

‘How can new and innovative drafting strategies help you manage and mitigate inflation risks and supply chain disruption while addressing stakeholder concerns about going to market?’

Graeme Young
Partner

Outline

Inflation and supply chain risks in public sector procurement



Approach to managing and mitigating these (through key stages of any regulated procurement process)



Concluding thoughts & questions



The background features a series of overlapping, wavy, diagonal bands in various shades of green and blue, creating a dynamic, abstract pattern. The colors range from deep teal to bright lime green.

Inflation risks and supply chain disruption

Guardian
'We are a political project':
how HS2's costs have
spiralled out of control



Construction Enquirer
Buckingham Group
supply chain hit for
over £108m



CN Construction News
Inflation 'adds £23bn to
annual construction
output costs'



Guardian
UK building material
costs soar on strong
construction orders



BBC
HS2: 'Crazy' not to
review project over
soaring costs - Shapps



BBC
Building projects hit by
lack of supplies and
price rises





BBC
Scottish infrastructure
plans no longer affordable
- watchdog



BBC
Buckingham Group
construction company
on brink of collapse



Guardian
True cost of Edinburgh
tram line has exceeded
£1bn, says report



STV News
Scotland's £26bn
infrastructure target to be
missed, auditor warns



Independent
Scottish councils facing
real-terms cut even with tax
increase, says think tank



BBC
Tricky decisions as
Scotland's councils face
budget shortfalls



Pre-procurement

Key points



Procurement planning



Scope out the project, being realistic on timelines and costs



(Early) market engagement



Understand the form of contract

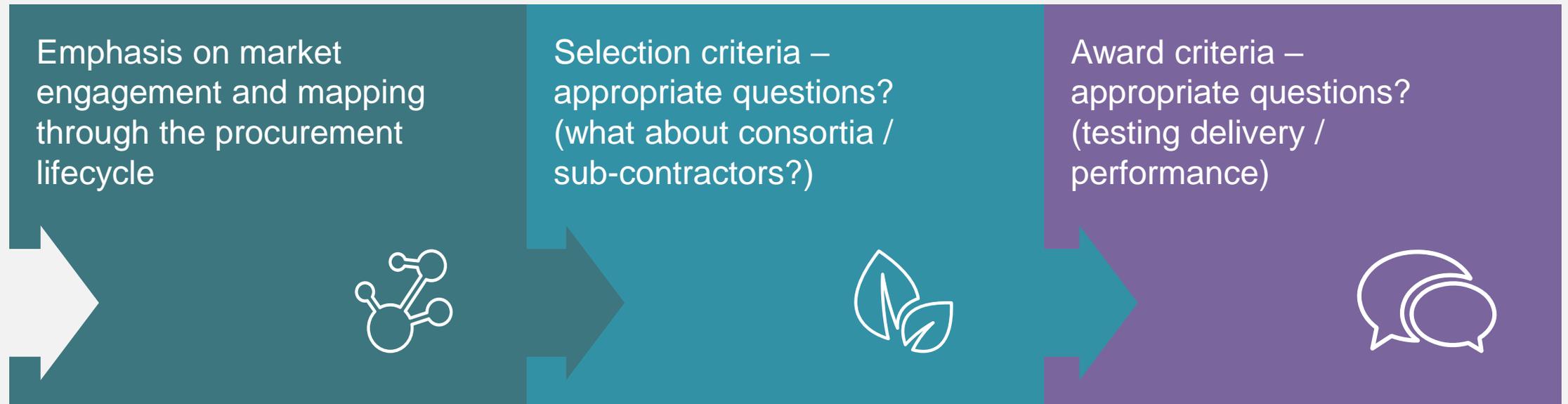


Use the tools (guidance and expertise)

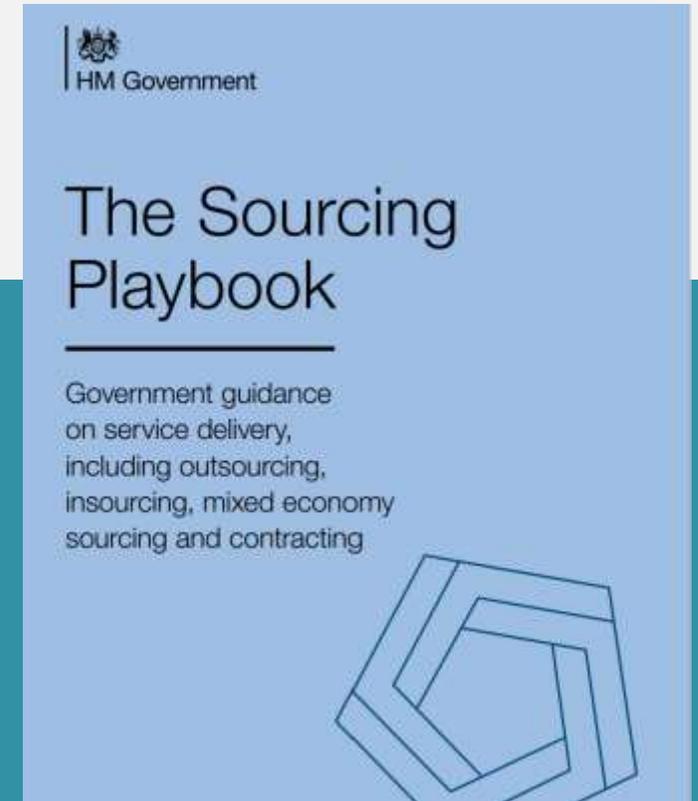
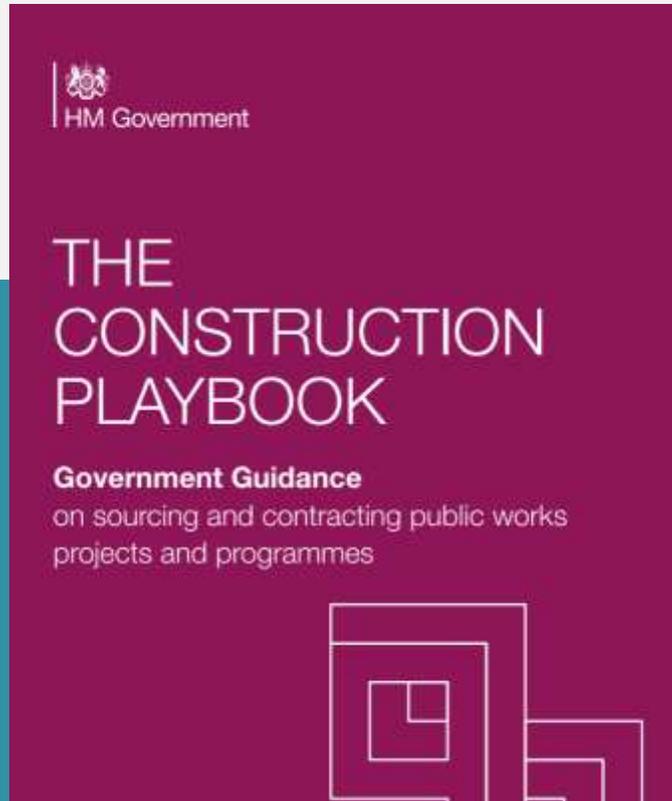


Prepare a robust procurement strategy, including a set of core tender documents

SPPN 9/2020 – supply chain resilience and diversity



Playbooks (1)



Playbooks (2)



- *'It is essential that contracting authorities assess and manage the risk of inflation and look to implement an agreed approach at the pre-procurement stage'*
- *'Consider the supplier's ability to manage these costs, and only consider indexing costs that are outside the control of the supplier'*
- Use of composite indices or indices for specific cost lines?
- Use of Open Book Contract Management (OBCM)
- *'Absence of a mechanism to manage inflation will essentially transfer the risk to the supplier'*

Ducks in a row before going to market

Procurement
plan
(+approvals)

Contract
Notice
(PCS / FTS)

PQQ / SPD

ITT / ITN

Form of
contract



In-procurement

Key points



Approach will depend heavily on the procedure you are using



Higher value, more complex projects should be using CPN / CD



Financial standing and selection stage criteria / exclusion grounds can be re-tested through tender stage



Value proposition needs to be tested through the Quality and Price submissions (alongside the contract documents)

Negotiation, down-selection and BAFOs

- Minimum requirements, should be the *minimum*
- You can't change your award criteria, but you can refine your requirements / contract documents
- Use of BAFOs (*Danninger v Bus Atha Cliath [2007] IEHC 29, at paras. 39-52*)



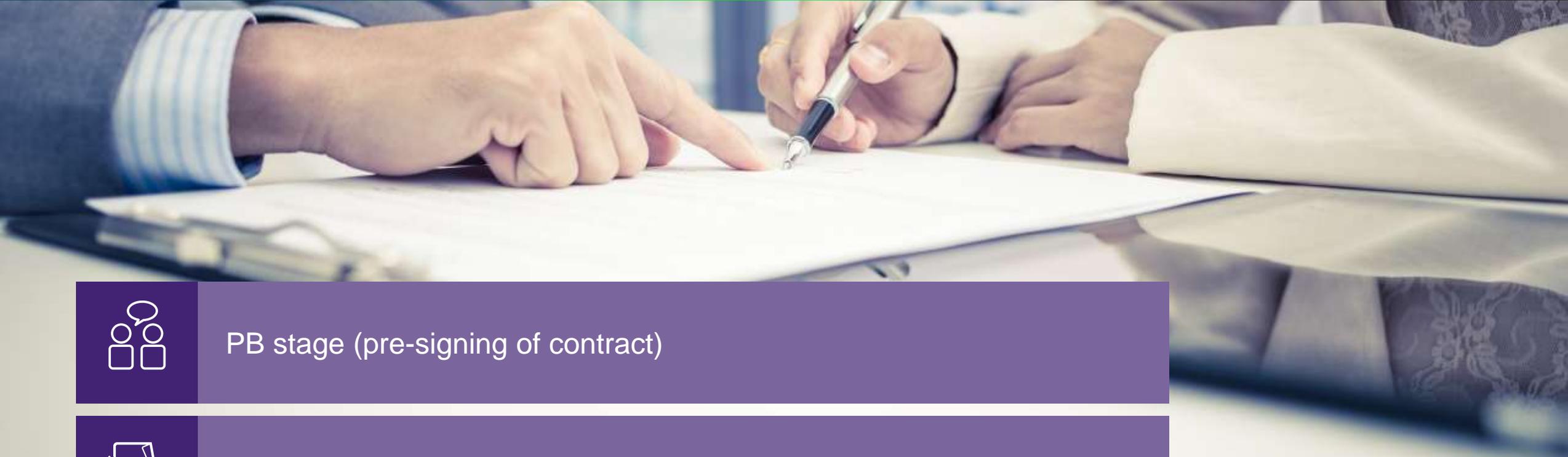
What if your strategy doesn't work?

- Options to rewind, being respectful of the expectations of the RWIND?
- Pull the plug, and abandon? (*Montpellier Estates Ltd v Leeds City Council* [2013] EWHC 166 (QB), at para. 445)



Post-procurement

Key points



PB stage (pre-signing of contract)



Post-award stage (post-signing of contract) – Regulation 72

PB stage



More relevant for high value / complex procurement using CPN / CD

Also relevant for “two-stage” D&B contracts?

Need to satisfy duties of equal treatment and transparency

**EC Decision in Case –
264/2002, *London Underground***

Can Reg. 72 principles be applied equally to PB stage?

Modifications (Reg. 72(1)(a))

‘where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents 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; and*
- (ii) do not provide for modifications or options that would alter the overall nature of the contract or framework agreement;*

James Waste Management [2023] *EWHC 1157 (TCC) (1) (at paras. 197-218)*

Confirms the strict interpretation of Reg. 72(1)(a)

→ Clauses should state the scope and nature of possible modifications and the conditions under which they may be used

→ While not accepted by the Court in this case, authorities should be able to draft provisions covering inflation and supply chain disruption.

Modifications (Reg. 72(b)-(f))

- (b) – additional works, supplies or services
- (c) – unforeseen circumstances
- (d) – replacement contractor
- (e) – not substantial / *Presstext*
- (f) – *de minimis*

All potentially relevant when dealing with issues arising out of inflation risk and supply chain disruption

James Waste Management [2023] EWHC 1157 (TCC) (2)

Reg. 72 case-law seems to rely heavily on Reg. 72(1)(e) – modification is “not substantial” (old *presstext* rules)

- Change is more likely to be considered not substantial if the value can be shown to be minimal compared to the overall value of the contract (here 0.26% of contract value) (at para. 121)
- Test is whether the change could be said to mean another tenderer would have had “a real prospect” of winning the original contract (at para. 142)
- Any change to the “economic balance” of the contract should be measured against Arrowsmith’s yardstick of “reasonable compensation” and whether justified (rather than necessarily the original contractual charging mechanism) (at para. 164)

Concluding thoughts &
questions

Concluding thoughts



You can manage and mitigate inflation and supply chain disruption



To do so, you need to understand the market, the suppliers' business / delivery models and the form of contract



And build relevant provisions into the tender documentation, specification and contract documents; and then actively manage the contract



Graeme Young

Partner | CMS Edinburgh

T: +44 131 200 7515

E: graeme.young@cms-cmno.com



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