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The Procurement Bill 2022: a new and improved legal framework?

Paul Henty and Ellie Eastwood – 20 July 2022

Agenda

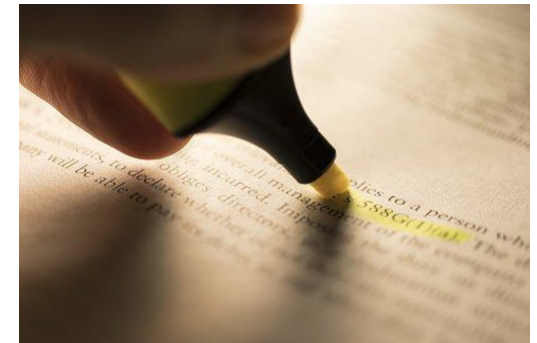
+ **Structure of today's talk**

- 1) Introduction to the Procurement Bill
- 2) Key changes:
 - 1) General principles of procurement
 - 2) Procedures and exemptions
 - 3) Debarment and exclusion
 - 4) Remedies
 - 5) Modification of contracts
- 3) Concluding comments



Introduction to the Procurement Bill 2022 (the “Bill”)

- + Public procurement accounts for around a third of all public expenditure each year in the UK
- + Future of public procurement has been the subject of debate for many years, particularly since Brexit
- + Current framework originally from EU directives implemented by UK regulations – thought to be unduly complex and in need of reform
- + The Government published its Green Paper on “Transforming Public Procurement” in December 2020 and published a response to the subsequent consultation in December 2021



Introduction to the Procurement Bill 2022 (the “Bill”)

- + The Bill was released and had its first reading in the House of Lords on 11 May 2022. It has since had its second reading (25 May 2022) and is now at committee stage
- + The legislation should be in place by early 2023, subject to prior notice to allow for implementation
- + It seeks to reform the UK’s public procurement regime to create a “fairer and more transparent system... and enshrine the objectives of public procurement in law”
- + Consolidation of various instruments:
 - The Defence and Security Public Contracts Regulations 2011
 - Public Contracts Regulations 2015
 - Utilities Contracts Regulations 2016
 - Concession Contracts Regulations 2016

Key changes – General principles of procurement

+ Principles for bidders in the current regulations:

- *Equality*
- *Non-discrimination*
- *Transparency*
- *Good administration*
- *Proportionality*



Key changes – General principles of procurement

- + **Slightly different “procurement principles and objectives” are proposed in the Bill (clause 11):**
 - Non-discrimination and equal treatment (unless different treatment deemed appropriate in which case duty to mitigate impact on competition)
 - Value for Money
 - Public good
 - Sharing information for the purpose of allowing suppliers to understand the contracting authority’s decisions
 - Acting, and being seen to act, with integrity

- + Consider effect on:
 - Equal treatment
 - Transparency
 - Proportionality

Key changes – Procedures and exemptions

- + Bill aims to streamline the six different procedures currently available to authorities
- + Considerable overlap in current procedures (e.g. negotiation and competitive dialogue)
- + Reduced to two:
 - **a single-stage award**; or
 - **“any other competitive tendering procedure”** which the authority considers appropriate



Key changes – Procedures and exemptions

- + Authority must ensure procedure “is a proportionate means of awarding the public contract, having regard to the **nature, complexity and cost** of the contract” (clause 19(3))
- + Authority will award contract to “**most advantageous tender**” (cf ‘MEAT’ under current law), i.e. tender CA “considers best satisfied the award criteria” (clause 18)
 - More social and environmental criteria?
- + Authority must publish “**tender notice**” inviting bids/participation (clause 20)
- + Provisions on exclusion (in relation to: (1) “**conditions of participation**” (i.e. legal capacity / financial capacity / technical ability, set by CA) (clause 18, 21);
- + Authority may establish “**dynamic market**” and restrict tender only to members of that dynamic market (clauses 34-39)

Key changes – Procedures and exemptions

- + Authority may award directly where a justification is present
- + Direct award justifications set out in Schedule 5
 - prototypes and development;
 - single suppliers;
 - additional or repeat goods, services or works;
 - advantageous terms on insolvency; urgency;
 - necessary to protect life etc; users choice contracts;
 - defence and security
- + Easier to rely on for novel services and goods
- + Requirement for transparency notice before entering into any directly awarded contract (Clause 43): More challenges?

Key changes – Procedures and exemptions

+ Framework Agreements

- Introduction of new concept of “open framework” (alongside other frameworks) (CI 41)
 - “A scheme of frameworks that provides for the award of successive frameworks on substantially the same terms”;
 - One framework will automatically succeed the next on its expiry. Sunset – 8 years;
 - Award of framework once in first 3 years and then within each period of five years;
 - Minimum of two suppliers.
- Call-offs awarded under direct awards or multi-party mini competition. Guidance to follow on mini competitions
- Single-supplier framework maximum duration 4 years (PCRs) and 8 years (UCRs)



Key changes – Debarment and exclusion

- + Exclusion of bidders
- + Grounds of exclusion are distinct from shortlisting criteria (e.g. top six on points from SQ stage are invited to tender) or minimum bidder criteria (financial, technical standing)
- + Under current law, authorities must exclude a bidder if certain **mandatory** grounds of exclusion apply
 - Reserved for serious criminal offences (e.g. bribery, fraud, corruption)
 - Non-payment of taxes or national security contributions
 - Exemption where an organisation has self-cleaned
- + Authorities may also exclude on **discretionary** grounds (where appropriate and proportionate to do so)
 - E.g. “gross professional misconduct”
 - Providing false or misleading information or seeking to unduly influence authority

Key changes – Debarment and exclusion

- + Change of **terminology (Clause 54)**:
 - **Excluded** bidder – bidder subject to **mandatory** debarment grounds
 - **Excludable** bidder – discretionary **debarment** grounds apply
- + Either category may be debarred from participation (but must be given opportunity to make representations)
- + Tenders from excluded suppliers must be disregarded. Excludable suppliers may be where deemed likely conduct will recur
- + Creation of **debarment list (Clause 59)**
 - Procedure for investigation of bidders by Minister of Crown (Clause 57) and Report (Clause 58)
 - Notice given to bidder concerned of outcome, along with applicable ground of debarment
 - Procedure for appeal of Minister's decision (application for removal) (Clauses 60 & 61)
- + New grounds for mandatory debarment (Schedule 6). Examples:
 - Offences under S 31(1) of the National Minimum Wage Act 1998 (para 19, Schedule 6)
 - A cartel related infringement of Chapter I of the Competition Act 1998 (para 39)
 - Foreign equivalent offences (para 41)
 - Failure to cooperate with regulatory investigations

Debarment: Proposals under Procurement Bill

- + **Contract performance** as a discretionary exclusion ground (para 13, Schedule 7)
 - Presence of a breach of contract (determined by Court or Settlement Agreement)
 - Prior termination will indicate seriousness
- + **New discretionary grounds** for exclusion (Schedule 7)
 - **Labour market misconduct** (e.g labour market order under the Immigration Act 2016 (paragraph 1(d) of Schedule 7)
 - Wider range of **competition law infringements** e.g. where there was a breach of Chapter II of the Competition Act 1998 (abuse of dominant position)
 - **Environmental misconduct** (para 4, Schedule 7)
 - Conviction of an offence (inside or outside UK);
 - Conduct constituting harm caused or may have caused significant harm to the environment, including life and health of plants and animals
- + Look-back period of three to five years depending on the particular offence (para 42, Schedule 7)

Key changes – Remedies

- + Substantive remedies remain largely the same, subject to certain clarifications
- + Mandatory standstill period of 8 working days – claim must be issued before end of standstill to benefit from automatic suspension
- + New test for maintaining automatic suspension
- + Debrief letters
 - Removed requirement to provide individual debrief letter to each bidder
 - Authorities to provide assessment summaries following procurement decision and publish a contract award notice
 - Information which has to be provided much more limited when compared to the ‘characteristics and relative advantages of the tender selected’
- + No cap on damages

Key changes – modification of contract

- + Allowing contract modification post award allows obvious scope for distortion of tender process
 - E.g. nature of contract changed, scope is drastically increased, more services added
- + Current rules (Regulation 72 of the PCRs)
 - A modification is substantial where:
 - If included originally, would have attracted different bidders or different outcome
 - It introduces significant scope change
 - It allows for substitution of contractor
 - Changes pursuant to amendment clauses may be ok if clause is “clear, precise and unconditional”)
 - Small changes (<10% of contract value for services and 15% of value for works may be ok)
 - Changes may be permitted up to 50% of contract value to deal with unforeseen circumstances

Key changes – modification of contract

- + Non-substantial changes allowed where four-part test satisfied:
 - i. term is increased or decreased by more than 10% of the original maximum term;
 - ii. overall nature of the contract is not changed;
 - iii. scope of the contract is not materially changed;
 - iv. that the economic balance of the contract is not materially altered in favour of the contractor
- + Immediate questions:
 - Are all limbs consistent?
 - Not clear if all limbs are cumulative
- + “below threshold” modification
 - 10% / 15% thresholds retained
 - Changes must also be below procurement threshold

Key changes – modification of contract

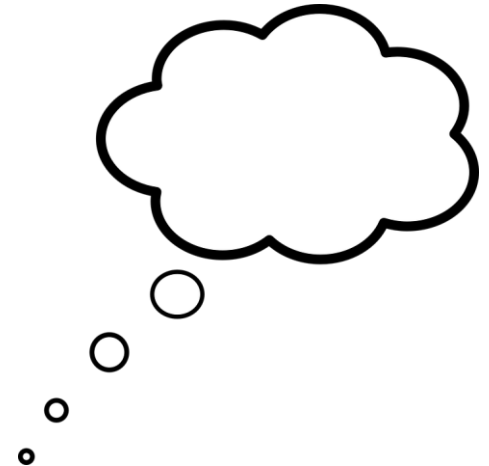
- Changes can be made where **contract clause is “unambiguous”** rather than “clear, precise or unconditional” (lower threshold?)
- Modifications permitted in cases of **urgency and protection of life**
- **Unforeseeable circumstances** (i.e. not reasonably foreseeable)
- Additional goods, services or works
- Modifications required on **materialisation of known risks**
- Change of contractors as a result of M&A activity
 - Allowed under current rules
 - Does new proposed language narrow the scope of exemption?

Key changes – modification of contract

- + Transparency requirements (Clause 70)
- + Where post-modification value of contract exceeds £2m, a copy of the contract (with amendments) must be published within 90 days of modification.
- + **Contract Change Notice (“CCN”)** needs to be published before the modification is made: authority intends to modify the contract (ii) certain other (to be confirmed in future regulations).
- + No need for CCN if value <15% (works) or <10% (services) of the contract or term extension <10% of contract term
- + Authority may hold a **voluntary standstill** after publication of CCN before enacting modification but:
 - Prohibited from entering into modification until standstill has expired
 - Challenges coming after standstill will not hold up award of modification

Concluding comments

- + Public procurement contracts are a substantial component of the overall economy
- + Used correctly, public procurement can help to boost jobs, growth and investment and create an innovative, resource and energy efficient, and socially-inclusive economy
- + Scale of change introduced by the Bill is significant
- + Some helpful changes but still some concerns – evolutionary not revolutionary
- + CAs and suppliers should monitor development as Bill passes through the next stages.
- + Major issues still to be resolved in future case-law. Legislation tinkers with existing terminology – will old jurisprudence still be good law?





Any questions?

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