

A hand holding a magnifying glass over two small house models. The background is blurred greenery. A diagonal blue and orange graphic is overlaid on the left side of the image.

**B8: The New  
Procurement Bill  
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13.35 – 14.35

# Background

- Current legislation
  - Public Contracts Regulations 2015
  - Concession Contracts Regulations 2016
  - Utilities Contracts Regulations 2016
- Brexit
- Government Green Paper – December 2019
- New draft Procurement Bill published May 2022
- Legislation expected to come into force sometime in 2023
- Once passed it will become the Procurement Act

# Overall Structure of the Bill

- Single piece of legislation covering public contracts, concession contracts and utilities
- 116 provisions and 11 Schedules
- Same / similar concepts – but different language
- A lot of the detail will need to be covered by secondary legislation – including forms of tender notices etc

# Who's Covered?

- Applies to “contracting authorities” (CA), which means an authority with functions of a public nature that:
  - Is funded wholly or mainly from public funds; or
  - Is subject to the management or control of:
    - A contracting authority; or
    - A board more than half the members of which are appointed by a particular contracting authority
- Not clear if this covers RPs / housing associations....
- But Government has said that no intention to change scope of organisations covered

# Contracts Covered

- Works, services and supply contracts
- Concession contracts
- Framework agreements
- Thresholds are same as currently
- Aggregation provisions have been simplified – apply where the goods, services or works to be provided under the contracts *“could reasonably be supplied under a single contract”*

# Exempt Contracts

- Land contracts
- Legal litigation services
- Loans
- Certain financial services
- Contracts for the provision by not for profit organisations of one or more of the following services:
  - services relating to the promotion of fire safety;
  - fire extinguishing services;
  - services for the protection of life and property in the event of fires
- “In house” awards (teckal exemption) – similar to current exemption
  - But no provision for “joint teckal” exemption???

# Light Touch Contracts

- Not yet entirely clear what contracts will be classified as “light touch” contracts
- Likely to include social care services
- NHS healthcare services will be removed from scope of Act, and will be covered by new “Provider Selection Regime”, under Health and Care Act 2022
- Residential care services may fall outside both Acts
- To be confirmed by secondary legislation
- Light touch contracts have to be competitively tendered if above applicable threshold, but certain rules don’t apply
- No minimum tender timescales for light touch contracts.

# Procurement Objectives

- Delivery value for money
- Maximising public benefit
- Sharing information to allow suppliers to understand CA's procurement policies and decisions
- Acting with integrity
- Equal treatment of all suppliers



# Competitive Tendering Procedures

- Open procedure – single stage procedure with no restriction on who can bid
  - 25 day tender period provided all docs available at start, or 10 days where urgent
  - S19(5) – can't exclude suppliers for failure to meet min. standards??
- Competitive flexible procedure
  - Can design own procedure – but complexity must be proportionate, and comply with general principles
  - 25 days SQ period, or 10 days where urgent
  - 25 days tender period provided all docs available at start, or 10 days where urgent
  - Government guidance will be key

# Selection and Award Criteria

- Selection criteria (“conditions of participation”)
  - Can relate to financial standing and technical capacity and ability
  - References can be used to check supplier meets criteria
- Award criteria
  - Must be proportionate and linked to subject matter of contract
  - For light touch contracts, views of individual service recipients can form part of award criteria
  - In multi-stage procurements can refine award criteria from one stage to the next, provided not material

# Excluding Suppliers

- CA must exclude a supplier if:
  - Mandatory exclusion ground in Schedule 6 applies and CA considers that circumstances giving rise to ground are likely to arise again; or
  - Supplier is on the debarment list under s59 list due to mandatory exclusion ground
- CA may exclude a supplier if:
  - Discretionary exclusion ground in Schedule 7 applies and CA considers that circumstances giving rise to ground are likely to arise again; or
  - Supplier is on the debarment list under s59 list due to discretionary exclusion ground

# Excluding Suppliers

- Discretionary grounds include:
  - Where the supplier has breached a contract with a CA which resulted in termination or partial termination, damages or a settlement between supplier and CA.
  - Where the supplier has not performed a contract to a CA's satisfaction, was given proper opportunity to improve performance, and failed to do so.
  - Where supplier has acted improperly in a previous procurement – ie, failing to provide info, providing misleading info or canvassing.
  - Limited to things occurring in last 3 years
  - **Grounds are potentially very wide**

# Excluding Suppliers

- Supplier must be given opportunity to “self clean” before CA excludes them
- Provisions also apply to “associated suppliers” (ie, a supplier that supplier is relying on to meet conditions of participation) and subcontractors - but before CA excludes supplier it must be given a reasonable opportunity to replace the associated supplier / subcontractor
- If CA excludes a supplier it must notify the relevant authority within 30 days. Can lead to investigations by the relevant authority, and supplier being put on debarment list under s59

# Dynamic Markets

- Replace dynamic purchasing systems
- Must issue a Dynamic Market notice to establish a DM
- Conditions for membership can relate to technical ability / financial standing – but must be proportionate to contracts to be awarded under DM
- Not limited in duration
- Can't limit number of suppliers appointed to DM
- Can charge DM suppliers fees, but must be calculated as fixed % of call off contract value.

## Dynamic Markets

- When awarding contract under a DM must issue tender notice to whole market saying that only suppliers on DM can bid
  - Must consider a supplier's application to join the DM before rejecting their tender on basis that they are not a DM member
- 25 day tender period, or 10 days where urgent

# Framework Agreements

- Closed frameworks – same as currently. Max 4 years duration
- Open frameworks - new suppliers can be appointed to framework during its term
  - Can last for up to 8 years.
  - Must be refreshed after 3 years – at which point new suppliers can apply to join.
  - If no limit to number of suppliers on framework then existing suppliers on framework can simply stay on. If there is a limit they have to be reassessed alongside any new suppliers that want to apply



# Framework Agreements

- Direct call off rules same as currently
- Mini-comps – requirement to invite all “capable” suppliers has gone.  
*More flexibility for CAs?*
- Can charge framework suppliers fees, but must be calculated as fixed % of call off contract value.

# Direct Awards

- Grounds for direct award set out in Schedule 5
  - “Exclusive” rights exemption
  - “Technical reasons” exemption
  - Urgency – unforeseen and not attributable to CA
  - User choice contracts – for light touch care services specified by secondary legislation
- CA must publish transparency notice before awarding contract under direct award grounds (except user choice), and observe 8WD standstill period before signing contract (except where urgency ground is being used)

# Assessment Summaries and Award Notices

- CA must provide each supplier who had their tender assessed with an “assessment summary”, containing info about their tender and winning supplier’s - not yet clear what extent of this must be
- CA must then publish a “contract award notice” and hold 8WD standstill period before signing contract
- No requirement for standstill period for contracts awarded under frameworks or DMs, or light touch contracts – but CA can voluntarily do this to remove risk of cancellation action
- CA must publish “contract details notice” within 30 days of contract signature, or 120 days for light touch contracts
- If contract value is more than £2million must publish copy of contract within 90 days of signature

# Contract modifications

- Rules on contract modifications are similar to current rules
- Before making a modification CA must publish a “contract change notice”, unless change in contract value is 10% (services) / 15% (works) or less
- Can voluntarily hold 8WD standstill period before making modification to avoid risk of cancellation action
- CA has complete freedom to modify light touch contracts, and no need to publish contract change notice

# Payments, KPIs & Pipeline Notices

- Implied term in all public contracts (and subcontracts) that invoices to be paid within 30 days. CA must provide periodic reports on compliance
- If contract contains KPIs, CA must publish reports on supplier's KPI performance – including details of poor performance, contract termination and any settlements reached with the supplier
- Secondary legislation to prescribe detail of this
- If CA estimated spend is more than £100 million in forthcoming year must publish a “pipeline notice” setting out details of contracts with an estimated value of more than £2million that it intends to publish a tender notice for

# Conflicts of Interest

- CA must take all reasonable steps to ensure that a conflict of interest does not put a supplier at an unfair advantage or disadvantage in a procurement
- Ultimately, can exclude a supplier if advantage cannot be remedied.
- CA to prepare conflict of interest assessments prior to starting procurement process

# Remedies for breach

- Essentially the same as under current rules, ie:
  - Damages
  - Injunction
  - Contract cancellation
- Time limits are also the same:
  - 30 days from date of knowledge for damages and injunction actions
  - 6 months from date of contract for contract cancellation actions

# Final thoughts

- A lot of the substance / key concepts have stayed the same
- But:
  - Changes in language will give rise to interpretation issues
  - Some important changes on DMs, frameworks and supplier exclusion rules
  - Increased transparency and reporting requirements
- Clarification required on certain aspects
- Anticipating some further changes as Bill passes through parliament
- Government will give 6 months notice of “go-live” date
- Secondary legislation and guidance will be key



# Questions?