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White Paper Conferences - Awarding Public Contracts Skilfully and Lawfully within the Procurement Rules



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How will the Competitive Flexible Procedure work in practice?

What are the differences, risks and advantages given its more flexible approach?

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Current procurement procedures

- Across current regimes in the PCRs, UCRs and CCRs, there are eight identifiable procurement procedures
 - Open procedure
 - Restricted procedure
 - Competitive dialogue procedure
 - Competitive procedure with negotiations
 - Innovation partnerships
 - Design contests
 - Negotiated procedure without prior publication
 - Light touch regime
- Many procedures are not really utilised and significant overlap between some of these procedures (e.g. CD and CPN)



Whatever happened to the Competitive Flexible Procedure?

- Green Paper Proposal
- Procurement Bill retained the concept, but not the name
- Two competitive procedures proposed (clause 19(2)):
 - Open Procedure
 - Such other competitive tendering procedure as the contracting authority considers appropriate for the purpose of awarding the public contract
- No default procedure, but choice of procedure must be proportionate



What's in a name?

- “Other”
- “Nameless”
- “Competitive Flexible”
- “Not the Open Procedure”
- “Closed”



Are there any rules governing it?

- “Implicitly this will operate within the bounds of the provisions of the Bill (such as procurement principles, publication and other requirement applicable to a competitive procedure) but can be designed around what would work best for the specific procurement” - *Explanatory Notes to the Bill*
- Proportionality appears to apply both to the choice between open and “other” and to the process designed for the “other” form of procurement
- Proportionality assessed by reference to the nature, complexity and cost of the contract



Rules or advice?

- Must ensure that the procedure is not designed in a manner that is unnecessarily complex or burdensome for suppliers, considering the nature, complexity and cost of the contract requirement
- Allows the design of a multi-stage procedure to include a limited number of participants in any of the stages
- Award criteria can also be refined in the course of the procedure (within the parameters set out in the Bill)



Participation

- May exclude for the following reasons:
 - Application of conditions of participation (selection criteria)
 - Intermediate assessment of tenders (successive stages)
 - Non-UK or treaty suppliers
- Not possible to add in participants who did not originally participate



Look Familiar? What happened to the Light Touch Regime?

- Green Paper proposed to do away with LTR
- Proposals for Competitive Flexible Procedure in Green Paper looked essentially the same as LTR under PCR 2015
- Current LTR applies only to social and other specific services
- LTR has been retained in the Procurement Bill, but seemingly not the same thing as in PCR 2015



Compliance with principles

- LTR in PCR 2015 made it clear that the procedure should comply with transparency and equal treatment principles
- No such explicit provision in Procurement Bill, though the Explanatory Notes suggest procurement principles must by implication be followed
- What are those principles?
- Clause 11 - Procurement objectives
- Clause 12 - National Procurement Policy Statement



Procurement Objectives

- 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
- In carrying out a procurement, a contracting authority must treat suppliers the same unless a difference between the suppliers justifies different treatment
- 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



Possible guidance from the old LTR (PCR 2015 - Regulation 76)

- Procedures shall be at least sufficient to ensure compliance with the principles of transparency and equal treatment
- Obligation to conduct the procurement in conformity with the published proposals - but possible to depart from the script if this doesn't amount to breach of the aforesaid principles
- Time limits simply required to be reasonable and proportionate
- May conduct in a way corresponding to other procedures



Light Touch Regime in Procurement Bill (clause 8)

- Expected to apply to health and social care - but Regulations to identify precise scope
- What about the NHS Provider Selection Regime?
- NHS PSR - commissioning of healthcare (excludes social care, public health and medicines)
- Seems likely that the PSR exclusions will fall into LTR under the Procurement Bill
- Higher threshold (as under the PCR 2015)



How is LTR different from the “other” procedure?

- Power to make regulations - maker must consider it appropriate for the award of contracts to be exempted from the general requirements (i.e. open or “other”)
- What does “exempted” mean? Not same as direct award provisions - still a procedure to be followed
- More latitude in evaluation - rule that criteria shall be limited to the subject matter of the contract amended to allow for both proximity and the views of receivers of services to be taken into account
- But no clarity on exactly what the procedure will look like - seems to be an even lighter touch regime



Making the most of the flexibility

- Timescales, documents, numbers of participants
- Potentially more flexibility in selection/shortlisting
- Flexibility in application of evaluation criteria at different stages
- Negotiation process
- Post tender negotiation
- Picking the best of CD and CPN



Advantages and Risks

• Advantages

- Fewer strict rules to comply with
- Fit timescales to the project, not the other way round
- Evaluation flexibility
- More scope to design the procurement

• Risks

- Ensuring compliance with principles
- Lack of clear rules as to how to do things
- Bidder uncertainty
- Increased risk of challenge?



Importance of preparation

- Without clear process driven rules, contracting authority and bidders may not be sure about what is going to happen
- Clarity needed in documenting the proposed process
- Be clear about where your flexibility lies
- Use any flexibility to change course with caution
- Make the most of preliminary market engagement



What happens next?

- Are we ready for flexibility and discretion?
- Do we prefer to have a strict set of rules to follow?
- Will Restricted, CD and/or CPN continue by default?
- Will a procedure be in due course designed by Guidance/guidance?
- Will somebody please give it a name!!!

