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Public procurement: Plus ça change, plus c'est la même choses

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For those of you whose French is as poor as mine, when someone said this to me about the procurement reforms I had to check what they meant! In some respects, they were right: the more things change, the more they stay the same. When you look at the new Procurement Bill (the Bill), there are lots of things and concepts which do indeed – notwithstanding the changes – remain the same. However, when you start looking beneath the surface, there are a number of significant changes for us all to consider. In this article I'll take you through some of the things which have occurred to me as being worthy of further thought and consideration, and a few things where I suspect further amendment to the Bill might be needed.

The first thing that hits you is the legislative drafting style. It's different to what procurement lawyers have been used to over the last few iterations of procurement regulations. It is much more typically an English drafting style rather than a copy of an EU directive. However, in places, the wording still mirrors the Public Contracts Regulations 2015 (PCR). It does take a little getting used to. For example, rather than all operative provisions being in the body of the regulations, you will often have to consult the schedules to work though how matters are dealt with.

Multiple sources and definitions

The second overall point is that the Bill is only the first stage of the legislative framework. Many of the provisions are going to be reliant on secondary legislation and/or guidance which together will make up the procurement framework. That is a break from the past where, by and large, you had a single source of truth in the form of the PCR (i.e., for contracts regulated by the PCR, you only had to look in the PCR). The green paper Transforming Public Procurement and the response to it, in main assumed that this would be a consolidation of legislation and hence would be much simpler. However, now we are faced with having to consider not only the Act, but secondary legislation, a national procurement strategy and statutory guidance. Contracting authorities will need to quickly come to grips with a consolidated view. Helpfully the Cabinet Office has confirmed a large suite of training programmes to help contracting authorities through this.

Definition of 'Contracting Authority'

The Bill does not have definitions in one place, and they are dotted around the various clauses where they are initially discussed. The first Clause defines 'Contracting Authority' and does so in a very broad brush way. In the PCR you had several different definitions of bodies which would be a contracting authority. In the Bill, a contracting authority is defined, for the purposes of everything other than utilities contracts, as a public authority other than an excluded authority. The definition is (emphasis added):

"public authority" includes any authority with functions of a public nature that—

- is funded wholly or mainly from public funds, or
- is subject to contracting authority oversight;

This wide-ranging definition is obviously designed to include genuine public authorities like local authorities, central government departments, arm's-length bodies etc. However, it is also one you might assume, designed to cover what was formerly a body governed by public law. As you may recall that definition had, at its heart, the concept of 'established for the purpose of meeting needs in the general interest'. The concept of functions has quite a specific meaning in administrative law in the UK. My concern is that this may not

cover some central purchasing bodies, which are companies established by local authorities and other public bodies to provide central purchasing activities. The explanatory note refers to functions of a public nature including building roads or policing. Certain bodies have been specifically established to run procurements - one might argue that the objectives of a central purchasing body as set out in their articles of association do not amount to functions of a public nature. In my view, I think it's potentially a stretch and some further thought and guidance in relation to this definition may be needed to ensure that a whole raft of central purchasing bodies aren't excluded from the definition of a 'contracting authority'. I'm also not quite sure about the implications of "includes" at the start of the definition: does this mean that there are other types of public authority? If so, where will we find these?

Definition of 'Public Contract'

The definition of 'public contract' within the Bill is not too dissimilar to that contained in the PCR. That is framework agreements, concession contracts and contracts for the supply of goods, services or works for pecuniary interests with an estimated value above the relevant threshold and which are not an exempted contract. The contracts which are exempt from the Act are set out in Schedule 2 to the Bill and here you will find many familiar exemptions. You will also find the provisions in relation to the Teckal in-house exemption, which was previously found in Regulation 12 of the PCR.

To simplify the provisions, the drafters may have missed something which will be particularly concerning for local government. As drafted, it does not seemingly allow multi-authority-controlled vehicles as was previously provided for in Regulation 12(4) of the PCR. Given the hundreds of shared-services vehicles throughout local government, the need to ensure that these arrangements are not prohibited will require some amendment to the Bill.

The Bill keeps the distinction in relation to light-touch contracts (Clause 8). This is one of the places where we currently don't know quite what types of services will be covered by the light-touch contracts regime, as these will be specified in regulations to come.

Principles and Objectives

Part 2 of the Bill sets out the principles and objectives of the public procurement regime.

Clause11 deals with procurement objectives.

In particular, in carrying out procurement, a contracting authority must have regard to the importance of:

- delivering value for money;
- maximising public benefit;
- sharing information for the purpose of allowing suppliers and others to understand the authorities' procurement policies and decisions;
- acting and being seen to act with integrity.

Sub-section 2 goes on to confirm that the authorities must treat suppliers the same, unless a difference between suppliers justifies different treatment. The European concept of proportionality has not been included in this clause. (Proportionality does raise its head at various clauses within the Bill, but is not a pervasive concept.)

Clause 12 deals with the national procurement statement and confirms that, before publishing such a statement, the minister must carry out any consultation they consider appropriate and make changes to the statement on the basis of the responses to the consultation. Critically for contracting authorities, they must have regard to the national procurement policy statement. No further guidance is set out in the bill as to what 'having regard to' means and the explanatory note at paragraph 109 does not add much more clarity.

Evaluation

Clauses 14 to 16 deal with pre-market engagement and, as before, this is encouraged. We will have two different types of notices: planned procurement notices and preliminary market engagement notices. It's the latter that contracting authorities will need to publish before engaging in preliminary marketing engagement, which is envisaged in Clause 15.

As set out in the green paper, the concept of 'MEAT' has been eradicated and the concept of most advantageous tender (MAT) brought in. However, there is little guidance as to what 'MAT' means in practice and so one would imagine that this may come in statutory guidance or in the secondary legislation.

The Bill does deliver on the promise to reduce the number of award procedures and Clause 18 deals with the award of public contracts following a competitive procedure.

In relation to procurement procedures, these are set out in Clause 19 and described (in a limited way) in subsection 2, which provides:

A competitive tendering procedure is:

- a single stage tendering procedure without a restriction on who can submit tenders (an open procedure); or
- such other competitive tendering procedure as the contracting authority considers appropriate for the purpose of awarding the public contract.

Sub-clause 3 introduces the first opportunity for the word ‘proportionate’, confirming that the procedure must be proportionate having regard to the nature, complexity, and cost of the contract. As you will note, you have in essence two concepts in that subclause: one is an off-the-shelf open-type procedure and the second is pretty much any procedure the contracting authority wishes to design.

Whilst there are parameters set out in Clause19 and various points within the remainder of this part, the level of discretion open to contracting authorities is significant. In my view this is likely to have two consequences.

Firstly, for most procurements, that will mean similar, if not identical, procurement processes to those which we currently have, particularly the restricted procedure. In many respects, that is to be welcomed because, for most procurements, that is all that is necessary.

Secondly, for more complicated procurements, more bespoke solutions to the tendering process will be designed. Without rules, there will inevitably be some divergence as to what the practice of each contracting authority will be, particularly depending on the advice they take from their procurement advisers and lawyers. This may well be problematic for suppliers to government and contracting authorities alike. One of the benefits of a more rule-based system when it comes to procurement procedures is that contracting authorities deliver consistency and can point to the rules without feeling pressure from contractors, especially at the end of a competition. For bidders, consistency of approach can save time and money. We expect guidance will be provided in this area, but inevitably time will be needed to allow practice and procedures to settle down, particularly as to how more complicated procurements will be run.

Clauses 22 to 25 deal with award criteria. The Bill introduces, in Clause 23, the ability to refine award criteria during a competitive procedure (other than an open procedure). Historically, this has been something that contracting authorities have shied away from through fear of economic operators complaining that they had been unfairly treated, with criteria being amended to favour a particular provider. This new explicit approach will be helpful when considering whether and how weightings can change/evolve at different points of more complex procurements.

Clause 30 allows contracting authorities to modify in-train procurements (prior to the submission of tenders) in an open procedure, or to request to participate in procedures other than open procedures. In this regard, the Clause sets out what is permissible, and provides a test for substantial impact of those changes. As with many parts of the Bill, any changes would need to be subject to transparency notices.

The ability of contracting authorities to exclude suppliers from tendering procedures is set out in clauses 26 to 30 and the actual exclusions, both on discretionary and mandatory grounds, are set out in Schedules 6 and 7. These will need to be analysed by contracting authorities. Interestingly, there are now specific powers to exclude and/or require changes to subcontractors. This will be a useful tool for contracting authorities. There is some academic debate about how this’ll work, and it is something that will need to be kept under review as the Bill goes through the various approval stages.

As has been trailed in the consultation and the response to it, there are new buying tools for contracting authorities. The new concept of dynamic markets is set out in clauses 34 to 39 and for frameworks 44 to 47. The clauses on framework agreements deal with both “normal” and open framework agreements. They confirm that framework agreements must include, amongst other things, the selection processes to be applied on the award of contracts. The clauses do not however, set out what that selection process must include, or how it must run. Again, we expect guidance either through secondary regulation or statutory guidance to help in that regard.

In relation to open frameworks, these are described as ‘a scheme of frameworks that provide for the award of successive frameworks on substantially the same terms’. In this regard, the drafting seems to suggest that existing framework providers, under an open framework, can be awarded subsequent frameworks without retendering and new entrants can be awarded on the basis of a new tender. Whether there is an opportunity for existing framework holders to refresh their information and tender submission is not clear.

Clauses 40 to 43 set out the provisions around direct award, although the direct award justifications are largely set out in Schedule 5. The direct award clauses allow for switching to direct award where there has been a failure in a previous procurement process.

Award, standstill period and notices

Chapter five deals with award, standstill period and notices. Here, the transparency concept really kicks in which will necessitate a change to the working practices of most contracting authorities. Before entering a contract, a contracting authority will be required to publish a much more detailed contract award notice which will include enhanced information about the process and the assessment that has gone on. It will also need to include information as required by subsequent regulations which will be issued under Clause 86. The concept of a standstill period remains, although that has changed to an eight-working days period as opposed to the existing periods in the PCR. As set out and promised in the consultation process, there will be a requirement to include, in contracts over £2m in value, key performance indicators (KPIs). These KPIs will need to be tested regularly and the results of those tests published. Once contracts are awarded, contract award notices are also required and for contracts with a value in excess of £2m, a copy of that contract must also be published.

Clause 56 deals with the debarment list which has caused some concern for suppliers to government. The process is set out in clauses 56 to 61 and involves investigations by the minister and a process for seeking removal from that list.

The Bill also goes on to include various provisions which are to be implied into public contracts, particularly around payment terms and electronic invoicing. These also go into the subcontracting network and implied terms of those contracts. The provisions also allow for the ability of contracting authorities to direct the terms of subcontracting arrangements.

The process of modifying public contracts is set out in clauses 69 to 73. The process, whilst similar, is slightly simpler. Again, the modifications which are permitted are set out in Schedule 8 rather than being in the main body of the Bill. The Schedule includes a new concept of the materialisation of a known risk. It will be interesting to see how often this provision is used given it relates to a known risk, that is not covered by the modification already set out in an agreement.

As with all the modifications, there'll be a requirement to issue a modification notice. There will be an implied right to terminate public contracts where the contract has been awarded or modified in material breach of this Act. This goes further than the existing rights in Regulation 73, because the right to terminate goes beyond mere modification and also goes to award. To this end, one might argue that if a contracting authority considers that it has awarded a contract in breach of the Act, then it would have the right to terminate it. However, before exercising the right to terminate, the contracting authority must give the supplier the right to make representations amongst other things, about the decision. Furthermore, subclause 72(6) provides:

'A public contract may contain provisions about restitution and other matters ancillary to the termination of the contract by reference to the term implied by subsection 1.'

This point will be particularly important for suppliers to be alive to. If the right to terminate the agreement is implied into every contract, then they will want to ensure that rights in relation to compensation for such a termination are clearly set out and established.

The concept of conflict of interest follows on from that set out in the PCR, particularly Regulation 24. It goes further, providing for a duty to mitigate conflict of interest based on an assessment of potential conflicts in relation to any particular procurement. That assessment must include details of conflicts or potential conflicts and any steps taken to mitigate them. One could imagine that that is a document which may be regularly called upon by any suppliers wishing to challenge a process. That assessment must be kept under review during the course of the procurement and therefore an emphasis on conflict of interest has increased from the current position.

As with the Lord Young reforms, there are provisions in relation to below threshold procurements and the details around advertising. Below threshold procurement obligations are clearer than they are in the PCR, but local authorities will need to be aware of their obligations in this regard.

As noted above, Clause 86 sets out obligations in relation to the notices and a lot of information about transparency obligations. However, these are going to be dealt with by secondary legislation and therefore at this stage, we don't know the full extent of the requirements and the form in which those will need to be made available. That information needs to be supplied as soon as possible so that contracting authorities can get their processes in place. Similarly, Clause 88 deals with the sharing of information through online systems and again, this will be set out in secondary legislation.

Remedies

Part nine of the Bill deals with remedies. The automatic suspension concept continues and as promised in the consultation, the Bill seeks to move away from the existing American Cyanamid test for the lifting of the suspension. This is set out in Clause 91(2), but although it is different from the existing three limb test, it still is far from being a clear and simple test and relies on the court having regard to:

- the public interest;
- the interest of suppliers, including whether damages are an adequate remedy for the claimant; and

- any other matters that the court considers appropriate.

To this end, I suspect that there remains fertile ground for litigation and judicial interpretation as to the grounds upon which the suspension would be lifted.

A new investigatory body for procurement processes

Part 10 deals with procurement oversight and the new investigatory body for procurement processes. The appropriate authority will have the right to investigate and make a section 97 recommendation. Such recommendations will be issued to the relevant contracting authority (which may be during a procurement exercise, not just at the end of it). Contracting authorities must have regard to the recommendations set out and issue a progress report setting out the actions to be taken because of the recommendations or, if the authority has taken no such action, a statement to that effect. If a contracting authority decides not to act, then it must set out the reasons for not doing so.

Finally, for local government, the dreaded section 17 of the Local Government Act 1988 is specifically referenced in the Bill and gives the power to the Secretary of State to make regulations to repeal or amend those provisions. The Bill itself does not disapply those sections: it will be set out in secondary legislation to the extent that is deemed necessary by the Secretary of State. We will wait and see whether it is repealed.

Conclusion

In conclusion, the Bill has some way to go before it reaches a settled form and one can already see numerous places where amendments will be necessary. Whether this Bill is wholesale reform will be something that we will have to keep under review. One thing that is clear is that the future level of transparency required is something which contracting authorities will need to get their heads around in order to modify and change their processes accordingly. We will of course keep you updated through our Get Ready for Reform series as to the progress of the Bill and any changes along the way.

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