

TRANSFORMING PUBLIC PROCUREMENT

1. INTRODUCTION AND OVERVIEW

This Appendix provides a brief overview in relation to some of the expected key Changes to the Public Procurement Regulations, the expected timescales and preparation for these.

The new Bill aims to consolidate the current 4 sets of regulations into one, with the aim of saving money, boosting domestic productivity, spreading opportunity, improving public services and empowering communities, taking social value into account as well as:

- Simplifying Procurement and enabling flexibility to better meet the needs of suppliers and Authorities
- Reducing bureaucracy
- Creating a fairer system, more open and competitive system for suppliers and Authorities
- Increased Transparency
- Support transition into more sustainable procurement and net zero carbon emissions.
- Further embed Ethical Trading

The Procurement Bill aims to provide procurement professionals in the public sector much more flexibility to use their commercial skills and allow us to move away from some of the rigid rules which don't currently allow for the design of the procurement process to meet the requirements or negotiation with suppliers to get the best deal. It also aims to make procurement processes quicker, simpler and more transparent.

The majority of the Bill will apply to both above and below threshold procurements. However, some of the Bill's most consequential provisions will only apply to "covered procurements – in essence those that previously fell under OJEU requirement – now known as (Find a Tender Service) FaTS

The Draft Secondary Legislation is expected to come out for consultation soon which will put more context around some aspects of the Bill and enable us to fully prepare.

The Cabinet office are currently finalising a training offering to Contracting Authorities and as an Authority we have signed up to be included in this.

2. TIMELINE



Following its introduction in May 2022, the Procurement Bill has now completed its passage through the House of Lords and is now well on its way through the House of

Commons, with amendments and an updated draft published in February which has formed the basis of the information we are now preparing for.

It is currently expected the Bill will be finalised and receive Royal Assent during the Spring of 2023 with a six month notice period following this, therefore that the Bill will come into force early in 2024 becoming the Procurement Act.

3. KEY PRINCIPLES

The proposed Regulations set out 7 Key Principles to be Enshrined in Law meaning these are explicit in law rather than implied and Authorities will be held to account for non compliance:

- Value for money
- The Public Good
- Transparency
- Integrity
- Efficiency
- Fair treatment of suppliers
- Non-discrimination

In addition to the above, a Social Value Model must be applied in all relevant procurements with a Minimum weighting of 10% of the weightings (scores).

The Bill also places a greater emphasis on sustainability and ethical procurement including modern slavery, fraud and corruption, with appropriate scoring mechanisms and contract management arrangements in place.

A greater emphasis is placed on evidencing Value For Money throughout the contract lifecycle.

The requirement for greater transparency means more records and reporting of decision making throughout the whole procurement lifecycle through to the end of the contract.

The New Act also provides for reservation of Below Threshold Contracts for:

- Supplier Location (meaning we will be able to specify local suppliers)
- SME / VCSEs (meaning we are able to specify that small companies and voluntary organisations will be treated favorably)

The new Bill is also designed to reduce bureaucracy in bidding for public sector contracts which is covered off below. General feeling amongst suppliers is welcoming of the new proposals.

4. PREPARATION AND TRANSITION

There are some key important changes that we are monitoring and this appendices seeks to highlight these from the information we have so far with the caveat that there is still scope for a further amendment prior to the Bill's last reading and the Secondary Legislation being drafted and published.

The Head of Commercial and Business Support will draft an implementation strategy which will:

- Develop an action plan and detail key milestones of the transition
- Identify benefits and potential risks of the changes
- Ensure the Commercial Team are fully trained and confident in the application of the new regulations
- Ensure all procurement and contract management documentation is amended accordingly and in readiness for the transition
- Develop targeted awareness sessions for all levels of the organisation
- Deliver commercial awareness training at the conception stage of each procurement / project
- Fully embed commercial awareness and Value for money principles across the organisation.
- Update and embed the Commercial Awareness Strategy across the organisation
- Finalise and embed sustainable procurement strategy and awareness across the organisation and the supply chain
- Further develop and embed ethical procurement strategy and awareness across the organisation.

The Commercial Team will:

- continue to be actively engaging in webinars, information events,
- sign up to Cabinet Officer Briefing Documents to gain as much knowledge and understanding of the new regulations
- continue lunch and learn sessions to run through to full implementation in 2024 to review an area of reform,
- Address any risk or issues as an authority we need to deal with to mitigate.
- reviewing the procurement pipeline to identify which procurements for the coming year will commence under the new regime as there are significant changes to the way procurements will be advertised (further details are covered below)
- Finalise revisions to all our procurement documentation, guidance, contracts and contract management documentation
- Engage with our key suppliers and markets to keep them abreast of the changes.

From published information the Head of Commercial and Business Support has looked at areas of benefit and risk and what some of the proposed changes mean for the Authority and the Commercial Team and these are detailed below again with the caveat that the Act and secondary legislation haven't been finalised and therefore may be subject to change.

Where changes have already been communicated by the Cabinet Office by way of policy notes, best practice guidance these have been adopted by the Commercial Team and incorporated into our processes and documentation for example the new Supplier Questionnaire, changes around debarment, thresholds, VAT, social value and sustainability etc.

5. KEY PROVISIONS

5.1 Preliminary Market Engagement (PME)

Early market engagement is provided for and explicit and mandatory in the Bill, giving us more freedom to talk to suppliers much earlier in the process and throughout the process to problem solve, build in innovation that enable the best outcome through the procurement process.

As a contracting authority we will be required to either issue a PME notice prior to issuing a tender notice; or provide reasons in the tender notice for why the authority didn't do so.

The Bill also proposes a more targeted set of objectives of pre market engagement which may provide both the Authority and bidders more confidence when engaging in PME.

It also appears to allow a PME Notice after conducting some pre marketing engagement which will reduce the number of stakeholders, however this also brings a risk that using a narrower stakeholder group means we are not treating suppliers equally.

More detail around this is expected in the secondary legislation.

What does it mean for us?
<ul style="list-style-type: none">• Commercial Team must be involved early in discussions about potential procurements to ensure the appropriate notices are published• There will be a set of requirements to satisfy during pre market engagement and records kept and published of this stage, therefore again it is essential that the commercial team are engage in all elements of commercial discussions to ensure we don't fall foul of the regulations and leave ourselves open to challenge.• The commercial team and authority must ensure fair and equal treatment of all suppliers involved or not involved in the pre market engagement activity.

5.2 Procedures (Routes to Market)

The current 8 routes to market have been reduced to three and these are covered briefly below:

Open Procedure

- This appears to have been retained in its current form
- This route generally will be used for simple purchases where an initial selection stage is not required
- Procurement notice will directly invite bidders and have all the details of the process
- There will be no shortlisting or negotiation provision

New Competitive Flexible Procedure (Most likely to be the default Procedure for the Authority)

- This procedure will be subject to minimum detailed rules, therefore bringing flexibility into the design of the procurement process to best meet market conditions and the requirements of the Authority
- This is a similar procedure to the existing light touch regime reserved for some organisations and types of procurement
- Advertisement of the opportunity will be via contract notice which will detail all the rules for participation
- This notice must also provide specifications, timelines, conditions for participation, evaluation criteria, performance measures, – once published cannot be deviated from.
- Any subsequent stages of the process, tendering rounds, negotiation must be consistent with published notice and not deviate from this

- There must be compliance with the rules on specification and evaluation throughout the process
- Time limits will be as detailed in the Government Procurement Agreement and recent consultation document.

What does it mean for us?	
Advantages to Us	Risks to Us
<ul style="list-style-type: none"> • Provides greater flexibility to design a process that meets with our timeframes, and requirements • Allows commercial team to build in stages of negotiation • Allows bidders to better understand requirements of the Authority • Facilitates opportunities for innovation to be built into the contract lifecycle • Facilitates opportunities for value for money initiatives and VE throughout contract lifecycle 	<ul style="list-style-type: none"> • Time to familiarise with what is permissible in designing a process to ensure compliance • The more diverse approach we take the greater the cost of running a procurement and increased timescales • Greater use of negotiations could increase timescales and needs to be fully documented • Need to be commercially aware to undertake negotiations to be in a strong position • May provide window for more legal challenges, particularly if we deviate from published process and information • Not engaging with commercial team pre- any activity could leave us open to challenge for falling foul of the process

Limited Tendering Procedure (This can now only used in Extreme Circumstances)

- New name for negotiated procedure without prior publication – whereby we can engage directly with a supplier to provide urgent goods and services.
- Only available in extremely limited circumstances
- Significant safeguards in place for using it
- No general assumption that this is a single source appears it must be evidenced
- Current regulation 32 grounds will be retained meaning it can be used if the following are met: -
 - No suitable tenders from previous notice
 - Artistic / technical or exclusive rights
 - Extreme urgency – covered later
 - Change of supplier would cause extreme technical difficulties which cannot be overcome
 - Repetition of works provided it is detailed at the outset
- There is a new ground for using this added to the above which is in case of crisis which is covered below.

Crisis Grounds

This came about because of Covid 19 and the letting of significant contracts without process due to urgency:

Crisis Grounds are defined as: -

- Exceptional event substantially endangers public health
- Required to protect public order or safety
- Required to protect human animal or plant life

These Grounds: -

- Supplements Grounds of extreme urgency
- HMG power to declare a crisis for the purpose of using this ground
- Provides greater certainty for Authority in national or local crisis
- Applies only to contracts meeting immediate need posed by the crisis
- Even in Crisis we must consider holding competition (shortened timescales)
- Contract is excluded from risk of automatic suspension however a 10 day standstill period will be required before signing contract

Dynamic Purchasing System

This route to market was historically used for commodity items and as an Authority / commercial team we have not run this process to date only used a DPS for purchases.

Proposal in the Procurement Bill is to reform this and it will be referred to as DPS Plus (also referred to as Dynamic Market Place): -

- It will be appropriate and encouraged for any procurement, goods and services
- A notice will be required to be published in Find a Tender Service which describes conditions for participation.
- Suppliers meeting criteria must be able to join at any time.
- There will be no maximum number of suppliers on the portal.
- The Authority must invite all suppliers on DPS to submit a tender.
- Uses the new Flexible Award Route to let the DPS
- An Award notice must be published.

What does it mean for us?

- Its use is being actively encouraged in the Bill and we therefore need to build this into procurement route decisions
- It provides more flexibility than a framework
- Suppliers will want us to use it
- Enables us to keep up with new entrants and add them to the system
- More administrative burden to manage the number of suppliers and on-boarding
- Our current e-tendering system has a module to do this and commercial team will familiarise themselves with this
- There will be a greater need to undertake regular checks that suppliers continue to meet criteria for participation
- The Commercial Team could potentially be managing a large number of suppliers if CFRS are the lead authority for a DPS

Frameworks

Currently frameworks are only open for 4 years and are closed to new entrants during this term.

Proposals in the new Procurement Bill are as follows:

- Longer periods (up to 8 years)
- Opened at least once (after 3 years) for new entrants to join
- If documented in original notice can be opened up multiple times
- Each opening must be advertised in FaTS
- All new applicants must be assessed using same original criteria
- Existing suppliers can update their offering and retender

What does it mean for us?
<ul style="list-style-type: none">• For complex procurements we can have a longer framework in place saving the cost of re-procurement• With this comes the need to think longer term to ensure framework provides opportunities for innovation and value for money through the lifecycle• Greater administrative burden with regards to re-opening the framework and the required documentation• Could have a large supply base to manage.• Need to be clear from the outset of the criteria and potential opening up timescales meaning more planning.

5.3 Procurement Stages

Participation (Selection) Criteria Stage

To reduce barriers for SME's the Authority can no longer request at selection stage the submission of audited annual accounts or ask for required insurance to be in place prior to the award of a contract.

A new Supplier Questionnaire has already been introduced for two or more stage approach and also to the selection criteria incorporated into the single stage open procedure – these changes we have adopted following a Cabinet Office Policy Note and it includes focus on the following:

- Financial capability
- Technical ability
- Relevant experience
- Proposal –
- To have a centralised supplier registration system (replace ESPD) meaning suppliers only have to register once and keep their information updated, reducing the burden of having to submit selection criteria for each tender.
- Removal of the limits on information that the Authority can request to verify that a supplier meets the selection criteria set.

The Bill proposes new exclusion grounds / debarment for participating in procurement activity – it is expected that a centrally managed debarment list will be produced and published by the Cabinet Office. (covered later)

Mandatory Exclusions include:-

- Non-disclosure of bidders' beneficial owners
- Ties with Russia and Belarus
- Tax evasion
- Deferred Prosecution Agreement (DPA) to resolve cases of fraud, bribery, or economic crime
- Relevant convictions
- Aid Authorities to identify suppliers excluded
- Rights of appeal for listed suppliers
- Appropriate self-cleaning measures

Past Poor Performance

- It is proposed to drop the criteria “only if led to early termination, damages or sanctions” meaning contractors can now be excluded for: -
 - Persistent or significant deficiencies in performance of contract
 - If these occurred anytime within the last three years
- The Bill also proposes to introduce:
 - Introduction of new central monitoring system (covered below)
 - Contracting Authorities will need to monitor and evaluate contract performance on agreed performance measures set out in the procurement
 - Data held and published from central system which the Authority will need to notify poor performance to a central body.
 - Government may set a minimum threshold for contract performance for higher value higher risk contracts
 - Suppliers below threshold could be excluded from being penalised for past poor performance, but the Authority should demonstrate how they have worked with small suppliers to improve their performance and contract delivery.
 - Duration will be set or a period to enable self-cleaning before suppliers go on the poor performance register and will have an opportunity therefore to come off it.

What does this mean for us?
<ul style="list-style-type: none"> • Overall, this could be seen as a good thing as it provides greater clarity around the selection stage and permissible exclusions, leaving less open to interpretation. • We have already adopted most of the above into the new Selection Questionnaire • Once up and running the Centralised Supplier Registration would cut down on paper submissions or electronic submissions for each procurement. • The Authority can request more appropriate relevant information where an area of clarity is needed

Tender Stage (Award Stage)

With the introduction of the new competitive flexible procedure, this enables us as a contracting authorities greater discretion when determining procurement time limits as opposed to the rigid time limits in the current regulations, provided the shortest minimum periods are adhered to.

That said there will be a published list of factors to consider when determining time limits for each separate procurement which takes into account:

- the nature and complexity of the procurement;
- the extent of the potential market,
- the need for site visits,
- physical inspections and sub-contracting;
- any trials and physical evaluations
- any modification to the tender notice or tender documents;

whilst minimising any unnecessary delays for the participants (which is an addition within the Bill).

However, whilst the new flexibility of the award stage brings increased effort prior to commencing a procurement it provides for more complex procurements to be better designed and run by contracting authorities.

We must set in a tender notice how the procurement process will run and this must be adhered to. Whilst it will enable the commercial team to design a process to suit the requirements it could cause confusion within the markets with each contracting authority designing a different process for similar requirements and could ultimately lead to increased challenges – particularly as the Bill expresses that procurements should not be over complicated or unnecessary lengthy.

The Bill appears to propose that the elements of the tender can be run in any order, for example trials may be undertaken first and suppliers excluded if they don't meet the criteria etc.

This procedure now allows for negotiation which it appears could be used pre-tender, during the tender stage or post-tender, or even in a combination of those options but it is still unclear how this will work in practice.

Pre-tender negotiation will allow the commercial team to condition the market to their expected outcomes and to identify critical success factors and minimum requirements that the bidders must comply with pre procurement to therefore be better prepared (particularly SME's and diverse markets).

Negotiation can also be undertaken during the tender stages if more than one, which looks to mirror the dialogue stage in the current Competitive Dialogue route and the negotiation stage in Competitive Procedure with Negotiation.

Giving the Commercial Team and Stakeholders an ability to discuss issues and clarify aspects of the bids at an early stage will be useful both to all parties and particularly in ensuring value for money and innovation.

The Bill also provides for an ability to have final clarifications around the proposed solution for complex procurements which will ensure that the successful bidder fully understands

their role and responsibilities prior to contract commencement and is intended to ensure the authority achieves value for money.

Timescales

Procurement	Minimum Period
<i>The contract being awarded is a light touch contract</i>	<i>No minimum period</i>
<i>A qualifying planned procurement notice has been issued</i>	<i>10 days</i>
<i>The contracting authority considers there to be a state of urgency that means any other applicable minimum tender period is impractical</i>	<i>10 days</i>
<i>Tenders may be submitted electronically, and the tender notice and associated tender documents are <u>all provided</u> at the same time</i>	<i>25 days</i>
<i>Tenders may be submitted electronically, but the tender notice and associated tender documents are <u>not all provided</u> at the same time</i>	<i>30 days</i>
<i>Tenders may <u>not</u> be submitted electronically, the tender notice and associated tender documents are <u>all provided</u> in the same time</i>	<i>30 days</i>
<i>Tenders may <u>not</u> be submitted electronically, the tender notice and associated tender documents are <u>not all provided</u> in the same time</i>	<i>35 days</i>

The Bill currently looks to allow contracting authorities to defer publication of tender documents until after the publication of an initial tender notice, but must allow for an additional 5 days to the minimum time period for the return of tenders.

Under the current procedure all tender documents must be released when the contract notice is published as part of the suite of procurement documents; the Bill therefore provides new flexibility to defer the release of tender documents but allow the timescales to commence from publication.

However nothing must change from the publication of the notice with regards to process and time frames etc.

What does this mean for us?
<ul style="list-style-type: none"> • This will be the most difficult area of the proposals for the commercial team to implement. • will require more consideration at the outset of a procurement in determine how to run the procurement/procedure. • could introduce more complexity into procurements as it requires design and tailoring to the procurement being undertaken (it is hoped there will be guidance around this) • undertaking negotiation without appropriate skills could end up being costly to all parties through:- <ul style="list-style-type: none"> ○ a failed procurement ○ increased challenges ○ increased time spent on the tender exercise if negotiation stage was an unnecessary element that delivered no benefit.

- Could lead to more challenges if the design of the process is seen as unfair or disproportionate
- Could increase the timescales of a straightforward procurement if more than one stage is built in or unnecessary processes.
- Suppliers could complain if one authority uses a different process to others for the same goods or services
- A greater degree of note taking, reporting and transparency will be required.
- Commercial team must be involved at the outset

5.4 Conclusion of A Procurement Process

There appears to be changes to the conclusion of a procurement however, this will be clearer once the Act and Secondary Legislation are published, indications at this stage are that a standstill letter will be replaced by: -

- An assessment summary will be required for all participants in the tender
- A requirement to publish a contract award notice
- The standstill period will be 8 working days from publication of contract award notice
- A contract details notice will be published following award of the contract following standstill
- For high value contracts (£2m) there will be a requirement to publish a copy of the contract within 90 days of entering into such arrangements. It is not yet clear what or how much of that contract can be redacted.

What does this mean for us?

- Whilst we capture this data for regulation 84 reports there will be a greater administrative burden to publish notices at regular frequencies throughout the process
- It is unclear whether there is still a requirement to do a standstill letter there is some indication that it will be deemed best practice to do so - this is something we currently do successfully and have had no challenges to date on our published information.
- If we don't send out a standstill letter it could still come through as a recommendation from the central review office and may be seen as not being open and transparent as it generally provides more information than the assessment summary, therefore it is anticipated we will continue to do this for above threshold procurements.
- There will therefore be some duplication as we will be recording information that would normally go into the letters into the portal also.
- This could be more time consuming as we have to report at each stage and ensure we capture all relevant information.
- Scope for complaint if we don't upload sufficient information in the first place
- Possibly there will be some test cases where debrief letters are not produced as the norm.

5.5 CONTRACT MANAGEMENT

Prompt Payment of Suppliers

There are a number of areas proposed within the Bill relating to contract management which will now be regulated and will include an obligation on The Authority to investigate the payment records of a supplier at any tier within our supply chain.

Contracts must provide for payment of undisputed invoices within 30 days
This term must be passed down the supply chain and the Contracting Authority will be responsible for enforcing this,

The Bill also proposes a requirement for us to publish all payment performance data on Gov.uk for access by the public each year showing our compliance to this requirement.

There is a proposal further down the line to align public and private sector reporting requirements on payments within the supply chain.

Further information around this is expected to be part of the secondary legislation.

Changes and Modifications

The Bill has introduced a number of enhanced transparency requirements including in relation to contract modifications.

The Bill proposes a redraft of the current regulations to make it clearer in relation to what is a permissible modification and has included a new ground permitting amendments to existing contractual arrangements in situations of crisis or extreme urgency. However there will be greater transparency around this with the introduction of contract amendment notices

Contract Amendment Notices

Under the current regulations a notice is only required to be published in certain circumstances. The Bill proposes that Notices will be required for almost every contract amendment and the scope for contract amendments other than for extreme urgency must be:

- under 10% of the original contract value for goods and services or 15% for works.
- The Increase / decrease of term is less than 10% of the original contract term
- The overall scope or balance of the contract does not change

Standstill Requirements for Contract Extensions and Variations

The Bill places a requirement on contracting Authorities:

- to publish amendment notices
- The amendment must not be entered into until 10 days after notice published (except if it meets criteria for extreme urgency)
- By publishing the standstill notice limits to 30-day period for challenges
- Replaces the VEAT notice requirement

Suspending Award of Contract

Currently a procurement challenge triggers an automatic suspension of letting the contract and during this period the Authority would extend the existing incumbent supplier.

The Bill proposes to limit the amount payable to an incumbent supplier under the extension period if the incumbent supplier is the challenger.

For all challengers the Bill proposes to introduce a standard government rate of profit for calculation of payment of damages with a cap of damages being introduced.

What does this mean for us?

- We must have robust contract management in place for our key contracts
- We must have in place clear lines of capturing and reporting performance
- Ensure robust checks of appropriate registers are undertaken as part of our due diligence, prior to onboarding and throughout the contract lifecycle
- We must be clear from the outset / pre procurement what the contractual requirements are and future proof prior to procurement and particularly prior to award.

Risks

- The Authority needs to be as clear as possible at the outset of future requirements and ensure these are provided for within the notices, tender documentation and contracts
- Ensure that innovation opportunities and forecasting are provided for and carried out prior to award of contract and incorporated and managed.
- More opportunity for challenges if we fall foul of the publication of notices
- The Authority must have greater transparency from key suppliers of the supply chain associated with a contract.
- Must have in place well documented contract management.

Benefits

- Existing arrangements could provide an incentive for incumbent supplier to challenge – proposed amendments remove this with a cap being place on damages and the amount payable during an extension period.
- Contractors are aware at the outset of the long term requirements of the Authority and are able to plan for these pre procurement.
- Higher prices being paid by the authority during this period of extension would be removed and any extensions should be provided for.
- Should reduce the risk of hidden / additional costs throughout the life of the contract due to requirements having to be clear from the outset including future technical refresh etc.

5.6 Most Advantageous Tender

The Bill looks to introduce a dual assessment for determining the most advantageous tender by awarding the contract not only with regard to which tender scored highest in accordance with the award criteria (as is the case under the current procurement regulations), but also taking into account which tender best meets the authority's requirements.

The requirement to use Most Economically Advantageous Tender (MEAT) has been replaced by Most Advantageous Tender (MAT)

- Therefore “economically” has been removed to encourage wider consideration of other areas such as Social Value, Sustainability, innovation etc.
- Also Intended to encourage wider value for money principles throughout the contract as opposed to initial known costs, this will enable cost reduction opportunities through the contract lifecycle.
- The Award criteria must include some % weighting / scoring for social value
- Removes need for criteria to link to subject matter of tender regarding
 - Prompt payment of suppliers
 - Plans for achieving environmental targets
 - Sustainability

What does it mean for us?	
Advantages to Us	Risks to Us
<ul style="list-style-type: none"> • Overall, this could be seen as a good thing as it provides greater clarity around the award criteria and broadens the scope to include the above initiatives and score accordingly • We have again already adopted most of the above into tender processes and award criteria • 	<ul style="list-style-type: none"> • Work will need to be undertaken to ensure these are measured throughout the contract lifecycle • There is a risk that in procuring something which meets the Authority’s requirements against the award criteria now has potential to conflict – ie it isn’t clear what as an Authority we do if the tender that best meets the requirements and the tender that scores the highest against the wider criteria are not the same. • Requirements will need to be accurately and fully identified and weighted at the start of the process to ensure the award criteria aligns with the requirements. • As “economically” has been removed, there is a risk that the bid which best meets the requirements is unaffordable.

There will be more detail around this in the secondary legislation.

5.7 Transparency

Within the current legislation, prior to award and standstill the Authority publishes data under Reg 84 and Contract Award Notice detailing: -

- Bidder identities
- Basis of award decision
- Basic disclosure of tenders submitted
- Evaluation reports
- Basic evaluation disclosure information

Proposed Requirements

Under the Bill, the detailed debrief requirements of the previous regulations have been replaced with a requirement for an assessment summary throughout the process. This means in relation to an assessed tender, information about the contracting authority's assessment of the tender and, if different, the most advantageous tender submitted in respect of the contract must be published at each stage of the procurement process.

It is expected that clear detail about what this assessment summary must contain will be detailed in the secondary legislation.

What we do know is the legislation is expected to embed transparency by default throughout the procurement lifecycle and proactively publish relevant data at timely intervals as opposed to on request including data normally disclosed under FOI, EIR or DPA

The Bill proposes the following:-

- Transparency notices will be published at each stage of the procurement process, detailing the conclusion of each stage, scoring and reasoning.
- Standstill letters therefore are no longer mandated at contract award stage, however it will be best practice to do so.
- There will be a reframing of the current approach to provide more detailed information based on the bidder's proposal and the information detailed within the evaluations
- With the introduction of the transparency requirements, this information will be published as a matter of course that bidders can access through the process and see how they did and why they were unsuccessful or not scored as highly if there are more than one round of tendering –
- This information will continue to set out the relative advantages of the winning proposal

It is anticipated that the default position will be to publish all data other than

- Bidders profit margins,
- Overheads
- Financial models
- Elements of proposal which reveal IP / innovative solutions USP's etc
- Trade secrets
- Personal information capable of identifying a living person

The new regulations however continue to recognise FOIA (Freedom of Information Act) Exemptions:

- Where disclosure would cause harm to commercial interests
- Information is provided within "permissible" confidence

There will therefore be a revised set of notices required for publication consisting of 15 different notices (including for example but not limited to)

- Pre Procurement Planning notices
- Pipeline notices
- Premarket engagement notices
- Payment terms notices

- Tender Notices or DM Notices and conditions for participation (could be two notices if all documentation does go with the first notice)
- Tender Assessment Summary (Evaluation outcomes) for each stage
- Contract award notices
- Contract Detail Notice (containing the full contract)
- Procurement Termination Notice (if no contract is let – detailing the reasons)
- Contract amendment notices (if negotiation from original contract at award of contract)

Other Notices which must be published during the life of the contract include

- Payment Compliance Notices
- Contract change notices
- Contract Performance Notices (for certain contracts)
- Supplier failure notices
- Various Transparency Notices

In addition to the above Below Threshold Tender Notices must be published for all tenders above £30k up to the threshold which currently sits at c£213k (including VAT)

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What does this mean for us:

- All stages of the procurement process from premarket engagement through to end of contract will need to be documented and reported meaning accurate notes kept of what were previously unregulated stages.
- Currently between three and 5 notices are produced throughout the procurement lifecycle, depending on its complexity and route to market - this will increase to a minimum 15 throughout the procurement and contract lifecycle
- Significant increase of administrative burden
- Will need to be aware of all future projects to enable timely publication of the pre procurement notices.
- Risk of challenge if adhoc conversations with suppliers aren't documented
- Risk of more opportunities to fall foul of the legislation if we do not publish a notice or publish within required timescales.

5.8 Single Digital Platform

The Bill proposes the creation of a single digital platform for all public procurement, meaning all public procurement opportunities will be published and viewed in one place. This aims to simplify the procurement process, particularly for suppliers, improve transparency and data sharing with the added intention of reducing public sector procurement opportunities to a wider diverse range of suppliers including small companies due to the current number of platforms and submission of forms and information for participation in each procurement opportunity.

It is proposed the New Central Platform will facilitate:

- Public access to all published data for suppliers and other public bodies
- Notices from Find a Tender Service (Replacement OJEU) and Contracts Finder
- Price and performance data in relation to suppliers

This will include a New Central Register to enable visibility of:

- Suppliers with SQ (Selection Questionnaire) type data and capabilities recorded to reduce submission for each tender opportunity
- Debarred suppliers (covered later)
- Commercial tools – DPS and Framework Agreements (covered above)
- Contract performance, including data on spend and KPI's
- Procurement pipelines for every contracting authority
- Complaints details against suppliers and public bodies

What does this mean for us: -

- Positive for the Authority and Commercial Team as there will be access to readily available information
- Reduction in the number of qualification submissions as suppliers will be obliged to keep their qualification information updated – also reducing the administrative burden on suppliers.
- Pipeline will be clearly available meaning opportunities for collaboration, economies of scale and standardisation and interoperability within the sector
- With the debarment list – information will be readily available to reduce some of the due diligence burden

5.9 Technical Specifications

The “rules of technical specifications” have been amended and are an important part of constructing a procurement design. When detailing requirements they must be “sufficiently clear and precise”, the award criteria must relate to the subject matter of the contract and again be sufficiently clear, measurable and specific. Procurement specifications must not refer to a UK Standard unless the standard adopts an internationally recognised equivalent or there is no internationally recognised equivalent.

What does this mean for us?

- As a contracting authority we must be able to accurately identify whether a UK Standard “adopts an internationally recognised equivalent” and be able to give clear thought to why they are asking for the UK Standard and therefore which other standards might be considered equivalent
- Those writing technical specifications will need to engage with the commercial team to understand what is permissible and ensure it is measurable at evaluation stage
- Reduce the number of mandatory requirements in a specification
- Ensure clear and precise wording is used.

5.10 Modern Slavery

The Bill incorporates Modern Slavery safeguarding into procurement processes and contract management. The expected guidance is that – particularly for procurements deemed to be at ‘high’ risk of modern slavery – the level of supply chain

transparency, and extent to which bidders might be expected to interrogate risks further down their supply chain, will increase.

Commercial Teams will need to work with potential bidders and supply markets to make them aware of these requirements and to prepare them for the level of potential enhanced scrutiny through the bidding processes and contract management.

The Modern slavery considerations below are expected feed into each stage of the procurement and contract lifecycle:

- a) Identifying the need and initial approach
- b) Determining the contract specification
- c) Selection criteria
- d) Award criteria
- e) Terms of contract
- f) Contract management,

There will be an additional focus on pre market engagement, both to aid understanding of where risks might lie and to test whether selection and award criteria relating to modern slavery are achievable for the relevant market, proportionate, and properly targeted.

Conviction of a modern slavery offence remains a mandatory ground for exclusion at selection stage, and evidence of modern slavery in a supplier's supply chain may be discretionary grounds for exclusion.

5.11 Key Performance Indicators

The Bill proposes that for high value contracts, Contracting Authorities will be required to set and publish at least three KPI's, which must be reviewed at least annually and publish information if the supplier has breached these and also at the conclusion of the contract performance against these.

The Authority can exclude a supplier who has seriously breached the contract and includes where the contractor has not performed a contract to the Authority's satisfaction, as long as they have been given opportunity to remedy performance.

As a contracting authority we will be required to notify when a supplier has failed KPI's and further investigations will be undertaken to ascertain whether the supplier would be added to the debarment list, stating the exclusion grounds.

6. CHALLENGES TO A PROCUREMENT

Within the Green Paper there was a proposal for New Court Rules, however to date have seen no further confirmation of the following and is an area for us to keep an eye on: -

- A new fast track system for public procurement challenges was proposed in the Green Paper on the basis of written pleadings only for review
- Clearer rules in relation to disclosure of documents used in litigation
- More use of TCC's outside of London and the appointment of a designated procurement only judge
- Requirement for Contracting Authorities to undertake a time limited formal review of procurement complaints in the first instance

- A review of the procurement being challenged to be conducted by stakeholders not directly involved in the procurement process

The Green Paper also talked about appropriate procurement challenges being referred to a tribunal-based system which would now also include: -

- Lower value claims
- Challenges to the procurement process
- Discriminatory specifications
- Wrongly excluded bidders
- Lack of transparency

It is expected that further details of the above will be contained within the Secondary Legislation

7. REMEDIES FOLLOWING SUCCESSFUL CHALLENGE

Damages

It is proposed to offer a shift of focus from monetary damages to:

- Measures to allow for a rerun of procurement
- Decisions to be set aside
- Documents to be amended
- Capping of Damages to:
- Recovery of legal fees
- Plus 1.5x bid costs
- Exemptions to Damages Rules: -
- Illegal direct awards – crisis
- Where malfeasance has been demonstrated

Some successful challenges led to an Automatic Suspension of contract, and it is proposed:

- Changes to the test of whether to lift suspension to tailored procurement specific tests
- Introduction of fast track tribunal court procedure – hoped will reduce need to rely on test for lifting the suspension
- Contracts let under new crisis and extreme urgency are excluded from automatic suspension risk – however note - this will not apply if correct process has not been followed with justification.

Again further information on the above is expected within the Secondary Legislation

8. PROCUREMENT OVERVIEW BODY

Part ten of the Bill proposes that an appropriate authority has an oversight over contracting authorities' procurement activity giving them the power to investigate their compliance with the new Act, as part of a new Procurement Review Unit and further details around this are expected in the coming weeks.

9. FIRE AND RESCUE REFORM

In addition to the above proposed changes to the Public Contracting Regulations the Fire and Rescue Reform Paper talks about Fire Commercial Transformation and some of the key points in relation to commercial activity are detailed below:

- Each fire and rescue authority must demonstrate that it is achieving value for money for the goods and services it receives.
- Every fire and rescue authority should look at ways to improve its commercial practices including whether they can aggregate their procurement with other fire and rescue authorities and other local services and blue light organisations to achieve efficiencies.
- Fire and rescue authorities must demonstrate and support national and local commercial transformation programmes where appropriate.
- Each fire and rescue authority should be able to demonstrate full awareness of the objectives to standardise requirements, aggregate demand and manage suppliers of products and services within their commercial arrangements.
- Fire and rescue authorities must ensure that their commercial activities, be that the placement of new contracts or the use of existing contracts, is in line with their legal obligations, including but not limited to the Public Contracts Regulations, the Public Services (Social Value) Act 2012, the Modern Slavery Act 2015 and transparency commitments.

What does this mean for us?
<ul style="list-style-type: none">• All of the above we have already built into our procurement processes and therefore will have little impact on us.

10. CONCLUSIONS AND OPINION

Whilst there are still several unknowns overall the reform does modernise outdated procurement practices and enables Commercial Teams to use skills they are trained for and frequently used in the private sector. However this is the biggest overall in Public Procurement since the original regulations were introduced and to date have been incremental changes very much aligned to previous versions, therefore this will be a huge undertaking for commercial teams.

Once the Bill has received Royal Assent and the secondary legislation is in place it will be a lot clearer as to what we need to do. The Cabinet Office will commence training and there will be much more available guidance to assist commercial teams implement changes. From what we do know the Regulations will: -

- Overall provides more flexibility and a more streamlined approach to procurement however, the administrative and resource burden on the Commercial Team will be significantly increased.
- The reduction of the routes to market to three make it simpler for bidders however the onus on the commercial team to design the procedure when using the new competitive flexible procedure and ensure it is adhered to by all stakeholders could be challenging and could lead to increased risk of challenge if stakeholders are not fully aware of the boundaries.

- There is now an opportunity to build negotiation stages into an increased number of procurements to drive value and innovation, however those undertaking negotiations must be equipped and competent in negotiating best practice and be fully commercially aware. (Basically, starting from a blank sheet of paper)
- The proposed significant changes to the remedies available to suppliers including the cap on the level of damages, if these are adopted into the regulations could reduce the temptation of sabre rattling challenges, however ascertaining the level of damages will require a robust formula and there is more scope to challenge
- Conducting an internal review at initial stage of challenge will also be resource intensive as well as an independent stakeholder review if necessary.
- Changes to the debarment lists and exclusion criteria are welcomed but will only be as good as the information recorded, which includes the onus on us as a contracting authority to report on these criteria
- Changes to framework arrangements and DPS will be welcomed by suppliers however will place a greater administrative burden on the commercial team. That said, they do provide for longer term fit for purpose and updated framework arrangements.

11. **NEXT STEPS**

- Develop Implementation Strategy and timescales
- Research information and secondary legislation when published
- Upskill Commercial Team
- Redraft procurement documentation accordingly
- Design template process documents
- Design Procurement Processes Accordingly
- Deliver Awareness to the wider organisation