

PROCUREMENT & CONTRACT MANAGEMENT NEWSLETTER & TECHNICAL BRIEF MAY 2023

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1. The Procurement Bill's proposed change from five current procurement procedures down to two raises many questions for contracting authorities and their suppliers.

Under the existing Public Contracts Regulations 2015 (PCR 2015) regime public sector buyers must select which of the five permitted procedures most closely matches their strategy, and thereafter they must follow the selected procedure's rules with little room for flexibility. The current PCR 2015 regulations offer a range of options, depending on the buyer's need, from Open and Restricted, where the buyer knows, to a point, exactly what they require; to Competitive Procedure with Negotiation and Competitive Dialogue, if the buyer wants the ability to have a degree of negotiation and dialogue around the potential solution; to Innovation Partnership, where a genuinely innovative solution is required.

In the future under the [New Procurement Act](#) buyers will have a choice between just two routes:

- 1) The Open Procedure where any supplier can submit a tender in response to a published notice, with no pre-qualification or shortlisting process; and
- 2) Competitive Flexible Procedure, which is defined by the Bill as "*such other competitive tendering procedure as the contracting authority considers appropriate for the purpose of awarding the public contract.*" This procedure is non-prescriptive and the Bill contains minimal detailed rules as to how contracting authorities should utilise the procedure. Nonetheless, contracting authorities will be under an obligation to observe the overarching procurement principles when designing a competitive tendering procedure, whilst still complying with all other requirements of the Act. Documenting your procedures and communicating these to all bidders will therefore be very important. While this allows buyers to design a process to suit their need, it may cause confusion for bidders because of lack of clarity about what the actual structure of the procurement is.

And, therein lies the difficulty – to design and document a bespoke procedure that meets the requirements of the Act whilst delivering the desired procurement. This will be the key challenge for all public sector procurement teams in implementing the New Procurement Act.

In-person 2023 Conferences

If you would like to know more about this topic, please join us at our 2023 summer in-person conferences where we will be exploring the options in designing a compliant Competitive Flexible Procedure. These events have been scheduled to support practitioners as they plan for the new Acts implementation. They will focus on the new procurement procedures and provide support and a suggested template for contracting authorities to design their own new competitive flexible procedure. See page 6 for Conference bookings and more details.

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2. England's NHS Provider Selection Regime – where competitive tendering is only an option rather than a requirement.

The NHS Provider Selection Regime (PSR) will be a new set of rules for procuring healthcare services in England. The PSR is intended to provide a regulatory framework for the award of healthcare contracts by NHS commissioners and local authorities that falls outside the requirements of the Public Contracts Regulations 2015 and the New Procurement Act. The PSR will be introduced by regulations made under the [Health and Care Act 2022](#).

The ethos behind the PSR is intended to fit with the integrated, collaborative approach to healthcare commissioning established in the Health and Care Act. The PSR will provide opportunities for contracting authorities to move away from the expectation of competition in all circumstances and towards a system of collaboration and partnership.

The latest news from NHS England is that the PSR is not expected to be in use before July 2023, and therefore not anticipated to be in use in time for the 2023/2024 NHS contracting round.

So in planning your contract award processes for this year you will need to ensure they are in line with the PCR 2015 and NHS Procurement Regulations. Until the PSR is in force, current rules must be followed to arrange healthcare services.

Wales – heading in another (potentially conflicting?) direction

The position in Wales is different. The [Health Service Procurement \(Wales\) Bill was laid before Senedd Cymru on 13 February 2023](#). The Bill seeks to reform the way in which certain NHS health care services are procured in Wales. Whilst the intent is that the PSR will give NHS England more flexibility to procure and arrange independent health services, there is currently no equivalent regulations planned in Wales. As a consequence, these new arrangements may have an impact on NHS Wales's ability to maintain and secure health services in Wales when working with independent providers who also work with NHS England. The Welsh Bill does however include a power to disapply the Procurement Act in respect of health services procurement in Wales and a power to create a new (yet to be designed) procurement regime for health services in Wales.

Will be interesting to see if Wales follow England with PSR or implement some other regime. All very complex....

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3. The new Procurement Bill - The ability to make post award changes to a contract is likely to be tempered by enhanced disclosure and transparency.

Change is inevitable and nowhere is this truer than with contracts. It is almost inevitable that the moment a contract is signed it is out of date and in need of revision; and this goes on throughout the contract's life. However, in the world of public procurement change is regulated and this regulation is itself changing under the new [Procurement Bill](#).

The direction of travel in the new Procurement Bill is clear. There will be far greater flexibility allowing Contracting Authorities to make modifications to public contracts, however this comes with greater transparency and disclosure of contract changes than under the existing PCR 2015 regime. So, whilst on the one hand the more accommodating regime may encourage Contracting Authorities to make more modifications to their contracts, the risk is that with added disclosure through the Bill's new Contract Change Notice procedure we will see greater scrutiny and many more challenges to contract modifications put before the Courts.

Greater scope to change a contract

In the Bill, the key provisions on modifying public contracts are found in sections 74 to 77 and Schedule 8. An authority may modify a public contract or a convertible contract if the modification:

- is permitted under Schedule 8 of the Bill; These are broadly similar to the current "doorways" (i.e. permitted modifications) in the existing PCR 2015 Reg. 72, but with some important differences;
- is not substantial; again a concept familiar from Reg. 72, or
- is a below threshold modification; which again has echoes in Reg. 72(5) of the current regime; and
- a modification to a contract which is a "light touch" contract.

More transparency of changes

A major development is clause 75 of the Bill which requires Contracting Authorities to publish Contract Change notices in addition to publication of modifications. The current regime in Reg. 72 PCR 2015 requires a contracting authority to give notice that a contract has been modified (and therefore the notification is after the event) where the modification is necessary because of economic and technical reasons, and where the need for modification was unforeseen.

However, the Bill provides that before modifying a public contract, or a convertible contract, a Contracting Authority must publish a contract change notice. Significantly, the Bill provides that a Contracting Authority may not modify a public contract or a convertible contract before the end of any standstill period provided in the relevant contract change notice, which introduces a greater risk of challenge of the modification while it is still live. However, it is noted that this notice requirement is voluntary, so it is not at all clear how this will work in practice. The notice requirements in the Bill will not apply in all circumstances. The Bill also requires that where a qualifying modification is made the authority must publish a copy of the contract as modified within 90 days.

The Bill is not yet final and may alter but we will all need to be much more careful when making changes to existing contracts under this new regime. These provisions, and our related actions, will no doubt be tested in the Courts in due course.

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4. How often do you see overpriced tender bids that just do not make sense – well sometimes that is because they are rigged

Following an [investigation by the Competition and Markets Authority \(CMA\)](#), 10 UK-based construction firms have been fined £59,334,957 for colluding on prices through illegal cartel agreements when submitting bids in competitive tenders for contracts. These bids were rigged, deceiving the customer that they were competitive when that was not the case.

The bids were rigged by one or more of the construction firms agreeing to submit bids that were deliberately priced to lose the tender. This practice, known as 'cover bidding', can result in customers paying higher prices or receiving lower quality services.

In addition, the CMA found that 5 of the firms, on at least one occasion each, were involved in arrangements by which the designated 'losers' of the contracts were set to be compensated by the winner. The value of this compensation varied but was higher than £500,000 in one instance. Some firms produced false invoices to hide this part of the illegal behaviour.

The public and private sector contracts impacted included the development of Bow Street Magistrates Court and Police station, the Metropolitan Police training centre in Hendon, Selfridges (London), properties belonging to Oxford and Coventry Universities, shopping centres in Reading and Taplow, a large office block on London's Southbank and other sites in central London.

The [CMA have a useful guide for public sector procurers](#) to help you spot and deal with bid-rigging. Well worth a read.

5. All change - A new Standard Questionnaire, an extended implementation deadline and further change to follow under the new Procurement Act

The Cabinet Office has published [PPN 03/23 Standard Selection Questionnaire \(SQ\)](#) and accompanying statutory guidance. This had initially been effective from 1 April 2023 but this has now been pushed back to 1 June 2023.

The SQ was originally introduced in 2016 as a means of standardising the supplier selection process in above threshold procurement processes and introduced the concept of self-certification by suppliers. The PPN 03/23 applies to all Contracting Authorities in England, and CAs in Wales and Northern Ireland which exercise wholly or mainly reserved functions, when they undertake above threshold procurements within Part 2 of the Public Contracts Regulations 2015.

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5. All change - A new Standard Questionnaire, an extended implementation deadline and further change to follow under the new Procurement Act (Continued)

What are the changes?

- There is updated guidance on the changes contracting authorities can and cannot make to the wording of questions;
- There is greater clarity and guidance on when CAs ask for evidence during the procurement process of when a supplier meets selection criteria;
- Guidance is provided on how authorities decide upon their own selection criteria and scoring system for assessing whether suppliers meet the selection criteria;
- Amendments have also been made to some of the selection questions to align with changes in policy.

More change to come:

The Procurement Act is due to receive Royal Assent in the coming months and is expected to apply to procurements from early next year. It contains some changes to the mandatory and discretionary exclusion grounds set out in Part 2 of the SQ and to the test CAs will use to consider these. There are also new consequences of exclusion from a procurement with the possibility of a debarment investigation being triggered and a supplier being placed on the debarment list.

So we have changes now with more to follow.....

6. Upcoming Training, Conferences and Free Webinars

In-Person Conferences

These events have been designed to support Contracting Authorities to understand and implement procurement procedures to comply with new obligations under the forthcoming Procurement Act 2023 (PA 2023). Procurement practitioners have been used to following process driven by PCR 2015 for the last decade, however, the new Act will require a transformative change in how procurements are undertaken. This should be welcomed by CAs as it offers increased flexibility to design their own procurement procedures, however, the catch is that they will still have to operate within the provisions of the Act and ensure compliance with the all-important principles and objectives. In addition, the new process will have to be documented to create certainty for all parties and avoid challenges from bidders.

The Conference agenda is planned to support practitioners in preparing for the new Procurement Act's implementation. We will be focusing on the new procurement procedures and provide support and a suggested template for CAs to design their own new competitive flexible procedure.

For bookings and more details please write to walter.akers@rsmuk.com or use the links below:

[Conference Bookings Wednesday 14 June - Leeds](#)

[Conference Bookings 20 June - London](#)

[Conference Bookings 11 July - Birmingham](#)

[Conference Bookings 20 September - London](#)

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6. Upcoming Training, Conferences and Free Webinars

Training

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

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

- Beginners Guide to Public Procurement (Level 1) – Friday 19 May 2023 (9:30 – 15:45) Cost £240 plus VAT per attendee.
- Procurement Challenges – What to look out for – Friday 23 June 2023 (9:30 – 15:45) Cost £180 plus VAT per attendee.
- Introduction to Contract Management (Level 1) – Thursday 13 July 2023 (9:30 – 15:45) Cost £240 plus VAT per attendee.

Join us on our next FREE Webinars

Common Mistakes in Tender Documents Tuesday 23 May 2023 (12:30 – 13:15)

Developing tender documents can often be a challenging task, especially in the case of high value/risky or innovating contracts. Various types of errors can inadvertently appear in procurement documents which, if not corrected at the appropriate stage, expose contracting authorities to the threat of legal challenge or prejudice the successful outcome of the tender process, resulting in delay and additional costs. This session will look at some of the common pitfalls and what practitioners can do to avoid them in the future.

[Click here to join the webinar 23 May 2023 12:30 Common mistakes in tender documents](#)

Climate Change and Procurement Tuesday 6 June 2023 (12:30 – 13:15)

The impacts of climate change and environmental degradation are clear for us all to see and their devastating effects will only increase in frequency and severity in the very near future. Sustainable procurement is an essential element for organisations to respond and deliver net zero commitments and meet their legal obligations. We all need to be making conscious purchasing decisions that factor in environmental and social factors such as climate impact and community benefits, alongside balancing cost, quality and risks inherent to our supply chains. Join us on this free webinar when we will be discussing procurements' role and practical action that we all should be taking. Our guest expert on this webinar is David Shields from [Value Match](#)

[Click here to join the webinar 6 June 2023 12:30 Climate Change & Procurement](#)

Walter Akers

Partner

RSM UK Risk Assurance Services LLP

walter.akers@rsmuk.com

+447561327662

