

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.

The main point raised was concern at the idea of publishing everything. By trying to get more transparency there is a danger of no award or lots of finding of things which are not significant, meaning this may become administratively burdensome.

We will be running a second working group shortly and sharing a more detailed set of comments from the first. If you would like to be part of this, or would like to discuss on a one-to-one basis, please contact Anja Beriro anja.beriro@brownejacobson.com.

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