Browne Jacobson

Procurement reform: what's in it for construction?

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The consultation Green Paper: Transforming public procurement was issued by the Cabinet Office in December 2020. Whilst we await the Bill, the Green Paper sets a very strong direction of travel and there is much to consider for the construction sector. Peter Ware, head of government at law firm Browne Jacobson and John Simons, acting group procurement director at Scape Group take a look at what might these changes mean.

The paper was split into eight chapters setting out various key themes and objectives for the Government trying to make the most of what it sees as one of its major Brexit dividends. A key underpinning principle of the paper is the simplification of the public procurement regime. It seeks to achieve this through various means including the consolidation of legislation and the reduction of available procurement procedures from at least five to three.

The three procedures proposed are:

1. the open procedure which we understand will be largely the same as the current open procedure;

2. the limited tendering procedure which will be similar to the current negotiated procedure without prior publication, expanded to include the principle of national crisis but with more obligations around transparency; and

3. the new competitive flexible procedure.

This last procedure is similar to the light touch regime in that the design of the process will, in principle, be left to the contracting authority to design. This will have to adhere to certain requirements around advertisement, process and transparency but otherwise there will be significant flexibility left to those procuring.

Whilst on paper this looks like a great new opportunity for contracting authorities, it does of course come with various challenges. Firstly, the Cabinet Office has been clear that they will issue guidance papers as to how these newfound flexibilities should be utilised. This leads to the potential challenge of there being several sources of the truth. Secondly, for the construction industry these flexibilities may lead to inconsistency. One of the great benefits of a flexible regime is that contracting authorities can make their own decisions as to how the process should run. Whilst some would imagine many procurers will look to continue with relatively straightforward procurement processes, some will rightly look to be more innovative in the way in which they engage with the market. This may lead to uncertainty and increased costs for bidders with the potential for some processes being disproportionate for the procurement in question.

Further, only those authorities with well-developed procurement expertise may be able to fully maximise the benefit of the flexibility being offered. Others may struggle to implement the new rules, which may force them to seek external procurement guidance, which can be costly or just stick to what they know.

The Paper details a new approach to transparency This will include a central repository where information will be kept and regularly updated. This will include information around performance and contractual disputes. Government is proposing to introduce a central debarment list where excluded bidders will be identified. Clearly how you get on and indeed more importantly how you get off that list will be something that all providers will be keen to understand. Those organisations may seek to engage quite closely with contracting

authorities who are intending to place or make a recommendation to place any particular economic operator onto that debarment list. This will need to be monitored by the sector in practice.

The paper also looks at a modernisation of framework agreements and Dynamic Purchasing Systems (DPS's). For the construction industry DPS's are not utilised widely. The intention is that DPS's will be further simplified and extended to allow their use for all types of contracts which may mean more use in the construction sector. The proposals in relation to the framework agreements are perhaps more interesting given the prevalence of construction frameworks across the country. The proposals look to create two types of framework agreements: closed, which will be very similar to the current regime, and an open framework.

Open frameworks will be able to run for up to eight years and new providers will be able to join at predetermined points. Existing suppliers will have the opportunity to submit new bids when the framework is reopened. This has the benefit of being on a framework for longer and that longer framework will be refreshed during its term. However, some have viewed this as a missed opportunity. The construction playbook advises authorities to identify pipelines of work and to facilitate long term relationships. Further, the playbook advocates early contractor engagement and to promote opportunities to support SME's. Early engagement and the roles of SME's are critical success factors in reducing programme timescales. The proposition of a framework which reopens to competition after three years, appears at odds with the need to develop long term strategic relationships and work will need to be done to ensure that this engagement isn't lost by this change.

The key thing for industry will be ensuring that the benefits of longer frameworks are not tempered due to the additional costs for both bidders and authorities managing the reopening of the framework.

We hope that the Government takes the opportunity to expand the current 'closed' framework to include clear and specific guidance as to when a framework could be longer than four years. This clarity would be welcomed and could be used to support the Government's wider agenda of early contractor and supply chain engagement, facilitate long term relationships and help support SME's and the wider socio-economic benefits that can be achieved through long term contracting.

There is a radical change in approach to challenges in public procurement with a move away from dealing with challenges post-award of the contract to pre-award. Currently, we rarely see challenges during the procurement phase, it is once the decision is taken that challenges tend to occur. This move may pose some difficulties for both procurers and bidders as it has the potential to slow down procurement processes. Time will tell as to whether there will be a greater willingness to bring challenges pre-procurement than after award. If this happens both the courts and contracting authorities will need to gear up to deal with more types of challenge. In relation to challenges post-award, the paper proposes to cap the level of damages available to challenges in most cases to legal fees plus 1½ times bid costs, we await some clarity on what bid costs might include.

The Green Paper represents both challenges and some real opportunities across the sector and it will be interesting to see what it delivers when the bill is issued. There are of course some gaps, there is nothing really on regeneration agreements. The procurement of regeneration projects has been subject to significant litigation over the years. Contracting authorities and bidders put themselves through all kinds of tortures to find ways through the regime. There is also nothing on public to public procurement; this again is a missed opportunity. Genuine public procurement needs much less regulation than is currently the case. Finally, there is nothing on abnormally low tenders which can be a thorny issue and it would be good to have some more guidance and clarity in the regulations as often authorities and bidders don't know when the threshold is met.

In any event an interesting set of changes are on the horizon and we look forward to seeing the Bill in due course and see the changes in reality.

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