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White Paper

Procurement: Transparency

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Question

Navigating Transparency Obligations

Is there a limit to transparency and full disclosure from the outset under the Procurement Act, including possible breaches of confidence or prejudicing retenders?

Coverage

- **What does “transparency” mean in the new regime?** The new rules and how they differ
- **What are the limitations at the outset of a procurement:** what is published and when, new notices, potential areas of risk
- **What to do now** to meet the new obligations
- **The answer**

What does transparency mean in the new regime?



Transparency

Procurement Act 2023

Procurement Regulations 2024

- Transparency is a “*fundamental, broad reaching aspect of the Act*” (see Green Paper)
- Transparency “*by default*”
- Embedded into every stage of a procurement
- Covers:
 - The need to share information
 - Enable others to understand the decision making
 - To act with integrity (section 12 PA23)
- PA focuses on publication of notices as means to achieve this

Transparency

- Difference between current and new law
- **Current law:**
 - Hard duty to ensure transparency (see e.g reg 18(1) PCR 2015)
*“Contracting authorities shall treat economic operators equally and without discrimination and **shall act in a transparent** and proportionate manner”*
 - Case law has built up around this obligation
- **New law:**
 - No longer a duty but an *“obligation to have regard to the importance of”*
*“sharing information for the purpose of allowing suppliers and others to understand the authority’s **procurement policies and decisions**”*

Transparency

- Current law focuses on fair competition in a particular procurement process
- New law focuses on authority sharing information so public spending is more transparent (visibility)
- New law says CA's need only have regard to transparency within specific procurements

- Need to read alongside PA 23 sections 12 (2) and (3) i.e

“In carrying out a covered 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”.

At outset of procurement

- New notice requirements a big change for CAs and suppliers
 - Central digital platform for all notices (improved Find A Tender)
 - Contracts Finder being abolished
 - New FTS will work with existing e-platforms
 - New Supplier Information System
- A Planned Procurement Notice cannot be used as a call for competition (PCR 2015 allows)
 - Can only reduce timescales for tender if a “qualifying notice”
- Additional requirements for £5m plus contracts including KPIs and contract publication

At outset of procurement

- **Procurement Pipeline Notice (UK1)**
 - Mandatory for CAs with projected spend of £100m+ on 18 month forward view
 - Optional for others including private utilities
- **Preliminary Market Engagement Notice (UK2)**
 - Mandatory where market testing is expected or has happened
 - Need to explain why not in tender notice
- **Planned Procurement Notice (UK3)**
 - Similar to current PIN
 - Optional but can reduce timescales for tender
- **Tender Notice (UK4)**
 - Mandatory for new open/ comp flexible procedure incl. to set up framework or DM
 - Mandatory for regulated below threshold contracts
 - Mandatory for new tender through existing DM (except utilities)

What needs to go into Tender Notice?

- **Section 21 PA 23 PLUS**
- **Regulations 18 – 23 PR 24**

- CA must provide any “associated tender documents” in accordance with the Tender Notice (section 21 (3) PA23)
- Associated tender documents means “any information supplementing the tender notice including, where appropriate, information duplicating the information [required for Tender Notice] (reg 23 PR24)

- CA may not invite suppliers to submit a tender unless satisfied that Tender Notice or associated tender documents contain
 - (a) information sufficient to allow suppliers to prepare such a tender, and (b)
 - in particular, details of the goods, services or works required by the CA

- CA must be satisfied that requirements
 - (a) are sufficiently clear and specific, and
 - (b) do not break the rules on technical specifications

Limitations

- **Two main areas:**
 - **National Security** (as now)
 - **Commercial Sensitivity**
 - If information is sensitive commercial information PLUS
 - Overriding public interest in withholding (section 94 PA 23)
- Govt considers same legal analysis as Freedom of Information Act
- Need to explain what is being withheld (unless National Security grounds) e.g in Tender Notice
- Procurement Regulations set out content of notices

Unique Identifiers

- CAs and suppliers, and each procurement will have a UI
- UI for a procedure will enable data for whole procurement journey to be captured
- Awarded contracts will have own UI
 - Will link to original advert etc
 - Covers all stages
 - Will track changes to contracts
- **Likely area for challenge/information requests**

Material decisions and record keeping

- Retain documents for 3 years from contract award for
 - Material decisions relating to the procurement
 - Communications with suppliers or
 - Where a notice is required under PA23
- **“Material decisions” (section 98 PA 23)**
 - a decision is “material” if, under this Act, a contracting authority is required—
 - (a) to publish or provide a notice, document or other information in relation to the decision, **or** (b) to make the decision.
- Any decision by the CA?!

Your next steps

Get ready for change

- New notices and administrative resource CA side
- Suppliers need to register for FTS and obtain UI
- Front loading of information provision
- Be prepared to share redacted contracts (£5m+)

The answer

- Transparency isn't the same obligation in new rules
- Sharing information isn't the same as being transparent to bidders in a process
- CAs need only to have regard to need to be transparent to bidders
- May be cases where other factors outweigh transparency
- Greater flexibility than now?
 - Document that regard has been had and is that enough
 - Potential for CAs to act in a way which wouldn't be transparent under current law
 - Case law will likely develop this area (and quickly)

Thank you.

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