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Insights

BIDS, SCORES, AND BRAND NEW LAWS? A REVIEW OF THE GOVERNMENT'S PROCUREMENT BILL 2022

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SUMMARY

On 11 May 2022, the keenly awaited Procurement Bill (announced in the Queen's Speech) was formally introduced to the House of Lords and received its first reading.

Running to 122 pages (and comprising 116 sections across 13 Parts, and 11 Schedules) in its current form, the Bill is one of the Prime Minister's so-called "Brexit bonanza" bills focused on further decoupling the UK from the EU. Post-Brexit, the government views this as an opportunity for the UK to develop and implement a procurement regime unburdened by the current complex regime that derives almost entirely from EU law. Indeed, the intention is to repeal the public contracts, defence, utilities and concessions procurement regimes, and replace these with a single piece of procurement legislation that extends to contracting authorities in England, Wales and Northern Ireland (Scotland has opted not to implement the new UK procurement regime).

Whilst the Bill reflects many of the proposals outlined by the government's December 2020 Green Paper and consultation response published in December 2021, some expected changes have not made their way into the Bill. We make the following initial observations.

RUNNING A PROCUREMENT PROCESS

Procurement principles and objectives

Part 2 of the Bill is entitled, somewhat misleadingly perhaps, "Principles and Objectives". It clearly sets out (at clause 11) the procurement objectives that contracting authorities are to have regard to when conducting procurements, including delivering value for money, maximising public benefit, sharing information to promote understanding, and acting with integrity. There is also a general requirement to treat suppliers equally, unless a difference between the suppliers justifies different treatment.

Perhaps surprisingly, however, there is no equivalent clause defining or otherwise outlining the concept of procurement "principles" of non-discrimination, transparency and equal treatment, as currently set out in Regulation 18 of the Public Contracts Regulations. Rather, these "principles" appear to permeate through the Bill. The requirement for transparency, for example, is incorporated through various obligations for the publication and provision of information throughout the lifecycle of a procurement, including the new obligations to: provide a submission "assessment summary" (rather than debrief letters, as is currently the case) to bidders who submitted an assessed tender (clause 48); set and publish key performance indicators in contracts valued above £2m (clause 50); publish "contract details notice" (including, in some instances, the contract terms) once a contract has been awarded (clause 51); publish details of any breach of (or failure to perform) a public contract by a supplier (clause 66); and publish contract change notices prior to modifying a public contract (clause 70).

As set out in the Green Paper and the government's response, the Bill does not include proportionality as a standalone principle; instead, it is introduced as and when required.

Contracts covered

Unlike the existing procurement regulations, the Bill does not include detailed definitions of public works, services and supply contracts. Instead, it has a single definition of "public contract" covering supplies of goods, services or works to a contracting authority. This could be of particular significance in relation to development agreements where works are carried out with the involvement of but not for a contracting authority. Under the existing regime, many such agreements are nonetheless caught by the definition of "public works contract" following the *Roanne* line of case-law. The exclusion of such agreements from the procurement rules will be welcomed by many.

Procurement procedures and awards

The Bill has reduced (to three) the number of available procurement procedures. Contracting authorities may choose to run (at clause 19) a single-stage "open procedure" for straightforward procurements or "such other competitive tendering procedure as the contracting authority considers appropriate". The latter appears to give the contracting authorities greater flexibility to structure their procurement procedures as they see fit, albeit that further guidance is expected from the government to understand the practical application of this procedure. Direct award is also available in certain circumstances, including in extreme and unavoidable urgency (clause 40), a requirement highlighted by the need for PPE during the pandemic.

The Bill also envisages awarding tenders on the basis of the "Most Advantageous Tender", rather than the "Most Economically Advantageous Tender", which will be assessed by reference to award criteria. In its current form, the Bill appears to grant contracting authorities relatively wide discretion when setting the award criteria, which may allow consideration of price, quality, social value or

environmental benefits, whether in isolation or in combination, when evaluating and awarding tenders.

Exclusion

The Bill introduces a centrally managed debarment list and supplier register accessible to all public sector organisations (clause 59). Suppliers can apply to be removed from that list, albeit that a Minister is only required to consider such an application if he considers that there has been a material change of circumstances since the supplier's name was entered on the debarment list or the application includes information not previously considered by the Minister (clause 60).

The Bill also refreshes and broadens the mandatory and discretionary exclusion grounds, including:

- widening discretionary grounds for previous poor performance to exclude suppliers who have not performed a relevant contract to the contracting authority's satisfaction and have failed to improve their performance, despite being given the opportunity to do so; and
- extending discretionary grounds to apply to individuals and entities to which a bidder is "connected" (including those owning or exercising "significant influence or control" over the supplier).

Commercial Purchasing Tools

The Bill introduces the government's proposals to replace existing dynamic purchasing systems with new Dynamic Markets that apply to all procurements and allow new entrants at any point in its lifetime. By contrast, and departing a little from the position in the government's consultation response, an "open framework" (at clause 47) must provide for the award of a framework at least once during the three years beginning with the day of the award of the first framework in the scheme, and at least once in the five years beginning with the day of the award of the second framework in the scheme. The maximum duration of an "open framework" (which is effectively a series of successive frameworks awarded on substantially the same terms) is to be 8 years, and (contrary to the proposals) there is no limit on the number of suppliers to that framework.

The government's consultation response promised that charges recovered by the contracting authority from suppliers of framework agreements and Dynamic Markets would be "proportionate and used solely in the public interest". Whilst the Bill does provide for the charging of fees at a fixed percentage of the estimated value of the contract to be awarded, it is noticeably silent on the requirement to evidence how (and that) these fees are being used in the public interest.

CHALLENGING A PROCUREMENT DECISION

Lifting the automatic suspension

The current test for lifting the automatic suspension follows the principles set out in *American Cyanimide*, namely:

1. Is there a serious issue to be tried?

2. Would damages be an adequate remedy for either party?

3. Where does the balance of convenience lie?

The test is not specific to procurement, and presents specific challenges for unsuccessful bidders challenging the decisions of public authorities. In particular, it has traditionally been difficult for an unsuccessful bidder to show that damages will not be an adequate remedy or that the procurement challenge will not delay the contract award.

On consultation, there was a majority consensus that a public procurement-specific test could positively address the balance between public authorities and suppliers. That said, there was also a clear wish by those consulted for the impact of suspension on public service delivery to continue to be a factor taken into account.

The Bill reformulates the test, now expressly requiring the Court to have regard to:

1. the public interest, including (but not limited to) the principle that public contracts should be awarded in accordance with the law, and the need to avoid delay in the supply of goods, services and works;

2. the interests of suppliers, including whether damages are an adequate remedy; and

3. any measures the Court considers appropriate.

Whilst this may seem a move away from the traditional *American Cyanimide* test, the Bill's formulation does, in fact, retain the essence of this test. That is, the need for the Court to assess the question of "adequacy of damages", arguably the least Claimant friendly element of the existing test. The Bill does envisage that the Court will retain a wide discretion and, if enacted, unsuccessful bidders, in particular, will have to await the extent of any impact these express additional considerations (which have traditionally been considered only as part of the "balance of convenience") will be given by the Court.

Pre-contractual remedies

The Green Paper acknowledged that although there is no stated priority of remedies in procurement challenges, in practice, often this emerges as damages. If the timeframes for challenges were to be shortened (which we discuss further below), it was suggested that a preference for re-running the procurement be stated expressly in the procurement regulations.

Whilst there was support for this proposal, in principle, responses to the consultation queried the appropriateness of a stated priority in circumstances where there was a need to balance the rights of challengers to pre-contractual remedies against the public interest in ensuring public contracts are not unduly delayed.

As a result, the Bill does maintain the pre-contractual remedies available to a challenger (i.e. damages, setting aside of the decision or action, and orders requiring the contracting authority to take any action). Crucially, it declines to recognise any preference between them.

Cap on damages

It was proposed that the Bill introduce a cap on damages of 1.5x a supplier's bid costs.

In light of concerns raised as to potential unforeseen consequences, this proposal has now been abandoned entirely. Interestingly, such unforeseen consequences included potential knock-on impact to the ability for contracting authorities to lift the automatic suspension, as damages would be less likely to be an adequate remedy if capped. The move away from this proposal means that, again, the Bill does not represent a change in this area from the existing regime.

Changes to the TCC Guidance

Remodelling the Guidance Note on Procedures for Public Procurement Cases, contained in Appendix H of the Technology and Construction Court ("**TCC**") guide has been suggested and is to be explored by the TCC, Ministry of Justice and Civil Procedure Rules Committee. The following proposals have been earmarked for exploration, with a clear focus on enabling faster and more accessible challenges:

1. a fast track system for expedited trial processes;

2. greater use of written only pleadings;

3. a clear early disclosure regime;

4. increased use of the TCC district registries outside of London; and

5. an emphasis on agreeing timetables at the outset of a claim.

Changes to the guidance could significantly impact procurement disputes. To take one example, guidance enabling faster litigation would clearly play into the court's consideration of "*the need to avoid delay in the supply of goods, services and works*" when assessing whether to lift the automatic suspension.

OTHER POINTS TO NOTE

- Part 6 of the Bill introduces new rules on "regulated below-threshold contracts", with the thresholds for notifiable below-threshold contracts being £12,000 for central government authority, or £30,000 for any other contracting authority.
- Buyers are required to have regard to the government strategy priorities for procurement as set out in the National Procurement Policy Statement.
- A contract modification is permitted if the contracting authority considers *inter alia* that a known risk has materialised (i.e. a risk that could jeopardise the satisfactory performance of the contract but could not be addressed in the contract as awarded and was identified in the tender or transparency notice for award of the contract).
- The language of the Bill is different to that used in the current procurement regime and, at first glance, more accessible to authorities, suppliers and practitioners alike. It remains to be seen if these changes materially affect well-established concepts and definitions.

WHAT HAPPENS NEXT?

As it stands, the Bill doesn't represent as much of a change to the existing regime as some might have expected.

The exception could be in the area of lifting automatic suspensions, which may now see its own procurement specific test. However, given the latitude for discretion the new formulation affords, only time will tell as to how this will play out in practice.

The Bill is due to have its second reading and be debated for the first time on 25 May 2022 and is likely to be amended as it undergoes the parliamentary process. In its current form, therefore, the Bill may only partially resemble what is ultimately enacted which isn't expected to come into force until at least 2023.

The government has promised a minimum six-month implementation period to allow authorities and suppliers to prepare. In the meantime, the existing Public Contracts Regulations 2015 and equivalent defence, utilities and concessions procurement regimes will continue to apply.

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