Audience question and answer session from Matrix webinar on the Procurement Act

(28th February 2024)

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Q. Hi Kieran. Cabinet office has said that templates will be provided. Do you have an update/have you been involved in deveolpment of tender pack/contract templates?

A. Unfortunately I'm not aware of this particular commitment from the Cabinet Office. It's not something I've been involved with and hasn't been widely publicised (for example it hasn't appeared in the monthly Transforming Public Procurement email updates). Under the current regime no tender pack templates have been provided, and I would anticipate that will remain the case under the new regime. Contracting authorities should therefore expect to have to create/update their own tender pack templates in preparation for the Act coming into force.

In terms of contract templates, I anticipate the Model Services Contract (and other standard templates produced by Government Commercial Function and Government Legal Department) will be updated in due course to reflect the new procurement law regime. Some of those templates are lengthy documents however, so you would need to carefully consider whether they are suitable for your procurement (noting for example the new need to consider SME barriers).

Q. How realistic do you think the stated implementation timescales are?

A. Good question! There's a lot to happen between now and October, so it's going to be a tight timescale. The Cabinet Office has been referencing the October date for a considerable time now however, and continue to do so. As such, there is obviously a degree of confidence it is achievable. I wouldn't be hugely surprised if there ends up being a delay, but would encourage authorities to prepare as though it *will* happen in October. That way, even if there is a future delay, you will be ready (rather than delay preparations and end up not being ready!)

Q. Will the modification elements of the new Act only apply to contracts let post go live, or will it apply to contracts let under the current regime as well?

A. Yes, it appears they will only apply to contracts let **post** the go-live date. The Part 2 Consultation on draft regulations to implement the Procurement Bill contained a section on transitional provisions. See page 22 onwards *(page numbering rather than PDF numbering)* of this document:

https://assets.publishing.service.gov.uk/media/64b1097dc033c1000d806367/E02921918_CO_Transforming_Public_Procurement_Part_2_Accessible.pdf

Whilst the position remains to be finalised the above, and other information I have heard, indicates that Regulation 72 PCR 2015 will apply to contracts let under PCR 2015, even if the modification is being made post the Procurement Act coming into force. So don't throw out your copy of PCR 2015 just yet!

Q. Can you confirm if the Reg84 report has disappeared?

A. Yes, there is no direct equivalent under the Procurement Act. That said, I think it will remain sensible for authorities to maintain a contemporaneous record of key decisions made in the procurement process. This should assist to enable them to explain their rationale in the event of a legal challenge. A failure to be able to explain decisions has drawn criticism in case law under the current regime.

Q. What does the new Act say about contract value aggregation/penny packeting?

A. Section 4 and Schedule 3 set out the new rules around how contracts must be valued. In terms of aggregation, Schedule 3 paragraph 4 requires that:

"where a contracting authority estimates the value of two or more contracts, and the goods, services or works to be supplied under the contracts could reasonably be supplied under a single contract….. The contracting authority must estimate the value of each of the contracts as including the value of all of the contracts, unless the authority has good reasons not to do so"

Regarding contract valuation more widely, at first glance there are some changes from the current rules in PCR 2015. Hopefully there will be some published guidance in due course clearly setting out what these changes entail in practice.

Q. If we use a national framework, will we have to issue any notices such as contract award?

This is an interesting point. It appears that the Act will see increased publication requirements regarding framework call-offs (compared to PCR 2015). This includes a requirement to publish a contract award notice (although note that under the Act this notice is now published **before** the award is actually made). When the framework call-off award has been made, a contract details notice will also need to be published under the Act (this is the equivalent of the contract award notice under the current regime).

Q. Can residential/nursing 'spot' placements fall under user choice. Any view? Spot placements not historically put to competition (unless establishing a block)

Schedule 5 of the Act, paragraphs 15 to 17, introduces a new direct award justification for certain specified "user choice services" that are to be supplied for the benefit of an individual.

The requirements are:

1. the authority must be legally required to "have regard to the views" of that individual (or their carer) in relation to who should supply the services; and
2. the service user/carer must have expressed a preference of supplier; or only one supplier is capable of providing the services; and
3. the authority considers that it is "not in the best interests" of the individual to award the contract via a competitive award process.

So yes, there is increased potential for direct awards in this area, subject to meeting the above criteria. Again, hopefully there will be guidance offering a further steer on the application of these new rules.

Q. Do you feel there much more benefit of a Dynamic Market place over the current DPS that will no longer available especially in the Adults and Childrens markets?

A. My first impressions are that the main benefits of a dynamic market over the current DPS are:

- increased availability *(a dynamic market can be used for **all** procurements, rather than being limited to "off the shelf" solutions);* and
- the ability to charge fees *(which is not permitted for a DPS under PCR 2015)*

Q. How do advertised the CA change the evaluation criteria to meet the requirement of the assessment summaries & who do CA protect themselves commercial sensitivity?

A. I don't think the new assessment summaries *necessarily* necessitate a change to the evaluation criteria. However, I would encourage authorities to carefully consider what amendments to their evaluation processes will be needed under the Act. For example:

- ensuring “detailed” reasons are recorded (as that’s the level of detail the new assessment summary requires)
- ensuring scoring bands can clearly be differentiated between. In my view this will take on increased importance given the new requirement to explain to bidders why they didn’t achieve the score immediately above. Where the gap is not clear, they may well seek to apply upward pressure on their score
- more detailed notes of the evaluation and moderation process, to reflect the new feedback obligations above.

(There will be other elements of change relevant to evaluation too, including the new requirement for a formal conflicts assessment in respect of conflicts of interest)

Regarding commercial sensitivity, section 94 of the Act provides a potential exemption from the duty to publish or disclose information. This is subject however to the authority being satisfied that there is “an overriding public interest” in the publication/disclosure being withheld. I anticipate there may be further guidance published on this point. Authorities should also consider how feedback can be presented in a sufficiently generic way that does not compromise any commercially sensitive information. For example, focussing on the *outcomes* that the winning bid achieves, rather than specifying *how* it achieves those outcomes.

Q. How those changes will affect procurement with other countries??

A. In terms of buyers from other countries, Part 11 of the Act contains provisions around cross-border procurements involving other UK nations. In respect of procurements that involve non-UK nations (for example EU member states), the Act does not contain any provisions governing this. Statistics indicate that such procurements are *extremely* rare however.

In terms of *suppliers* from other countries, the Act confers rights upon “treaty state suppliers”. This means those suppliers that are entitled to the benefits of an international agreement specified in Schedule 9 of the Act. For example, treaty state suppliers must not be discriminated against, and have standing to bring legal challenges under the Act. Non-treaty suppliers do not enjoy the same protection and could, for example, be excluded from a competitive tendering process.

Q. If a procurement is closed due to existing Patents how will this be catered for?

A. If there is a desire to award the contract to a particular provider for this reason, the authority would need to satisfy one of the direct award justifications in Schedule 5 of the Act. The only justification that specifically refers to intellectual property rights is where the *“public contract concerns the creation or acquisition of a unique work of art or artistic performance”,* so this would all need very careful scrutiny based on the particular facts and circumstances.

Note that in terms of patents more broadly, section 56(7) provides that authorities may not refer to a particular parent in the procurement documents unless the authority *“considers it necessary in order to make its requirements understood”.*

Q. The current PCR makes reference to "arms length or sub central" bodies - as a not for profit should we prepare in line with the current act requirements?

A. The Cabinet Office position is that there is no change of scope in terms of those organisations whose procurements are caught by the Procurement Act. As such, if you are caught by the current rules, it’s perhaps safe to assume you will be caught by the new rules (and likewise if you aren’t currently caught by the rules). The precise definition of contracting authority has changed however – see section 2 of the Act. So if you are unsure I would strongly recommend taking legal advice on whether your organisation will be caught by the new rules.

Q. Where are contracts to be published?

A. The Part 2 Consultation on draft regulations stated that this will be done via the new central digital platform. Likewise the publication of notices will take place via that platform.

Q. Are Cas going to be reqruited to publish tender notice as well as contract award notice for regulated below-threshold procurements (section 87 of the new Act)?

For below-threshold contracts of 12k or more (central government) or 30k or more (other authorities) there is a requirement to publish:

- a below-threshold tender notice, to invite tenders; and
- a contract details notice (currently known as a contract award notice), with details of the award

Note there is no obligation under the Act to publish a contract award notice for below-threshold procurements (noting again that under the Act such a notice is now published **before** award).

Q. Can you say something around the proposed new cental database for suppliers?

"The Procurement Act 2023: A short guide for suppliers" states there will be:

"*a central digital platform for suppliers to register and store their details so that they can be used for multiple bids, and see all opportunities in one place"*

The **Transforming Public Procurement February update** stated that:

"The Cabinet Office is working to provide a fully integrated digital platform where Registration, Supplier Information and Find a Tender (noticing) all work together to support the Procurement Act 2023 and its regulations. Combined, these components make up the "Central Digital Platform""

I would recommend signing up for those updates should you wish to be keep abreast of progress on the new central database.

Q. Where an ICT Support contract expires but the system still has some life, will the Direct Award principles allow you to recontract with the incumbent supplier

A. I would probably be minded to firstly explore whether the ***existing*** contract can be varied/extended. This is likely to carry less administrative burden internally, and also less risk of challenge externally. This would need to be done *prior* to expiry however - as a matter of contract law, once the contract has expired it cannot be varied/extended.

You would also need to be satisfied that any such variation/extension is compliant with the Act (in particular the modification rules set out in Section 74 and Schedule 8). This will depend on the particular circumstances, including the length and value of any proposed extended term, and what the original contract and tender documents said in this regard.

If it is deemed to not be possible to extend the contract, or where the contract has already ended, you would need to consider whether any of the direct award justifications apply. These are set out in Schedule 5 of the Act. On the face of it, the justification around *"Additional or repeat goods, services or works"* is perhaps most likely to be relevant. However, legal advice would need to be taken on the specific facts and circumstances - use of this ground to make a direct award is only permitted where certain conditions are satisfied - see paras 7 to 9 of Schedule 5.