

# What is happening with the legislative reform, and how should you prepare?

Dr Totis Kotsonis  
Partner, Pinsent Masons

White Paper Procurement Conference, July 2023

## Overview

1. Where are we now?
2. Changes to form, changes to substance
3. The principles
4. Contract award procedures
5. Selection, exclusions and debarment list
6. Award criteria
7. Standstill period, award decision notification
8. Substantive modifications
9. Remedies, review procedures
10. How should you prepare?

## Where are we now?

- 15 Dec 2020 – Publication of Green Paper (consultation up to 10 March 2021)
- 6 Dec 2021 – Government response to consultation
- 11 May 2022 – Procurement Bill introduced in the House of Lords
- 13 June 2023 – Bill has third reading in the House of Commons
- 19 June 2023 – First part of the consultation on secondary legislation begins
- [July 2023] – Second part of the consultation on the secondary legislation
- [July 2023] – Expectation that the Bill will receive Royal Assent before the summer recess
- October 2024 – Procurement Act 2023 expected to come into force

3

## New form and (partly) new substance

- Key aim of the legislative reform

*“...to comprehensively streamline and simplify the complex framework of regulations that currently govern public procurement.” (Green Paper, Dec 2020)*
- Consolidation of procurement legislation into one Act (and related secondary legislation)
- Greater flexibility in the conduct of contract award procedures
- Introduction of additional obligations that seek to ensure greater transparency
- Introduction of post-contract award obligations
- But a lot remains the same:
  - Familiar concepts and requirements expressed differently
  - Tweaks and clarifications
  - Need to ensure compliance with the GPA (and other international treaty obligations)
  - Remedies, review procedures?

4

## Principles, objectives and policy statements (1)

### Whatever happened to our principles?

#### Public Contracts Regulations 2015 Principles of procurement

- 18.—(1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.
- (2) The design of the procurement shall not be made with the intention of excluding it from the scope of this Part or of artificially narrowing competition.
- (3) For that purpose, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

5

## Principles, objectives and policy statements (2)

### 11 Covered procurement only in accordance with this Act

- (1) A contracting authority may not carry out a covered procurement except in accordance with this Act.
- (2) Accordingly, a contracting authority may not enter into a public contract unless it is awarded in accordance with—
- section 19 (competitive award);
  - section 41 (direct award in special cases);
  - section 43 (direct award after switching procedures);
  - section 45 (award under frameworks).

### 12 Covered procurement: objectives

- (1) In carrying out a covered 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 authority's procurement policies and decisions;
  - acting, and being seen to act, with integrity.
- (2) In carrying out a covered procurement, a contracting authority must treat suppliers the same unless a difference between the suppliers justifies different treatment.
- (3) If a contracting authority considers that different treatment is justified in a particular case, the authority must take all reasonable steps to ensure it does not put a supplier at an unfair advantage or disadvantage.
- (4) In carrying out a covered procurement, a contracting authority must—
- have regard to the fact that small and medium-sized enterprises may face particular barriers to participation, and
  - consider whether such barriers can be removed or reduced.

6

## Principles, objectives and policy statements (3)

*And there's more...*

### 13 The national procurement policy statement

- (9) A contracting authority **must have regard** to the national procurement policy statement.

### 14 The Wales procurement policy statement

- (8) The following contracting authorities **must have regard** to the Wales procurement policy statement –
- (a) a devolved Welsh authority, except in relation to procurement under a reserved procurement arrangement or transferred Northern Ireland procurement arrangement;
  - (b) a contracting authority other than a devolved Welsh authority in relation to procurement under a devolved Welsh procurement arrangement.

7

## Contact awards procedures (1)

*Compare and contrast*

### PCR 2015 procedures

- Open procedure
- Restricted procedure
- Competitive procedure with negotiation
- Competitive dialogue
- Innovation partnership
- Negotiated procedure without prior publication

### Procurement Bill procedures

- Open procedure (single stage, with no restriction on who can submit a tender)
- Competitive flexible procedure (“such other competitive tendering procedure as the contracting authority considers appropriate”)
- Direct award – where a direct award justification applies; in line with regulations introduced to protect life etc.; no suitable tenders or requests received

8

## Contact awards procedures (2)

### Competitive flexible procedure

- CFP not only available when certain conditions are met. At the same time, the CA must ensure that the chosen procedure “is a proportionate means of awarding the public contract, having regard to the nature, complexity and cost of the contract”
- No explicit requirement that the number of suppliers shortlisted to participate in the procedure should be sufficient to ensure genuine competition
- The CA must provide (in most cases) for at least certain minimum periods (generally between 25– 35 days if no urgency) but in setting these the CA must have regard “where relevant” to certain factors such as complexity of contract
- No explicit requirement to make available all tender documents available at the start of the process but if tender notice and associated tender documents are not all provided at the same time, this affects the minimum periods permissible

9

## Conditions of participation, exclusions (1)

### Conditions of participation [selection requirements]

- A Contracting Authority *may* set conditions of participation but only if these are proportionate means of ensuring that suppliers have the legal and financial capacity or technical ability to perform the contract
- Such conditions *may not* amongst other things:
  - require the submission of audited accounts other than from suppliers who have an obligation to have their accounts audited in accordance with the Companies Act 2006 (or overseas equivalent)
  - require particular qualifications without allowing for their equivalents

### Some inconsistencies...

- If a supplier does not satisfy a condition of participation, the contracting authority *may exclude* the supplier from participating in, or progressing as part of, the competitive tendering procedure
- a Contracting Authority *must disregard* any tender from a supplier that does not satisfy the conditions of participation

10

## Conditions of participation, exclusions (2)

### Exclusions

- Introduction of the concepts of “excluded” and “excludable” supplier
- **Revamped grounds** for mandatory or discretionary exclusion, for example:
  - Mandatory exclusion for:
    - cartel offences
    - breaches of Chapter I of the Competition Act 1998
    - aiding, abetting or procuring the commission of certain offences
  - Discretionary exclusion where:
    - National security threat
    - poor performance
- Like grounds for mandatory exclusion, most grounds for discretionary exclusion also engaged if they apply to a “**connected person**”

11

## Conditions of participation, exclusions (3)

### Centralised debarment list

- Where a supplier is placed on the DL it would be deemed to be an excluded or excludable supplier for all covered procurement awards (so no need for contracting authority to consider the question of whether the supplier should not be disqualified because of adequate self-cleaning)
- Detailed provisions as to the process for placing a supplier on the DL, for example:
  - Obligation on contracting authority that has disqualified a supplier on basis of application of mandatory or discretionary grounds to **inform the “relevant appropriate authority” within 30 days**
  - An “**appropriate authority**” may **investigate** whether the supplier should be deemed to be an excluded or excludable supplier and, on that basis, placed on the DL
  - Provisions for notification of decision and **standstill period** before entry into DL; ability to apply for interim relief; can **appeal** decision (but only on basis that a **material mistake of law** has been made)

12

## Award criteria

### *Bye-bye MEAT, hello MAT*

*“A contracting authority **may** award a public contract to the supplier that submits **the most advantageous tender** in a competitive tendering procedure.”*

- Reference to “**may**”, because a contracting authority may decide not to make an award
- Reference to MAT, as this is consistent with the GPA wording and also emphasises the fact that the winning tender is not necessarily the cheapest
- Express obligation not only to **indicate relative importance of criteria** but also **describe the “assessment methodology”**
- Subject to certain conditions, **ability to “refine” the award criteria** once the competitive flexible procedure has commenced

13

## Notification of award decision, standstill period

### *All change*

- Before entering into a contract the CA must publish a Contract Award Notice notifying its intention to do so
- The publication of the CAN commences a **mandatory standstill period of 8 working days** (possibility to provide for a longer period or where no mandatory standstill period required, a voluntary SP which must be at least 8 WD)
- Before the publication of a CAN the CA must provide an **“assessment summary”** to each supplier that submitted an assessed tender providing information about its assessment of the tender, and if different, the winning tender
  - Does this amount to the same obligation as providing information about **“the reasons for the decision, including the characteristics and relative advantages”** of the successful tender (Reg 86(2)(b) PCR)?
  - Cf. **“All the information that would be necessary for the unsuccessful bidder to determine whether or not the decision is wellfounded”** (Case T-272/06)
  - No express provision requiring CA to notify its contract award decision as soon as possible (despite other provisions requiring CA to notify certain decisions “as soon as practicable”)

14

## Modification of contracts (1)

### Permitted contract modifications

- Obligation (subject to certain exemptions) to publish a “contract change notice” before modifying contract
- Option for CA to implement a voluntary standstill period of at least 8 WD (cf. mandatory SP was proposed in Green Paper)
- Obligation to publish modified contract within 90 days of amendment if contract value is (or becomes following modification) greater than £5m
- In most respects the same grounds as in PCR but some simplification in their formulation, certain clarifications and introduction of an additional safe harbour

### Some examples

- “Below threshold modifications” provisions make clear that safe harbour applies in relation to amendments which lead to the (permitted) increase or decrease in value of the contract
- Change in economic balance in favour of supplier not a substantial modification unless it is a “material change”

15

## Modification of contracts (2)

### Permitted contract modifications – examples (cont.)

- The possibility of the modification is “unambiguously” provided for in the contract and certain other conditions are met
  - (Cf. PCR “provided in... clear, precise and unequivocal review clauses, which may include price revision clauses or options, provided that such clauses (i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used...”)
- Modification for the provision of additional goods, services or works where change change in suppliers would result in “(i) disproportionate technical difficulties in operation or maintenance or other significant inconvenience, and (ii) the substantial duplication of costs for the authority” and certain other conditions are met”
  - (Cf. PCR “(i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement, and (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority.”)

16

## Modification of contracts (3)

### Permitted contract modifications – examples (cont.)

#### *New safe harbour: Materialisation of a known risk - key conditions*

- i. A known risk has materialised otherwise than as a result of any act or omission of the contracting authority or the supplier,
- ii. Because of that fact, the contract cannot be performed to the satisfaction of the contracting authority
- iii. the modification goes no further than necessary to remedy that fact, and
- iv. awarding a further contract (instead of modifying the contract) would not be in the public interest in the circumstances,
- v. and the modification would not increase the estimated value of the contract by more than 50 per cent

17

## Remedies, review procedures (1)

### Green Paper (Dec 2020)

*“The Government wants to bring about fundamental changes to the way procurement challenges are heard and managed, increasing accessibility for suppliers and reducing the impact of sometimes long and expensive court cases on contracting authorities, businesses and ultimately the taxpayer...”*

*“...The objectives of these changes would be to make a future review system quicker, cheaper and therefore more accessible to suppliers, with decreased impact on delivery of public services.”*

### Government response to consultation (Dec 2021)

*“We are continuing to explore feasible options for faster and more accessible routes for valid challenge of procurement decisions.”*

18

## Remedies, review procedures (2)

### Plus ça change...?

- Available remedies remain the same- Green paper proposal to cap damages has not been pursued
- Setting aside order - available effectively on the same grounds as a PCR declaration of ineffectiveness (but grounds expressed and set out differently)
- Automatic suspension still available, provided challenge within standstill period
- Test that the court should apply in determining interim applications (including lifting of automatic suspension) now set out in the legislation: a modified *American Cyanamid* test. Would it change outcomes in practice?
- Despite the Green Paper's acknowledgment for the need of a quicker, cheaper and more accessible review system, the possibility of a specialist tribunal has not been taken forward
- Procurement oversight body – “An appropriate authority may investigate a relevant contracting authority's compliance with requirements of this Act”
  - Possibility of issuing recommendations and guidance

19

## Remedies, review procedures (3)

### Plus ça change...? (cont.)

#### 101 Interim remedies

- (1) In proceedings under this Part, the court may make one or more of the following orders—
  - (a) an order lifting or modifying the restriction in section 100(1);
  - (b) an order extending the restriction or imposing a similar restriction;
  - (c) an order suspending the effect of any decision made or action taken by the contracting authority in carrying out the procurement;
  - (d) an order suspending the procurement or any part of it;
  - (e) an order suspending the entry into or performance of a contract;
  - (f) an order suspending the making of a modification of a contract or performance of a contract as modified.
- (2) In considering whether to make an order under subsection (1), the court must have regard to—
  - (a) the public interest in, among other things—
    - (i) upholding the principle that public contracts should be awarded, and contracts should be modified **in accordance with the law;**
    - (ii) **avoiding delay** in the supply of the goods, services or works provided for in the contract or modification (for example, in respect of defence or security interests or the continuing provision of public services);
  - (b) **the interests of suppliers, including whether damages are an adequate remedy** for the claimant;
  - (c) **any other matters that the court considers appropriate.**
- (3) An order under subsection (1) may not permit a contract to be entered into or modified before the end of any applicable standstill period (see sections 51 and 76).
- (4) An order under subsection (1) may provide for undertakings or conditions.

20

## Some other aspects of the reform

- Open frameworks
- Dynamic markets
- Contract management: e.g. enhanced implied rights to terminate contracts, regular assessments of contract performance against key performance indicators
- More notices...
  - a) tender notice
  - b) transparency notice
  - c) dynamic market notice in relation to the establishment of a dynamic market,
  - d) contract details notice relating to a public contract
  - e) contract change notice
  - f) contract termination notice
  - g) contract award notice
  - h) Pipeline notice
  - i) Contract details notice
  - j) procurement termination notice
  - k) Planned procurement notice
  - l) Preliminary market engagement notice
  - m) Payment compliance notice

21

## How should you prepare?

- There will be a six-month lead-in period before the new Act and related secondary legislation takes effect, to allow stakeholders to familiarise themselves with the new framework. Start now!
- Government guidance will supplement the new legislation
- Government training programme, including so-called “knowledge drops” “deep dives” and e-learning modules
- Attend procurement law events and conferences!

22

Totis Kotsonis

Partner, Head of Subsidies, Procurement, Trade Agreements and Trade Remedies

T: +44 20 7054 2531

Email: [totis.kotsonis@pinsentmasons.com](mailto:totis.kotsonis@pinsentmasons.com)