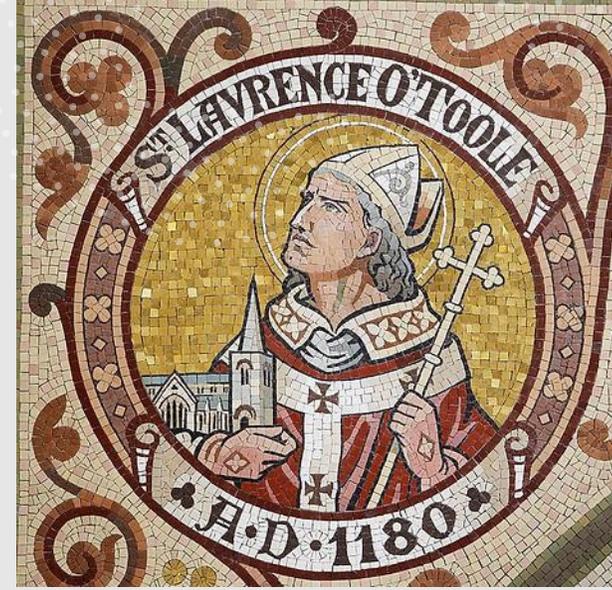


How much extra flexibility do you have to negotiate with bidders under the future Procurement Act? What will you be able to do that you can't do now?

How will you advise your clients?

- Michael Bowsher KC
  - Barrister: London, Belfast & Dublin
  - King's College London



# Late Stage Change in Regulated Procurement – Some History

## Historic Disapproval of Post-Tender Negotiation

- Negotiation as a Generally Negative Word
- Driving out Discussion in the Interests of Integrity
  - A rather 1990s view of economics that open tendering will achieve the most efficient outcome?
- The Challenge of maintaining competitive tension
- Some Flexibility & a Risk Based Assessment
  - Aspey & Craven, “Regulating Complex Contracting: A Socio-legal Study of Decision Making Under EU and UK Law” (2018) 2 MLR 191

Was there both too much and too little negotiation?

- More recently see very limited reference to Negotiation in Playbooks

And are we now denying ourselves the opportunity of making the most of those supplying the Public/Utilities Sector

- Dampening supply led innovation?



# The Value of Negotiation

Negative Connotations in the Internal Market Law – Negotiation means Someone's Up to No Good

Insufficient Research into Value but, for instance,

Manso & Nikas, "The application of post tender negotiation procedure: a public sector procurement perspective in UK"  
International Journal of Information Systems and Project Management  
Vol 4 No 2

Negotiation may be necessary e.g.

- For Financial Elements in Public-Private Transactions  
Kennedy-Loest, "What can be done at the preferred bidder stage in competitive dialogue?" (2006) PPLR 316
- For Innovation  
Especially if Innovation necessitates engagement from the Supply Chain – essential for, say, Net Zero Procurement



# Guidance on Late Stage Change in Regulated Procurement

London Underground PPP – some measure of tolerance

- Preferred Bidder No Longer Best
- Someone else might have bid or won
- The Contract is Substantially Changed

Case C-561/12, Nordecon

Very Few References in PPRS Cases

Compare with Emerging Practice in Changing Contracts

- Case C-454/06, Presstext
- Edenred (UK Group) v HM Treasury
- Legislative Provisions



# The Procedures

Competitive Dialogue

Various Forms of “Negotiation”

Innovation Partnership



# The Constraints

## Strict Application of Equal Treatment & Transparency

- Re-emphasised in various references spread through the legislation

## Bid Challenges

- Including Guerilla Tactics during Ongoing Negotiations

## Internalised Concerns about Negotiations

- Risk Based Assessment

Do we Deny the Nation Best Value by Applying this Approach?



# Procurement Bill

cl. 11, 26 October 2022

- Procurement Objectives
  - Value for Money
  - Maximising Public Benefit
  - Understanding Decision
  - Integrity
- (2) “In carrying out a 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.”

How Much of a Change is this?

# Procurement Bill, cl. 18, 19, 22, 23, 30

- 18(1) Award to MAT as defined in Award Criteria
- 19 (5) A competitive flexible procedure may provide for exclusion by reference to an intermediate assessment - but still by reference to award criteria, not some criteria.
- 22/23 Criteria
  - Under 23 a competitive flexible procedure may provide for refinement of an award criterion before submission of tender.
  - but “not if someone else could have stayed in the process” (23(3))
- 30 Modifying a Procurement
  - Before submission of tenders



# New Approaches

- Back to 11(3) in Bill
  - (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.”
  - So let’s think about deciding that some different treatment is going to be needed and fair.
  - Identify what is going to be negotiated, when and why?
  - Probably need to start from a broader context for discussions set in the tender documents
- UNCITRAL Model Law, Article 50
  - Consecutive Negotiations on Quality, then Price
  - Under that model Quality Criteria still fixed.
  - Perhaps adapt to refine Quality Criteria before tender, but hard to reconcile with constraints on refinement



# Advice

- Back to the Risk Based Analysis
- Unfortunate Impact on Advice
  - Is all non-compliance to be looked at as Risk-Based Question
  - The concerns of Tofu-eating Blogerati
  - Integrity etc should not be “risk based”
- Risk Based Perspective Emphasised by Distorted Remedies System based almost entirely on Bidder Challenge
- Pressure for Dilution of Ethical Standards of Lawyers
  - Compliance with Procurement Objectives should not be just a matter of Risk Based Assessment
  - If advice is only risk based, then Integrity becomes negotiable



# Broader Proposals

- Is the Certainty of strict Transparency and a Bid Challenge System outweighed by the Uncertainty of the post tender regime?
- We need to make the most of our Public Spending
  - Of course many purchasers already do....But
  - A lack of Clarity and Uncertainty disincentivises Innovation
  - Creates lack of Clarity on Integrity
  - And Risks Reducing Appetite to Participate at All
- Signals Required as to When and How Negotiation can be Used: Safe Harbours in Secondary Legislation and Soft Law
  - backed up by Robust Advice which encourages Negotiation properly constrained in the Right Circumstances





How much extra flexibility do you have to negotiate with bidders under the Act?

What will you be able to do that you cannot do now?

How will you advise your clients?

See also <https://mostlyprocurement.typepad.com/>



**Michael Bowsher**  
Barrister, Visiting Professor, Arbitrator

