

“Competitive Flexible” procedure

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The question

How will the Competitive Flexible procedure work in practice?

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

Coverage

- Existing procurement routes
- The new competitive procedure
- Light Touch contracts and utilities/defence
- The answer / Q+A

Setting the scene



Government believes these reforms can transform public procurement to make it faster, fairer and more effective.

UK Govt Green Paper 2020

Existing procurement routes

8 current procedures across PCR, UCR, CCR and DSPCRs:

- Open
- Restricted
- Competitive Dialogue
- Competitive with Negotiation
- Design Contests
- Innovation Partnerships
- Negotiated procedure without prior publications
- Light Touch Regime

What is proposed?

- **Procurement Bill**

- Section 19(2) says:
- Open procedure (broadly “as is”) or
- “*Such other procedure*” as the CA considers appropriate for the purpose of awarding the contract

- **Competitive Flexible?**

- Term was used in Green Paper but now disappeared
- No default procedure but proportionality essential in choice

Procurement Principles

- **Must have regard to**
- Delivering value for money
- Maximising public benefit
- Sharing information
- Acting, and being seen to act, with integrity

- Equal treatment – unless difference between bidders justifies different treatment
- Must take all reasonable steps to avoid putting supplier at an unfair advantage or disadvantage

Maximum flexibility, or Wild West?

- Cultural switch from process driven procedures
- Parameters:
 - Must operate within provisions of the Bill e.g Procurement Principles and advertisement (see Explanatory Note to Bill)
 - Proportionality needed in choice of open or other and to the process designed within competitive process.
- Higher risk of procurement challenge/ skirmishes on design of new procedure seems likely

Maximum flexibility or Wild West?

- All procedures must be designed so as not to be “*unnecessarily complex or burdensome for suppliers*”
- Can use a multi stage slim down of bidders (as now in CD/CPN)
- Award criteria can be refined in some cases as process continues

Choosing the winner

- As now:
- Can exclude at selection stage (bidder doesn't meet conditions)
- Can exclude on slim down stage(s)
- Non UK/Treaty suppliers – note position on key sub contractors
- Can't add a bidder later who didn't pre qualify

Light Touch Regime – stay or go?

- Green Paper proposed to abolish
- LTR survives (in current draft) but changed – section 8
- LTR procurements should follow Procurement Principles
- Expected to be used for certain health and social care contracts – Regulations promised
- NHS Long Term plan – interface not yet clear
- Higher thresholds

How is LTR different?

- Ministers can make contracts “exempted” under Regulations
- Exempted isn’t a direct award – still a process to follow
- More flexibility in evaluation – subject matter of the contract rule is lifted to allow service users views to be included
- Nothing further yet
- Risk of complaints/ challenge especially on conflicts of interest/incumbent suppliers

Considerations for CAs

- Blank sheet of paper?
- Early market engagement likely to be very important when designing process
- Clarity on timescales, number of bidders, how shortlisting will work, how bids will be evaluated
- Golden Thread for negotiations
- Audit trail
- Approach to post tender negotiation

Considerations for CAs

- Bidders need to be able to understand process (RWIND bidder)
- Authority needs to understand pressure points and decision making/governance
- Once the process is set, you should stick with it
- Are you prepared for extra notices, confused bidders and wary staff?
- Internal guidance and bidder days/engagement

The answer

- Seemingly endless possibilities to structure
- Will CAs end up designing their own processes?
- Might existing procedures just get used in practice?
- Regulations and Guidance could design a process
- Bill not yet law and could yet change – update next year!

Q&A

440

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