Bird & Bird

Cabinet Office - Transforming public procurement

Green Paper consultation:

Synopsis of the changes proposed to public procurement law

February 2021

Foreword

All change for public procurement?

Introduction

On 15 December 2020, the Cabinet Office published its proposals for transforming the current public procurement rules. In the words of Lord Agnew, Minister of State for the Cabinet Office, the UK's exit from the European Union "*provides a historic opportunity to overhaul our outdated public procurement regime*". In our view, the Green Paper certainly suggests that the Cabinet Office are aiming to make the most of this opportunity.

The Green Paper is some 78 pages in length and explains the Government's current thinking in terms of what a 'new' regime may look like. However, it is clear that many of the ideas proposed within the paper require much further clarification in order to fully explain how such reforms would work in practice. There are also some proposals which may require further consideration from a practical perspective, and whether they are likely to help or hinder achieving a better, more flexible, regime.

Purpose of this paper

Given the length of the Green Paper, and in light of the fact that much of the document assumes that readers will have a fairly advanced understanding of the current public procurement regime, this document provides a summarised version of the proposals, together with a comparison between the current and the proposed regime.

The Cabinet Office has asked for feedback on its proposals by 10 March 2021. We intend to submit a response to the consultation and as part of this, we invite our clients and contacts to submit any thoughts to us in advance of this deadline, in the event that they do not wish to respond directly to the consultation themselves. We believe that the proposals should be of equal importance/interest to authorities and utilities, as well as private sector suppliers with a public sector customer base.

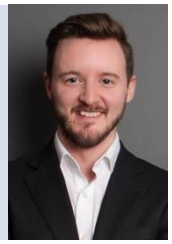
We hope that you find this document useful. We would be delighted to hear your thoughts on the proposals by contacting any member of our UK Public Projects and Procurement Team (see contact details set out below).

Stuart Cairns
Partner
Tel: +44 (0)20 7982 6439
stuart.cairns@twobirds.com

Roger Bickerstaff
Partner
Tel: +44 (0)20 7415 6160
roger.bickerstaff@twobirds.com

Claire Gamage
Senior Associate
Tel: +44 20 7415 6023
claire.gamage@twobirds.com

Chris Murray
Senior Associate
Tel: +44 (0)20 7415 6190
chris.murray@twobirds.com



Changes proposed

Synopsis

	Change proposed	Position in current regime	Change(s) proposed
1.	**New procurement principles**	The main principles which underpin public procurement exercises include: • transparency • equal treatment • non-discrimination • proportionality • mutual recognition	The Green Paper proposes to update the principles which will apply to the following: • transparency • non-discrimination (n.b. note that this means that authorities may not discriminate against suppliers based in countries which are a signatory to the GPA, which includes the EU) • value for money • the public good • integrity • efficiency • fair treatment of suppliers
2.	**One set of rules**	There are currently four separate sets of regulations including: • Public Contracts Regulations 2015 (PCR) • Utilities Contracts Regulations 2016 (UCR) • Concession Contracts Regulations 2016 (CCR) • Defence and Security Public Contracts Regulations 2011 (DSPCR)	Proposal to amalgamate all four pieces of legislation so that the same set of rules will apply to all types of public procurement covered by the previous regulations. There will, however, be some sector-specific provisions in order to accommodate specific issues related to utilities and defence procurement for example.
3.	**Procedures**	There are currently seven different types of procedure across the various sets of regulations including:	Proposal to condense the current seven procedures into three procedures, i.e.:

		• Open • Restricted • Competitive Dialogue • Competitive Procedure with Negotiation (or the 'Negotiated Procedure' in respect of utilities procurement) • Innovation Partnerships • Design contests • Negotiated procedure without prior publication	• Open (same as the current open procedure – for simpler 'off the shelf' procurements) • Competitive Flexible Procedure (will replace Restricted, Competitive Dialogue, the Competitive Procedure with Negotiation, Innovation Partnerships and design contests and will be used for all concession contracts) • Limited Tendering – will replace the negotiated procedure without prior publication, however will now also permit the use of this procedure in times of 'crisis' (it is proposed that the Minister for the Cabinet Office is provided with new powers to declare a crisis for the purposes of utilising this procedure)
4.	**Framework agreements**	Framework agreements currently operate as "closed" systems and are subject to a maximum duration of four years under the PCR, eight years under the UCR and seven years under the DSPCR.	It is proposed that two options will be available for framework agreements: • Closed – where no further suppliers are permitted to join the framework following the initial competition, however these will remain subject to a maximum period of four years • Open – will have a maximum duration of eight years, provided that they remain open for new suppliers to join at defined points in time (with the proposal that the framework can operate as a 'closed' framework for the first three years only). Contracting authorities will continue to be permitted to limit the number of suppliers on a framework at any one time, but if this option is utilised, the authority will need to re-evaluate the bids of suppliers already on the framework alongside 'new' suppliers each time the framework is re-opened, to determine which suppliers are allocated the available places.
5.	**Transparency**	Authorities are required to retain certain documentation which other authorities, or interested parties, may request (e.g. as part of a freedom of information request, consideration of a challenge, etc.). An example	The Green Paper suggests a fundamental change in this area. In order to maximise transparency, authorities will be required to publish information about a procurement as it progresses through the procurement lifecycle (e.g. the identity of the bidders, the basis of the award decision,

		of this would be the 'regulation 84 report', i.e. a report which documents key decisions made by the authority during a procurement process. Such documentation is not generally made public as a matter of course and in order to retain information about a procurement process, interested parties are usually required to issue a request to the authority. Where this is refused, this may force a party to issue a freedom of information request or apply to the Courts for disclosure.	evaluation reports etc.), but only to the extent that such information would be publishable under the Freedom of Information Act, Environmental Information Regulations and the Data Protection Act. The intention is to implement this practice by requiring authorities to undertake fully electronic procedures in accordance with the Open Contracting Data Standard (an internationally recognised standard which describes how to publish data and documents at all stages of the contracting process). This information will be retained/published on a central register and authorities will be required to declare in their tender documents when information will be published. Authorities must comply with this requirement at the time of posting their contract award notices, otherwise they will not be able to initiate contract award and enter into standstill.
6.	**Removal of standstill letters**	Subject to a limited number of exceptions, at the point an authority wishes to award a contract to a supplier, the authority must send a letter to unsuccessful bidders which must include certain information (e.g. the identity and scores of the successful bidder, the scores of the unsuccessful recipient and reasons for those scores and the characteristics and relative advantages of the successful bidder's tender).	As the proposal is to introduce greater transparency throughout the procurement lifecycle (as discussed at Issue 5), the proposal is to remove the obligation to send out standstill letters at the end of the process, albeit guidance will be published which will recommend that sending a standstill letter will constitute best practice. Further, that unsuccessful bidders will not receive the comparative information about the successful bid (i.e. characteristics and relative advantages).
7.	**New central platform**	New requirements were introduced as part of the 2014 EU Directives on public procurement to require procurements to be conducted electronically (subject to certain exceptions such as procurements which require the submission of physical or scale models which cannot be transmitted by electric means). Authorities currently use a range of tools to enable them to do this, including e-portals licensed by third party providers. At present, there is no 'central' platform which enables e-portals to integrate with each-other,	It is proposed that the requirement to conduct electronic procurement will continue, however will be expanded by introducing a new central platform which will: • hold the information which authorities will be required to publish pursuant to the new transparency proposals discussed in Issue 5 above • require third party suppliers of e-portals to share data with the new platform (as discussed in relation to Issue 5 above, such providers must ensure that their software/systems comply with the Open Contracting Data Standard) with the aim that

		and no single database which holds information about procurements and public sector suppliers.	suppliers/citizens need only to go to one place to access information • enable publication of contract notices in Find a Tender service and Contracts Finder Over time, it is proposed that the central platform should be able to host additional functionality including: • register of suppliers (i.e. a single place for suppliers to register certain information under the "tell us once" principle, i.e. to eradicate the requirement for suppliers to complete the same basic information time and time again across different e-portals) • register of commercial tools (i.e. framework agreements and DPS+ agreements) • contract performance data including spend data and KPIs • central debarment list • procurement pipelines • central register of complaints • register of legal challenges.
8.	**Procurement challenges (formal)**	At present, claims concerning breaches of the PCR, UCR, CCR and DSPCR are initiated by issuing a claim form in the High Court of England and Wales. Procurement challenges are usually allocated to the Technology and Construction Court (the "**TCC**"), which has an established panel of judges which has built up expertise over a number of years. Typically, these cases can last anything up to 18 months before the trial takes place (unless the claimant requests an expedited trial and the request is granted). Due to the level of damages often sought by claimants, the Court filing fee alone typically falls within the highest tier (i.e. circa £10,500). Claimants would then typically instruct both specialist solicitors and barristers to advise on points of law, strategy, drafting	The Green Paper sets out a number of proposals for reforming procurement challenges, with the objective of 'speeding up' the challenge process and making it more accessible. The proposed changes include: • *Tailored fast track system* – an expedited trial process tailored to the individual challenge (e.g. consideration of the urgency of the need to award the contract, value of the claim, the stage of the procurement etc.) • *Written pleadings* – certain types of claim to be reviewed on the basis of written pleadings only. It is envisaged such claims may not require the instruction of barristers. • *Disclosure* – it is hoped that the new transparency requirements (see Issue 5) will dispense with the issue of challengers needing to request basic

		pleadings and represent them in Court. In turn it is not unusual for the costs of challenging a procurement to amount to hundreds of thousands of pounds (albeit if the claimant is successful at trial, the majority of its legal costs should be reimbursed by the authority).	information about a procurement process from the authority. However, the proposal is to develop clear rules to establish what additional information should be disclosed as a matter of course and provide some further clarity on the use of confidentiality rings. • *Capacity* – it is proposed that the TCC will encourage claimants/lawyers to make more use of the TCC's district registries outside of London to free up capacity in addition to employing a 'procurement only' judge who should be able to provide active case management in shorter timescales. • *Timescales* – in the early part of proceedings, defining and aligning common timescales for submission of pleadings. Half day (Part 8) hearings may also be introduced where claims relate to a specific point of law. Further proposals include: • encouraging authorities to undertake a time-limited, formal independent review of procurement challenges to reduce pressure on the Courts (albeit it is unclear whether this will impact on the continuation of the relevant limitation period); and • the potential transfer of a sub-set of challenges to a tribunal-based system. Tribunals may deal with, for example, low value claims or challenges concerning an ongoing procurement. It is envisaged that this will provide a cheaper and faster route for claimants.
9.	**Procurement challenges – remedies available to claimants**	Claimants have a number of remedies available to them, which differ depending on whether the claim form is issued before or after the contract has been executed with the successful bidder and whether the grounds for seeking the remedy(ies) concerned are met. Essentially these include: *Pre-contract* • an order to set aside the decision or action concerned	The Green Paper expresses a preference to requiring authorities to re-run or rewind procurements, setting decisions aside and/or amending documents, rather than awarding damages. While it is proposed that the remedy of damages remains, it is suggested that post-contract damages may be capped to the claimant's legal fees and 1.5x of their bid costs (subject to certain exemptions including whether malfeasance has been demonstrated). In respect of the automatic suspension, it is proposed that the test for determining whether the automatic suspension should be lifted (which would permit the

		• an order requiring the contracting authority to amend a document • interim orders • damages (uncapped – linked to profit) • automatic suspension *Post contract* • declaration of ineffectiveness (or contract shortening) • damages (uncapped – linked to profit)	authority to enter into the contract with the successful bidder), is amended from the current approach (which is based on the American Cyanamid test), to balancing public interest, urgency, the upholding of the regulations and the impact on the winning bidder.
10.	**Replacement of Cabinet Office Public Procurement Review Service (PPRS)**	The Cabinet Office currently operates the PPRS which enables suppliers to raise concerns, anonymously, about potentially poor public sector procurement practice. The service was launched in February 2011 (originally badged as the "Mystery Shopper" scheme) and aims to investigate complaints of non-compliance with the public procurement rules as well as investigate issues of non-payment. The PPRS's recommendations to the contracting authority are non-binding, however it regularly publishes information about its investigations online.	The Green Paper proposes to replace the PPRS with a new unit, supported by an independent panel of experts, to oversee public procurement capability. The unit will not focus on securing individual remedies for individual suppliers, but instead will be aimed at improving public procurement capability and practices for the benefit of all contracting authorities and suppliers. The unit will have intervention powers to issue improvement notices/recommendations and if such recommendations are not followed, the unit could have recourse to further action such as spending controls.
11.	**"Crisis" as a new exemption to the requirement to undertake a regulated competition**	As described in Issue 3 above, the regulations enable the use of the "negotiated procedure without prior publication" of a contract notice. This procedure can only be used in very limited circumstances including: • absence of tenders or suitable tenders in an advertised procurement • artistic reasons, technical reasons or exclusive rights • extreme urgency • for the purchase of research and development goods	It is proposed that: • the "negotiated procedure without prior publication" of a contract notice will be re-named as the "limited tendering" procedure • that in addition to the current grounds for use of this procedure, authorities will be able to utilise this procedure where a crisis has been declared by the Minister of the Cabinet Office.

		• additional purchase of goods where a change in supplier would result in technical difficulties • purchase of goods on commodity markets • purchase of goods on advantageous terms due to winding up or bankruptcy • design contests • repetition of works and services in limited circumstances.	
12.	**Dynamic Purchasing Systems (DPS) and Qualification Systems**	DPSs may only be used for "commonly used goods and services". Qualification systems are only available under the UCR.	Proposed that a new 'DPS+' will be introduced to replace both DPSs and qualification systems. A DPS+ can be used for all types of procurement, not just commonly used goods and services.
13.	**Debarment list**	Current legislation includes a list of mandatory and discretionary exclusion grounds which require/enable an authority to exclude a bidder in certain circumstances (e.g. human trafficking offences, child labour etc.). However, there is no central list or register which would enable an authority to verify that no such grounds exist without undertaking further investigations itself (and therefore, authorities are very much reliant on 'self declarations' from bidders).	The Green Paper proposes developing a centrally managed debarment list of entities who have relevant convictions to make it easier for authorities to identify organisations that must be excluded from procurements. It is intended that the list will only relate to the mandatory grounds for exclusion initially, however, may be extended to include some discretionary grounds in the future.
14.	**Supplier poor past performance**	Contracting authorities may exclude a candidate from a procurement process where the candidate has "*shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract [...] which led to early termination of that prior contract, damages or other comparable sanctions*".	It is proposed that this ground for exclusion is expanded in order that an authority is able to exclude a candidate where it has shown "significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract", however there would be no requirement for the authority to determine that the poor performance resulted in termination. The Green Paper also discusses implementing a 'USA style' system which would require authorities to evaluate suppliers' contract performance based on prescribed KPIs. This information would be published and be made available to all authorities. It is envisaged that later down the line, a threshold will be determined whereby if a supplier's performance falls below the pre-determined

			threshold, then it may then be possible to exclude that supplier from public sector contract opportunities for a set period of time.
15.	**New exclusion grounds**	Regulation 57 of the PCR, 80 of the UCR, 38 of the CCR and 23 of the DSPCR list circumstances where authorities/utilities must, or may, exclude candidates from a procurement process.	The Green Paper discusses introducing two *new* mandatory exclusion grounds concerning offences related to fraud (previously, the regulations only covered offences related to fraud against EU institutions). In addition, it is proposed that the following amendments to the grounds for mandatory and discretionary exclusion will be implemented: • new mandatory exclusion ground related to the non-disclosure of beneficial ownership (meaning that candidates who do not disclose the identity of their beneficial owner(s) will be automatically excluded) • extending the obligation to exclude where the person/entity convicted is a beneficial owner • rearranging the provisions relating to the non-payment of taxes and consideration of how tax evasion could be included as a discretionary exclusion ground • inclusion of a discretionary exclusion ground covering deferred prosecutions.
16.	**Social value**	Under the Social Value Act 2012, contracting authorities are required to have regard to economic, social and environmental well-being in connection with public services contracts. However, despite there being clear provisions in the regulations which permit the use of such criteria/contract conditions, confusion has often arisen about whether criteria and contract conditions to achieve social value are compliant with the public procurement rules due to a number of cases heard within the European Court of Justice which arguably constrain the extent to which such criteria/contract conditions can be utilised.	Authorities will continue to be bound by the Social Value Act 2012, however the Green Paper proposes reinforcing a contracting authority's right to consider social value as part of the procurement process. For example, via the introduction of the new procurement principle of the "public good", which will reinforce that authorities can and should take a broad view of value for money that includes social value. It is also proposed that authorities should also have regard to a "National Procurement Policy statement" when structuring their procurements, so that public procurement can be leveraged to achieve social and environmental value.

17.	**Selection criteria**	There is a distinction between "selection criteria" which must first be used to assess whether candidates have the ability and experience to deliver the contract (i.e. 'backward looking' questions), and "award criteria" which focus on assessing bidders' proposals for the advertised contract (i.e. forward looking questions). Only selection criteria can be applied during the selection stage of the process and only award criteria can be applied to any subsequent stage(s).	The Green Paper discusses the fact that authorities can often become confused between which criteria constitute "selection" criteria and which are "award" criteria. To overcome this issue, it is proposed that the Government will simplify the selection stage through the use of a basic supplier information system. Candidates will submit their information which shall then be stored on a central platform. Authorities would then be able to apply their own evaluation thresholds/criteria to that information, in order to determine whether a supplier would be eligible to tender for the contract in question. If an authority wishes to further reduce the number of suppliers, this may be applied after this stage. It is not, however, clear whether the intention is to: (i) enable/require authorities to run a further, separate, selection stage to produce a shortlist of bidders who will be invited to tender; or (ii) authorities are able to use a combination of selection and award criteria as part of the next phase of the process. We anticipate further clarity will be provided on this issue in due course.
18.	**Award criteria**	Authorities must evaluate tenders on the basis of the "most economically advantageous tender" and from the point of view of the contracting authority. Any evaluation criteria relating to quality must be linked to the subject matter of the contract and must only be considered from the perspective of the procuring authority.	Proposed that authorities now evaluate tenders on matters which go beyond the subject matter of the contract and encourage suppliers to operate in a way that contributes to economic, social and environmental outcomes, by awarding contracts on the basis of the "most advantageous tender". This will also permit a wider point of view to be taken into account in respect of the evaluation of tenders (e.g. the impact on other parts of the public sector). However, award criteria must remain linked to the subject matter of the contract, except for some specific exceptions set by Government which will be set out in statutory guidance set by the Minister of the Cabinet Office.
19.	**Late payments within the supply chain**	There are statutory requirements placed on authorities in terms of ensuring suppliers are paid within 30 days. Authorities are also required to ensure that 30-day payment terms are reflected within any sub-contract between the supplier and its sub-contractors, and further any "sub" sub-contract. However,	Proposal for greater visibility to: (i) allow subcontractors to take up payment delays with the authority itself; (ii) a right for the authority to investigate payment performance of a supplier of any tier in its supply chain; and (iii) achieve alignment of public and private sector reporting requirements so that payment information is published in

	there is limited visibility at present in terms of whether this requirement is being adhered to at subcontractor level.	one place on the "gov.uk" website to allow greater scrutiny.
20. **Modifications to existing contracts**	Authorities are permitted to modify public contracts in a limited number of circumstances including: • Where the change is already accommodated for as it was referred to within the original procurement documentation/contract • Where additional works, services or supplies are required which have become necessary and where a change of contractor cannot be made for economical or technical reasons and would cause significant inconvenience or substantial duplication of cost (each such change is capped at 50% of the original contract value) • Where the change has been brought about by circumstances which a diligent authority could not have foreseen and does not alter the overall nature of the contract (again, each such change is capped at 50% of the original contract value) • Where a new contractor replaces the previous contractor (subject to certain criteria being met) • Where the change does not meet the definition of a 'substantial' change (as defined within the regulations/case law) • Where the value of the change is below both the current threshold (previously commonly referred to as the "OJEU threshold") and 10% of the initial value of the contract for service/supply contracts or 15% for works contracts.	The Green Paper proposes to: • permit amendments to be made in cases of crisis or extreme urgency • explain what does not constitute a 'substantial' amendment (so it will be easier to understand whether it is a legally permissible amendment) • require that any amendment made to a public contract is published by way of a contract amendment notice. A 10-day standstill period will apply following publication of the notice, before the amendment can be entered into (with the exception of changes which are required due to a crisis or emergency).

21. **VEATs to MEATs**

Voluntary ex-ante transparency notices ("**VEATs**") may be used by authorities for a range of purposes, one of which can be to notify the market that a contract has been amended, or the authority intends to award a contract to a supplier without undertaking a competition.

Provided that the authority's intentions are not challenged within a period of 10 days of publication of the notice and that the notice has been published in 'good faith', the authority can then enter into the contract without the risk of a challenger seeking the remedy of a declaration of ineffectiveness.

The Green Paper suggests that the concept of VEATs will disappear and instead, mandatory notices will be required where an authority intends to utilise the new limited tendering procedure and where an authority proposes to make changes to an existing public contract (unless an exemption applies). The same principle will apply in respect of the requirement for the authority to wait for a period of 10 days before entering into the contract/amendment concerned (unless a crisis or emergency applies). However, it appears that such notice does not need to be published in 'good faith' in order for the authority to ensure it is not at risk from ineffectiveness claims.

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