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## Transforming public procurement

### What does the Green Paper tell us about the likely direction of travel?

Our recent [article](#), summarised the regulatory framework for UK public procurement following the end of the Brexit transition period. This current framework very much represents an interim position as, in its Green Paper of December 2020, "Transforming Public Procurement", the UK Government has heralded an "historic opportunity to overhaul our outdated public procurement regime". Now that the dust has settled on the end of the transition period, it's worth delving a little deeper into the Green Paper to understand the likely direction of travel for future reform.

#### Background

In this article, we consider the key planks of reform signalled by the Green Paper and their likely impact on purchasers and suppliers. Much of the Green Paper's commentary focuses on the post Brexit narrative of freeing Britain from red tape and taking full control of our rulebook. So we try here to cut through to the core of the proposals and the underlying policy drivers. Importantly, we comment on how these proposals might play out in practice. Will these planned reforms actually deliver on the policy aims and what will be the impact for those at the coalface of public procurement?

This article focuses the reforms' impact on how public procurement processes would be run. Our next article will look at the Green Paper's proposed changes relating to public procurement challenges.

The Green Paper is open for consultation until 10 March 2021 and we are currently compiling our response to the 42 questions posed. If readers of this article have any thoughts on the Green Paper that they would like to share, please email Rebecca Carter ([rebecca.carter@shlegal.com](mailto:rebecca.carter@shlegal.com)) and we will take your views into account in our response.

#### The underlying drivers for reform

As we explained in our last article, for as long as most of us can remember, when the UK public sector purchases goods and services or procures works, it has had to follow rules that are underpinned by European Union (EU) law. The UK Government sees the end of the Brexit transition period as an important opportunity to transform the way public procurement is regulated. Its goal is to "speed up

and simplify our procurement processes, place value for money at their heart, and unleash opportunities for small businesses, charities and social enterprises to innovate in public service delivery". The Green Paper seeks to move away from the current regimes that are "too restrictive with too much red tape for buyers and suppliers alike, which results in attention being focused on the wrong activities rather than value and transparency".

It's also clear that the Government very much sees the £290 billion of public money spent annually through UK public procurement as an important means of supporting its priorities: to boost growth and productivity, to help the post COVID-19 economic recovery and to tackle climate change. But what does this mean in practice?

#### Public procurement – a tool for delivering Government priorities?

The Government proposes that a number of key principles should be enshrined in the new legislation. To a degree, these reflect the EU Treaty principles that underpin the current regime, such as non-discrimination. But they do go further in a number of material respects. The inclusion of "integrity" and "the public good" are notable examples. The Green Paper states that the principle of integrity is key to strengthening trust and combatting corruption and notes that in planning a public procurement, management of conflicts of interest and the protection of intellectual property rights and confidential information are all key.

On "public good", the Green Paper signals the Government's intention that public procurement

should be leveraged to support strategic national priorities which will be set out in a National Procurement Policy Statement. Commercial teams should have regard to these when conducting their procurements so that public procurement is leveraged to achieve social and environmental value beyond the primary benefit of the specific goods, services and capital works being procured.

Much more detail is needed on these proposals before we can assess the legal implications, such as how compliance with these principles might be enforced. The Green Paper does note, however, that purchasers will only need to have regard to these priorities where they are relevant to the subject matter of the contract and it is proportionate to do so. It is clear though that contracting authorities, when planning their procurements, will need to look beyond their own procurement outcomes and consider national priorities, such as creating new jobs and skills in the UK and tackling climate change and reducing waste.

### **Greater flexibility – will this deliver the desired outcomes?**

One of the primary aims of these reforms is to reduce red tape significantly, which the Government sees as having stifled innovation and hindered access by SMEs and charities to public procurement opportunities. As a starting point, the Government proposes to consolidate the Public Contracts Regulations 2015, Utilities Contracts Regulations 2016, Concession Contracts Regulations 2016 and the Defence and Security Public Contracts Regulations 2011 into a single set of regulations “specifically designed for the UK market and priorities”. The Green Paper acknowledges, however, that this alone will not achieve its ambition to simplify the rules and speed up public procurement.

Perhaps the biggest change is the proposal to replace the current procedures available to purchasers with three new routes - a competitive flexible procedure, an open procedure and a limited tendering procedure to be used in certain circumstances such as crisis or extreme emergency.

The rarely used innovation partnerships procedure and design contests do not make the cut and the current competitive dialogue procedure and competitive procedure with negotiation are combined into a “new competitive, flexible procedure that gives buyers maximum freedom to negotiate and innovate to get the best from the private, charity and social enterprise sectors”.

This new procedure would have minimal detailed rules and give purchasers the maximum flexibility to

design a procurement process that meets their needs and those of the market. The process designed would need to be consistent with the principles of public procurement mentioned above and the opportunity would need to be advertised in a contract notice, together with the usual information about the specification, timelines and any conditions for participation. The process would need to follow the proposed requirements on selection and evaluation (discussed further below). Minimum time periods would also need to be complied with – 30 days to receive expressions of interest after publication of the contract notice and 25 days for submission of tenders after issuing an invitation to tender. There would be scope to reduce these to 10 days in each case due to urgency.

The eagle eyed reader will note that under these proposals, the restricted procedure would no longer be available to purchasers. We question whether this omission will hinder the achievement of speedier and more cost effective procurements. Where specifications are fairly standardised and market commercial terms pretty settled, using a negotiated procedure can be costly for both suppliers and purchasers. If the only alternative is an open procedure, where there is a wide market, the purchaser may be faced with a significant number of offers to evaluate.

While the flexibility of the new negotiated procedure is, on the face of it, welcome to purchasers and suppliers alike, flexibility does not of itself drive innovation. There is also a concern that purchasers may use this flexibility to develop a myriad of different procurement approaches which will make market access more difficult for small businesses and the charity sector, rather than easier. Everyone who has been involved in any negotiated procurement process will know that these can be costly and time consuming to participate in. To get the real benefits from this new flexibility, without suffering from the potential downsides, purchasers and suppliers are going to need a lot of guidance and support to make this work.

### **The limited tendering procedure – including a response to COVID-19**

The Green Paper proposes to retain the current “negotiated procedure without prior publication” of a contract notice but it will be renamed as the rather punchier “limited tendering procedure”. This procedure will continue to be available in a limited number of circumstances such as where there has been an advertised process that has not produced any tenders.

Importantly, a new ground will be added for using this procedure. One of the issues that has arisen during the COVID-19 pandemic is uncertainty about whether the public health crisis justified public purchasers making direct awards on grounds of extreme urgency. Under the current rules, direct awards can be made “insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseen by the contracting authority” the usual time limits could not be complied with.

In the early weeks and months of the global pandemic, it was fairly easy to make the case for using this ground to place direct awards for PPE, testing kits and so on. But as time went on, well publicised questions were raised about whether the longer term impact of the pandemic, and resulting procurement needs, could have been foreseen. The Green Paper seeks to address this by adding a new limb that specifically relates to “crisis”. This would cover, for example, an event which clearly exceeds the dimension of harmful events in everyday life and which substantially endangers or restricts the life or health of people.

The Minister for the Cabinet Office would be given new powers to declare a crisis for these purposes and contracts could only be awarded to deal with the immediate requirement posed by the crisis. One important point to note is that even where a crisis is declared, it should not be necessarily mean that a directly awarded contract to a chosen supplier is justified. Even if the time limits within the accelerated procedures cannot be met, if there are a number of potential suppliers and it is feasible to undertake a degree of competition then the purchaser should consider doing so.

Whenever purchasers use the limited tendering procedure, they would now have to publish a notice in advance explaining the justification for using the process. This is in addition to the current requirement to publish a contract award notice and will clearly aim transparency and supports the fact that this procurement should only be used in very limited circumstances. A 10 day standstill period will also apply to all awards other than those contracts placed due to crisis or extreme emergency.

### Choosing the right supplier

The changes proposed to the regulation of the selection and evaluation of suppliers warrant a whole article in their own right. But the one that probably has the most potential impact is the proposed change to how past performance of potential suppliers would be assessed. The Green Paper proposes an extension of the grounds under which a

candidate can be excluded for poor performance under the discretionary exclusion ground so that it applies even though the poor performance had not led to contract termination, damages or comparable sanctions. An expansion of the information that can be requested from potential suppliers to demonstrate technical and professional ability at the selection stage is also proposed.

The proposed reforms also seek to address the practical issue that purchasers often encounter with the limited availability of independent information on poor performance. The Government proposes implementing a system which would require contracting authorities to measure contract performance based on set KPIs which would then be held centrally on a database and made available to all contracting authorities and the public. Such a database would clearly improve transparency and help contracting authorities evaluate past performance. But it may also raise concerns among purchasers about the cost burden of maintaining this register up to date for all its contracts as well as concern among suppliers on the accuracy of the data as well as commercial confidentiality.

### Transparency

Transparency is very much one of the buzz words of the Green Paper. It features not just in terms of the requirement for purchasers to be transparent in the way they run procurement processes vis a vis the suppliers, but in a much more wide ranging and fundamental way. The Green Paper states that the new legislation will “embed transparency by default throughout the commercial lifecycle from planning through procurement, contract award and performance”. While the Green Paper seeks to respect the boundaries currently imposed by freedom of information and data protection legislation, it would create a positive obligation to disclose, as opposed to a reactive one in response to information requests from interested parties. This full lifecycle procurement and contract data would have to be published by purchasers on a new central platform and using the Open Contracting Data Standard.

The potential scope of this central platform, as envisaged by the Green Paper, is very wide. The Government sees it as ultimately being able to host a register of suppliers (containing “tell us once” evidence similar to the current Standard Selection Questionnaire), contract performance data, a central debarment list (of suppliers who are debarred from public procurement because of mandatory or discretionary exclusions), procurement pipelines, a central register of complaints and a register of legal

challenges. This would represent a very significant shift from current procurement practice and it raises many questions which are not tackled by the Green Paper at this stage. It will be interesting to see how the Government's plans develop in this regard.

### Final thoughts

This is really just a summary of some of the key planks of the planned reforms but even from this overview, it can be seen that some quite significant changes are on the horizon. Many of these proposals are, understandably, at a pretty high level at this stage, and much more detailed is needed before we can properly assess their likely impact. What is clear though, is that those involved in public procurement need to be prepared for change – both in terms of the procurement procedures that will be followed in the future and in the data that will need to be made available about planned and current procurements, as well as the performance under the contracts once they are let.

In our next article, we will look at the Green Paper's proposed reforms of the Court processes for public procurement challenges and the remedies available for public procurement breaches.

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