



Procurement & Contract Management

Newsletter & Technical Brief

Feb 2023

In this our second newsletter of 2023 we cover the latest developments and news about public sector procurement and contract management in the UK.

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Please contact us for more information about the content of this newsletter or if you would like to attend our free webinars or paid-for training events.

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1. How to prepare - It is time to put the new Procurement Bill on your to do list!

The new Procurement Bill means change – change brings opportunity as well as risk.

The new Bill will be the most significant change to public procurement practice in a generation. Whilst it has echoes with the outgoing Public Contract Regulations 2015, it brings entirely new elements and will require every public sector organisation to make significant changes.

Much has been discussed in our seminars and across the sector about what elements of new legislation might mean for us all as procurement specialists, and this will continue right through to the Bill being passed as an Act of Parliament and after. However, the challenge will be about distilling, understanding and implementing the changes required.

Procurement permeates organisations way beyond lawyers and procurement specialists. We will all need to think specifically about how the new Act will need to be introduced into organisational practice. You should be thinking now, about:

1. Where should this change be led from to get the greatest support and chance to succeed?
2. How will it be delivered?
3. Who in the organisation will need to be involved? Including those responsible for procurement but also those outside your procurement teams.
4. How will information be cascaded?
5. What support and guidance will be required ahead of the Act coming into law?
6. How to operationalise the new Act and reflect it in policy and procedures that govern not only procurement but broader areas across the whole organisation?

The breadth and detail of the change requirements is likely to be the same regardless of the size of the organisation. However, larger organisations are likely to have to implement changes across a greater number / range of staff and activities. Smaller organisations, meanwhile may have smaller numbers to deal with, but may not have the bandwidth to accommodate changes in the required timeframes. Both challenges mean early preparation and planning will be needed.

The to do list for February 2023 should include:

- Getting the top of the organisation engaged about the Procurement Act. Put it on the board's agenda now!
- Start planning. Even though we don't yet know what the final Act will contain we should start developing a high level outline plan that addresses the 6 key questions set out above.

We will be running dedicated webinars & seminars on implementing changes to draw in and share thoughts on planning for the new Act over the coming months.

For information on what the Government Commercial Function are advising organisations to do visit [Transforming Public Procurement - planning and preparation checklist](#)

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2. Call for evidence – your chance to shape the new Procurement Bill, however act fast as time is tight

The Procurement Bill was debated at a second reading in the House of Commons on Monday 9 January 2023 without any major opposition and has now been sent to a Public Bill Committee which will scrutinise the Bill line by line and is expected to report to the House by Thursday 23 February 2023. It is anticipated that whilst there will be several amendments to the Bill over the next few months, they are likely to cover technical deficiencies in the Bill, rather than major amendments. The timetable for royal assent is expected to be Spring/ Summer 2023 and implementation in early 2024.

The Public Bill Committee [has called for evidence](#) and seeks views to be received by 5pm on 23 February 2023. So act fast if you want to participate.

3. The new Bill debarment and exclusion of bidders will be a war zone

The Procurement Bill introduces new grounds for exclusion from all public sector tenders where a supplier has committed a sufficiently serious breach of any relevant contract. This exclusion for poor performance could apply when a breach has resulted in contract termination, the award of damages or a settlement agreement between the supplier and any relevant authority. In the past these difficult situations have often been dealt with by contracting authorities behind closed doors, however the new Bill will change this.

In an unusual move the Government has published a memorandum addressing the [European Convention on Human Rights \(ECHR\) in relation to the Procurement Bill](#). It is clear the proposed regime allowing for bidders' debarment and exclusion from all public sector contracts will be a hugely contested area once the new Procurement Act is enacted. This is because being excluded from all future public sector tenders will be catastrophic for most suppliers. In the memorandum the government puts forward its case as to why the debarment provisions are not inconsistent with the ECHR. Looks like the government is getting their argument in first knowing that trouble is on the way.

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4. A painful lesson - Bromcom Computers Plc v United Learning Trust

With the substantive issues decided by the Courts in favour of Bromcom, the litigation now proceeds to a trial on exactly how much it should receive by way of damages. This hearing is expected to take place later in 2023.

The sad truth about this case is that damages and costs could amount to more than £800,000. That is a huge amount which will have to be funded from the academy's budgets to the ultimate detriment of the school children.....yes running a compliant procurement process is time consuming and costly but getting it wrong is far more painful.

Interesting to read [Bromcom's statement on the ruling](#) wherein they say that "...schools have been locked in legacy non-cloud technology due to procurement gaps and the lack of a level playing field in the marketplace" and that they were motivated (and now vindicated) in bringing the legal claim against ULT in a desire "to drive the changes needed."

[Bromcom Computers Plc v United Learning Trust](#) is a useful reminder of some key rules for contracting authorities:

a) consensus scoring cannot be done with a calculator

The fact that "average scoring" may be common practice within the public sector did not make it lawful. In this case, the final score for each technical criterion was determined by simply aggregating and averaging the scores awarded by each individual evaluator. The Judge held that this approach to scoring was unlawful. It resulted in scores being awarded that were not whole number scores, as indicated in the ITT. It also meant that erroneous scores would remain within the final score. Most importantly, as there was no moderation process at which the evaluators discussed their scores and agreed a final consensus score, there was no record of the authority's reason for the scores (there was just a record of why each individual evaluator awarded the scores they did).

b) award criteria must relate to the contract being awarded, and not to any other contract.

United Learning should not have allowed the incumbent (Arbor) to include a discount in its commercial tender to reflect a rebate on fees charged under its existing (entirely separate) contract in the event that its tender was successful.

c) read submissions carefully and, if something is unclear, it may be more appropriate to ask clarification questions rather than to guess. That is particularly acute when adding costs that appear to be missing.

United Learning should not have added a cost to Bromcom's financial submission to reflect the cost of establishing a link for the transfer of data. The only reason the same cost was not added to Arbor's tender was because the applicable data link had already been established under the existing contract.

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d) Don't use a drop box

The Court also found that it was unlawful for the winning bidder (Arbor) to have submitted its final tender by way of a drop-box to which the winning bidder (Arbor) continued to have access, both after submitting its final tender, and after the deadline for final tenders had passed.

e) Quality of evaluation is important

The Court further found that individual evaluators between them made no less than 10 manifestly erroneous scoring errors in the scoring of the quality responses.

Examples include:

- a miscalculation of the winning bidder's mobilisation costs, unduly inflating their score.
- a misunderstanding (by the evaluators) of what the invitation to tender required in each bidder's response to the "Meet Local Needs" part of the tender such that scores awarded were inaccurate.
- a misinterpretation of Bromcom's response to one question where the evaluator had incorrectly concluded that Bromcom could not meet ULT's requirements. The court concluded, however, that Bromcom were "plainly offering what the tender required".

We will be discussing Bromcom Computers Plc v United Learning Trust during our FREE webinar on 6 March 2023 (12:30 – 13:15). This FREE Webinar has been specially developed following this important judgement and will provide guidance and useful tips to ensure you avoid potential procurement breaches. To register for this FREE Webinar on 6 March 2023 at 12:30, use this link: [Webinar Bromcom Computers Plc v United Learning Trust](#)

5. Contracts Finder thresholds changed again

[Procurement Policy Note 01/23](#) – update to legal and policy requirements to publish procurement information on Contracts Finder

The Public Contracts (Amendment) Regulations 2022 came into force on 21 Dec 2022. This makes two changes to the Below Threshold Regime:

- a) The contract value limits have been amended: from £10,000 to £12,000 for central government authorities; and from £25,000 to £30,000 for sub-central authorities.
- b) NHS Foundation Trusts now have the same publication value thresholds as sub-central authorities, alongside NHS Trusts (i.e. £30,000 and above), and need only publish the minimum information required by the PCR 2015, and to the 90 day timescale.

All contracting authorities should also note that the contract value limits are to be calculated inclusive of VAT (this took effect from 1 Jan 2022).

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6. Looks like the Government has still not published all Covid contracts – what could they be hiding or have they simply lost the contracts?

Back in March 2021, former Prime Minister Boris Johnson, said in Parliament that details of all Covid contracts were now “on the record”. A month later, Cabinet Minister Julia Lopez, claimed “all historical covid-related contracts” had been published. However, [an investigation by Good Law Project](#) has found examples of 29 deals awarded where the contracts still haven’t been made public.

The Government is facing a judicial review challenge from the Good Law Project over a three-year delay in publishing the details of ventilator contracts worth £247m.

In a pre-action protocol letter sent to the Secretary of State for Health and Social Care, the Minister for the Cabinet Office and the Secretary of State for Defence, the legal campaign group claim the Government's failure to release the contracts amounts to a breach of Government policy on transparency.

The dispute centres around three sets of contracts awarded between May 2020 and January 2021 as part of the Government's "ventilator challenge" programme, which called on manufacturers to step up the production of ventilators in response to the Covid-19 pandemic.

The first set of contracts highlighted in the claim were awarded to 14 manufacturers in May 2020 at a cost of £193m. A second batch of contracts awarded in August 2020 totalling £51m and a third contract totalling £3m are also targeted in the claim.

7. Upcoming webinars and training courses

Training

The next Public Procurement & Contract Management Training days are open for bookings.

Please write to walter.akers@rsmuk.com to book.

- Introduction to Contract Management (Level 1) – Wednesday 15 March 2023 (9:30 – 15:45) Cost £240 plus VAT per attendee.
- Guide to completing FTS Notices – Friday 24 March 2023 (9:30 – 12:45) Cost £180 plus VAT per attendee.
- Beginners Guide to Public Procurement (Level 1) - Friday 19 May 2023 (9:30 – 15:45) Cost £240 plus VAT per attendee.
- How to Undertake Compliant Tender Evaluations - Friday 28 April 2023 (9:30 -15:45) Cost £240 plus VAT per attendee.

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7. Upcoming webinars and training courses (continued)

The next FREE Webinars are:

28 February 2023 (12:30 – 13:15) TUPE in Tenders

TUPE often raises tricky and complex problems in public tenders or when insourcing services. Failure to fully comply not only prejudices the success of the procurement process but can also lead to employment tribunals which can result in additional costs and damaged reputations. To register for this FREE Webinar on 28 February 2023 at 12:30, use this link: [Webinar TUPE in Tenders](#)

6 March 2023 (12:30 – 13:15) Bromcom Computers Plc v United Learning Trust

This recent case has lessons for all public procurement professionals and specifically schools and academies. This FREE Webinar has been specially developed following this important judgement and will provide guidance and useful tips to ensure you avoid potential procurement breaches. To register for this FREE Webinar on 6 March 2023 at 12:30, use this link: [Webinar Bromcom Computers Plc v United Learning Trust](#)

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