

TRANSFORMING PUBLIC PROCUREMENT

1. Introduction

- 1.1 This document provides a brief overview in relation to some of the expected key changes to the Public Procurement Regulations following consultation on the Green Paper published in 2020.

2. Key Principles

- 2.1 The Governments Green Paper on Transforming Public Procurement sets out the seven key principles to be enshrined in law meaning these are explicit in law rather than implied and Authorities will be held to account;

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

- 2.2 In addition to the key principles above, the following must also be a part of any commercial activity;

- **Social Value Model** to be applied in all relevant procurements with a minimum weighting of 10%,
- **Construction Playbook** – now has wider public sector relevance,
- **Below Threshold Contracts** – allows for possibility to reserve by supplier location, SME/VCSEs,
- **Value for Money** - greater emphasis throughout contract lifecycle,
- **Records and Reporting of Decision Making** - increased stages of feedback.

3. New Legal Powers

- 3.1 The Paper sets out the following new legal powers to oversee public procurement;

- a new unit to oversee public procurement with new powers to review and, if necessary, intervene to improve the commercial capability of contracting authorities,
- where members of the proposed panel be drawn from, sanctions and powers to review procurements,
- consolidating the current regulations into a single, uniform framework.

4. Procedures (routes to market)

- 4.1 The current eight routes to market have been reduced to three and these are covered briefly below.

- 4.2 **Open Procedure** (pretty much as is)

- has always been the most popular widely used,

- retained in current form,
- use for simple purchases where initial selection stage not required,
- notice will invite tenders directly,
- no shortlisting or negotiation provision.

4.3 **New Competitive Flexible Procedure (most likely to be the default procedure for the Authority)**

- subject to minimum detailed rules,
- similar to existing light touch regime,
- advertisement via contract notice,
- notice must provide specifications, timelines, conditions for participation, evaluation criteria etc – once published cannot be deviated from,
- subsequent stages of process must be consistent with published notice,
- compliance with rules on specification and evaluation,
- time limits as detailed in GPA
 - 30 days from expression of interest
 - 25 days from ITT to submit final tenders
 - 10 days for each of the above if meet the criteria for urgent.

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 requirement • Facilitates opportunities for innovation • Facilitates opportunities for value for money initiatives and VE throughout contract lifecycle 	<ul style="list-style-type: none"> • Time to familiarise to ensure compliance • The more diverse approach we take the greater the cost and timescales • Greater use of negotiations could increase timescales • Need to be commercially aware to undertake negotiations to be in a strong position • May provide window for more legal challenges • Not engaging with commercial team pre- any activity

4.4 **Limited Tendering Procedure (only used in extreme circumstances)** - new name for negotiated procedure without prior publication;

- only available in extremely limited circumstances
- significant safeguards in place for using it
- no general assumption that this is a single source
 - current regulation 32 grounds will be retained: -
 - no suitable tenders
 - artistic / technical or exclusive rights
 - extreme urgency - covered later
 - change of supplier technically difficult
 - repetition of works
- there is a new ground for using this added which is in case of crisis – further discussed later,

- new duty to publish mandatory notice except for **Crisis Grounds**
- 10 day standstill period before signing contract.

4.5 **Crisis Grounds**

4.5.1 This came about because of COVID-19 and the letting of significant contracts without process due to urgency.

4.5.2 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.

4.5.3 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 excluded from risk of automatic suspension.

5. **Other Modifications in Routes to Market**

5.1 **Dynamic Purchasing System (DPS)**

5.1.1 **Old Regulations**

- historically used for commodity items
- we have not used it in house.

5.1.2 **Proposal - DPS Plus**

- to use for any procurement, goods and services
- FTS describes conditions for participation
- suppliers meeting criteria must be able to join at any time
- no maximum number of suppliers
- to contract – Authority must invite all suppliers on DPS to submit a tender
- uses the new Flexible Award Route
- publish an award notice.

What does it mean for us?
<ul style="list-style-type: none"> • more flexible than a framework • suppliers will want us to use it • means we can keep up with new entrants • more administrative burden to manage however our e-tendering system has a module to do this • need to undertake regular checks that suppliers continue to meet criteria for participation

- Could be managing a large number of suppliers

5.2 Frameworks

5.2.1 Currently

- Frameworks only open for four years
- closed to new entrants during this term
- provides a cohort of “qualified” suppliers for call of via direct award or further competition.

5.2.2 Proposal

- longer periods (up to eight years)
- opened at least once (after three years) for new entrants to join
- if documented in original notice can be opened up multiple times
- each opening must be advertised in FTS
- all new applicants must be assessed using same original criteria
- existing suppliers can update their offering and retender.

What does it mean for us?

- for complex procurements can have a longer framework
- need to think longer term to ensure framework provides opportunities for innovation and value for money through the lifecycle
- greater administrative burden
- could have a large supply base to manage
- need to be clear from the outset of the criteria and potential opening up.

6. Awarding Contracts

6.1 What’s new with regards to a two stage approach / and selection criteria in the open procedure?

6.2 Selection Stage

New Exclusion Grounds / Debarment for participating in procurement activity

- **Mandatory Exclusions**
 - non-disclosure of bidders' beneficial owners
 - just added – ties with Russia and Belarus
 - discretionary
 - tax evasion
 - Deferred Prosecution Agreement (DPA) to resolve cases of fraud, bribery, or economic crime
 - HMG may introduce centrally managed debarment list
 - relevant convictions
 - Aid Authorities to identify suppliers excluded
 - rights of appeal for listed suppliers
 - appropriate self-cleaning measures.

6.3 Past Poor Performance

- 6.3.1 Propose to drop “only if led to early termination, damages or sanctions meaning;
- can exclude for persistent or significant deficiencies in performance of contract
 - if occurred within the last three years.

6.3.2 Proposal;

- introduction of new central monitoring system
- Contracting Authorities evaluate contract performance on agreed performance measures
- data held and published from central system
- Government may set minimum threshold for performance
- suppliers below threshold could be excluded
- duration will be set or a period to enable self-cleaning.

6.3.3 What does this mean for us;

- robust contract management in place
- lines of reporting such
- ensuring we check appropriate registers as part of due diligence.

6.3.4 Selection criteria will focus on;

- financial capability
- technical ability
- relevant experience.

6.3.5 Proposal;

- to have a centralized supplier registration system (replace ESPD)
- removal of the limits on information that the Authority can request to verify supplier meets the selection criteria set.

6.3.6 What does this mean for us;

- still the same focus
- centralised supplier registration would cut down on paper submissions
- can request more appropriate information.

What does this mean for us?
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.

6.2 Award Stage

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

- removed “economically”

- intended to encourage wider value for money
- includes % 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.

7. Transparency

7.1 **Current Requirements** - prior to award and standstill, Authority publishes data under Regulation 84 and Contract Award Notice detailing;

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

7.2 **Proposed**

- Legislation to embed transparency “by default” throughout the procurement process / Lifecycle
- Proactively publish relevant data as opposed to on request
- Publish data normally disclosed under FOI EIR or DPA
- Default position to publish all data
- **Data which may / should not be disclosed**
 - 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.

7.3 The new proposals recognise FOIA (Freedom of Information Act) Exemptions; where disclosure would cause harm to commercial interests and information is provided within “permissible” confidence.

What does this mean for us:
<ul style="list-style-type: none"> • Whilst we capture this data for regulation 84 reports a greater administrative burden to publish at regular frequencies throughout the process • Could fall foul of the law if we do not.

7.4 Open Contracting Data Standard (OCDS) – Non-Proprietary

7.4.1 The Authority will be required to publish data in a compliant and reusable format that covers data for buyers suppliers, contracts spends and performance. There will be a revised set of notices required for publication on OCDS and will consist of 15 different notices, including

for example but not limited to, planning notices, pipeline notices, premarket engagement notices and payment terms notices.

What does this mean for us: -

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|---|
| <ul style="list-style-type: none">• Currently we typically produce three notices throughout the procurement lifecycle this will increase to 15,• Significant increase of administrative burden• More opportunities to fall foul of the legislation. |
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7.5 Publication of Data

7.5.1 It is proposed there will be a New Central Platform to facilitate public access to all published data, notices from FTS and Contracts Finder and price and performance data in relation to suppliers.

7.5.2 This will include a New Central Register to enable visibility of;

- Suppliers with SQ (Selection Questionnaire) type data and capabilities recorded
- Debarred suppliers
- Commercial tools – DPS and Framework Agreements
- Contract performance, including data on spend and KPI's
- Procurement pipelines for every contracting authority
- Complaints details.

8. Challenges to Procurement

8.1 There is a proposal for New Court Rules;

- There will be a new fast track system for public procurement proposed
 - On the basis of written pleadings only for review
- There will be clearer rules in relation to disclosure of documents in litigation
- More use of TCC's outside of London and the appointment of a designated procurement only judge
- Requirement of CA's to undertake time limited formal review of procurement complaints in the first instance
- Review conducted by stakeholders not directly involved in the procurement process
- Pilot programme is currently in development.

8.2 Appropriate procurement challenges will be referred to a tribunal-based system this would include;

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

- Lack of transparency .

9. Remedies following Successful Challenge

9.1 Damages

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

- Measures to allow for 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.

9.1.2 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.

10. Debriefs following Conclusion of a Procurement Process

10.1 Debrief Letters;

- No longer mandated at contract award stage, but
- 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 introductory 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 –
- This information will continue to set out the relative advantages of the winning proposal.

What does this mean for us?
<ul style="list-style-type: none"> • Whilst it isn't mandatory but is best practice it means we should continue to do it • If we didn't it could come through as a recommendation from the central review office and may be seen as not being open and transparent • There will be some duplication as we will be recording information that would normally go into the letters into the portal also. • Could be more time consuming. • Scope for complaint if we don't upload sufficient information

- Possibly there will be some test cases where debrief letters are not produced as the norm.

11. Contract Management

11.1 Prompt Payment - existing obligations state that;

- Contracts must provide for payment of undisputed invoices within 30 days
- This term must be passed down the supply chain and the Contracting Authority is responsible for enforcing this
- The Authority must publish our statistics each year showing our compliance to this requirement.

11.2 In addition to this any business may take up payment delays in the supply chain with the Authority.

11.3 The Authority will be obligated to investigate the payment records of a supplier at any tier within our supply chain. There is a proposal further down the line to align public and private sector reporting requirements on payments within the supply chain. It is also proposed that there is a requirement for us to publish all payment performance data on Gov.uk for access by the public.

11.4 Amending an Existing Contract

11.4.1 Currently Regulation 72 provides for amendments to our existing contracts without the need for a new tender if the amendment meets the criteria within the regulation.

11.4.2 Proposal;

- Redraft Regulation 72 to make it clearer in relation to what is permissible
- Add a new ground permitting amendments to existing arrangements in situations of crisis or extreme emergency (inspired by COVID-19 pandemic).

11.5 Contract Amendment Notices

11.5.1 Currently a notice is only required to be published in certain circumstance.

11.5.2 Proposal;

- Notices to be published for almost every contract amendment
- Unless under 10% of original contract value for goods / services or 15% for works
- Increase / decrease of term is less than 10%
- The overall scope of the contract does not change.

12. Standstill Requirements

- 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.

13. Suspending an Existing Contract

13.1 Currently a procurement challenge triggers an automatic suspension of letting the contract and during this period, the Authority will need to extend the existing incumbent supplier.

13.2 Proposal;

- Limits on the amount payable under an extension period
- Introduction of a standard government rate of profit for calculation of payment.

What does this mean for us?
Risks <ul style="list-style-type: none">• The Authority needs to be as clear as possible at the outset of future requirements• Ensure that innovation opportunities and forecasting are provided for and carried out prior to award of contract• More opportunity for challenges if we fall foul of the publication of notices Benefits: - <ul style="list-style-type: none">• Existing arrangements could provide an incentive for incumbent supplier to challenge – proposed amendments remove this• Higher prices being paid by the authority during this period of extension would be removed.

14. How can we prepare for these?

14.1 To ensure we are ready for when the new proposals come into effect and become legislation we need to;

- Ensure the Commercial Team are fully trained on the new proposals
- Align all procurement documentation accordingly
- Embrace the Commercial Awareness Strategy across the organisation
- Embed commercial awareness training into the role map / development portfolio of managers
- 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.

15. Fire and Rescue Reform

15.1 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 (e.g. police) 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.

16. Conclusions and Opinion

16.1 Whilst there are a number of observations, some of the key issues are covered below;

- Overall provides more flexibility and a more streamlined approach to procurement however the administrative and resource burden on the Commercial Team is increased.
- The implied principles under the WTO / GPA are now enshrined in law, providing value to the taxpayer, however efficiency with regards to the amount of reporting is not addressed and can be costly for the Authority in terms of resources.
- Reduction of the routes to market to three make it simpler for bidders however the onus on the Commercial Team to write and adhere to the procedure under the broad headings can lead to opportunities for challenge if not fully aware of the wider principles.
- Provides opportunity to build in 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).
- Significant changes to the remedies available to suppliers, some of which will reduce the temptation to challenge and cap the level of damages, 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.
- 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.