

Welcome to

TRANSFORMING PUBLIC PROCUREMENT PREPARING FOR CHANGES TO PCR AND RECENT CASE LAW

DAVID HANSOM CLYDE & CO





Transforming Public Procurement

Preparing for new rules and recent case law

David Hansom, Partner and Head of Procurement Law, Clyde & Co LLP

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Setting the scene



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

Coverage

- How the new rules will apply to my institution and me
- Information provision and transparency obligations in disclosing future bids
- New rules on frameworks
- Case law update
- Questions and answers

Where are we now?

- Green Paper published in December 2020
- Consultation received 600+ responses from stakeholders
- National Procurement Policy Statement June 2021
- PPN 05/21
- Government response released in December 2021
- Procurement Bill Royal Assent depending on Parliamentary time
- Govt has committed to 6 months' warning – expected end 2023 earliest
- A lot will be in statutory guidance which is to follow

How the new rules will apply to my institution and me

- Universities are subject to PCR when they are “*bodies governed by public law*”
- Question of fact based on financial dependency and management control from the state
- WTO GPA contains identical provisions
- Nothing in Green Paper to change the legal test
- Nothing specific in Green Paper for the sector
- If you are within scope now, chances are you will be in 2023...

New transparency obligations

- Government has confirmed that transparency will be a key focus of the new regime
- Transparency was encouraged in the consultation, but concerns were raised about the burden this could place on stakeholders
- Final proposals are diluted overall
- The Government intends to *'ensure the transparency requirements are proportionate to the procurements being carried out and are simple to implement'*

New transparency obligations – proposals

- Redacted contracts will only need to be published where the value is over £2 million
- Publication of all submitted tenders has been dropped
- Debrief letters abolished
- Proposal to provide:
 - all participants with certain redacted evaluation documents (on the winning bid only) and
 - sending the unsuccessful bidders their own documents privately
- Bidders must do the comparison exercise themselves

New transparency obligations – proposals

- New mandatory transparency notice for contracts awarded under ‘extreme urgency’
- Moving away from use of ‘crisis’ wording
- Confirmed plans to introduce publicly available register of supplier performance
- Debarment Lists
- Light Touch Regime will be retained, but with various amendments (details to be confirmed)

New transparency obligations – Notices

- Introduction of new notices which will be published over the life of the contract:
- Planning and Pipeline Notice – will contain advanced information for procurements over £2 million
- Pre-Market Engagement Notice – if the authority uses pre-market engagement
- Appropriate Tender Notice – used to commence a competitive procurement
- Award Notice

New transparency obligations– Notices

- Contract Detail Notice – will provide details of awarded contracts
- Contract Implementation Notice – will bring KPIs into public domain and populates new register of public performance
- Contract Change Notice – to confirm amendments that increase value and scope over certain threshold
- Contract Termination Notice – to confirm the contract has ended (and by what means)

Oversight and monitoring compliance

- New oversight body – Procurement Review Unit (PRU). Will consult a panel of experts appointed by Cabinet Office
- Similar to the current Public Procurement Review Service, but main focus will be on *'addressing systemic or institutional breaches of the procurement regulations'*
- Will be able to investigate cases of poor policy and practice reported by suppliers and make informal recommendations
- Will expand upon Cabinet Minister's powers in new regulations to investigate and place duties on authorities to comply with investigations

Remedies

- Abandoning **1)** the proposed cap to damages for unsuccessful bidders that successfully challenge contract award decisions; and **2)** the proposed independent contracting authority review (although this was broadly supported) – issues surrounding cost and resource
- Abandoning proposed primacy of pre-contractual remedies over post-contractual damages
- The Government is *'continuing to explore feasible options for faster and more accessible routes for valid challenge of procurement decisions'*
- Will be a new test to lift automatic suspensions, and there will be a mechanism to remove automatic suspensions in a crisis

Consideration of past performance

- Government will introduce the proposed register of supplier performance – recognises concerns regarding proportionality and where factors were beyond a supplier's control
- New discretionary ground for previous poor performance (termination or failure to remedy)
- Will introduce Contract Performance Register, which will hold information on suppliers' performance against KPIs and may automatically flag previous poor performance
- Authorities will be encouraged to regularly consult the register

New rules on frameworks

- Two types – Closed and Open
- Closed – as now, maximum 4 year term, only those appointed can join/ be offered work, rules on mini competitions
- Open – must be re-opened at least once if duration of 3 years +. Must not be closed for more than 5 years
- Open - maximum 8 year term with minimum 2 suppliers
- Will allow new sub criteria on mini competitions
- No change to requirement to set out nature, scope and overall maximum estimated value in advance
- Charging suppliers for framework access to be expressly permitted if proportionate

Case law update

BIFFA Waste Services Limited v Leicestershire County Council (2021)

Anonymised bid data

- £400m waste services contract
- BIFFA unsuccessful on first procurement and challenged on various grounds
- Bidder information was anonymised but BIFFA worked out who the other bidder was and used its market knowledge to try to win the bid
- Application for summary judgment by BIFFA
- Unsuccessful and dismissed:
- No legal duty in relation to anonymised information
- BIFFA's own speculation could only be assessed by a trial
- What would the RWIND bidder have done?
- Summary judgment not the appropriate route

Case law update

Draeger Safety UK Limited v London Fire Commissioner (2021)

Automatic suspension maintained

- Procurement for provision of respiratory protective equipment to LFB
- DSUKL issued a claim which suspended the award
- LFB applied to lift automatic suspension
- Court declined on basis that:
 - There was a serious issue to be tried
 - Damages were not an adequate remedy for Draeger
 - Least risk of injustice to maintain suspension pending an expedited trial.
- Expedited trial ordered

Case law update

Bromcom Computers v (1) United Learning Trust and (2) United Church Schools Trust [2021]

Claim allowed more than 30 days after date of knowledge

- Procurement for a cloud based IT system for 57 schools
- B challenged the award. Authority sought to strike out on basis out of time
- Court allowed claim on basis that
- Requisite knowledge is of facts which "apparently clearly indicate, though they need not absolutely prove, an infringement"
- Initial debrief letter was sketchy and inadequate

Questions and answers

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Clyde & Co LLP

David Hansom, Partner

david.hansom@clydeco.com

0044 0207 876 4127

0044 07969 359617

clydeco.com/publicprocurement

www.clydeco.com

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