

PROCUREMENT & CONTRACT MANAGEMENT NEWSLETTER & TECHNICAL BRIEF JUNE 2023

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1. Update on the new Procurement Bill – feels like the timetable is slipping.

Well summer has finally arrived and the Procurement Bill is still winding its way through parliament. Is Royal Assent in the late summer / autumn still possible? We are getting closer, but the timetable is now looking tight. The secondary legislation will take time to draft and the looming general election in May 2024 could delay everything.

Whitehall officials are sticking to the script: The Bill is currently at the Report Stage in the House of Commons and is intended to come into force sometime in 2023. The Bill has a six month run-in period. The government has said that the run-in period will not commence until secondary legislation, which will put meat on the bones for some aspects of the Bill, has been consulted upon and laid before Parliament. This means it is now likely that it will be early next year before the Bill is in effect.

On the whole, the provisions of the Bill apply equally to England, Wales and Northern Ireland. Scotland will retain its own procurement regulations in relation to its devolved authorities. You can read the latest version of the Bill and follow its progress through the legislative process [here](#). You can access the latest news on the government's training and development package [here](#).

Late Update: On 8 June 2023 The Cabinet Office issued an update on the Procurement Bill's progress and stated that *"Now that we are nearing the conclusion of the Parliamentary process we can advise that we are now planning for an October 2024 commencement [of the Procurement Act] - following a six month preparation period."*

2. Are your CCTV systems spying on you? How can procurement help?

Three-fifths (61%) of public bodies in the UK are using CCTV systems made by Chinese companies that should be "debarred from our procurement supply chains", according to the campaign group [Big Brother Watch](#). In a [consultation submission to the UK Procurement Bill](#), Big Brother Watch said CCTV systems made by Hikvision and Dahua were in use across schools, colleges, universities, police forces, NHS trusts, and local authorities.

Human rights abuses

According to the consultation paper, Chinese state-owned surveillance companies Hikvision and Dahua provide technology that is central to the regime of ethnic persecution of the Uyghur population in Xinjiang and both hold contracts to build and operate surveillance systems in the region. The atrocities inflicted on the Uyghur population are technology-enabled.

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2. Are your CCTV systems spying on you? How can procurement help? (Continued)

National security concerns

On 24th November 2022, the UK Government announced it will be removing surveillance equipment manufactured by Chinese state-owned companies from “sensitive sites” within Government departments, in recognition of the risk they pose to national security. This is an important step, but the entirety of the public sector must be afforded the same protections.

The use of these cameras and CCTV systems is widespread across the UK public sector with 73% of local authorities, 60% of NHS trusts, 63% of schools, 66% of colleges and 54% of universities using Chinese-made CCTV; 35% of police forces have Hikvision cameras. More than 10% of public bodies using these CCTV systems have advanced capabilities, including thermal scanning or facial detection.

As the report says, “It is vital that companies, clearly linked to human rights abuses overseas and security risks domestically, should be debarred from our procurement supply chains,”

Clearly our procurement of these systems must stop. You may need to consider closing existing contracts and replacing these systems if you have them.

3. By how much can you change an existing contract? The answer is not a lot.

Making changes to existing contracts is common. What is not so common is a challenge in the Courts to such changes.

In [James Waste Management LLP v Essex County Council](#) it was alleged by James Waste that Essex Council had varied a contract beyond the narrow boundaries permitted by the Public Contracts Regulation 2015 (“**PCR 2015**”). The implication being that a variation of a contract beyond the restrictive limits permitted by Regulation 72 PCR 2015 is effectively a prohibited direct award of a contract which ought instead to have been subject to further competition through a compliant procurement.

James Waste’s claims was unsuccessful as they were not able to prove that the modification was sufficiently “substantial” within the meaning of Regulation 72(8).

The judge held that the ‘safe-harbour’ tests in Regulation 72 (1) (a)-(f) should be interpreted narrowly because they amount to an exemption from the general rule set out in Regulation 72 (9) that a new procurement procedure is required for all modifications of the provisions of a public contract or a framework agreement during its term other than those which fall within the safe-harbours, and not being considerable, substantial, significant or material.

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3. By how much can you change an existing contract? The answer is not a lot. (Continued)

Interestingly the judge was clear that the burden of providing evidence and proof fell on the claimant, James Waste. In addition, for Reg 72(8)(b)(ii) to be satisfied, it is sufficient for a claimant to show that there is a real (as opposed to fanciful) prospect that another tenderer would have won the modified contract, because of the conditions newly introduced. It is not necessary, however, to show that the new conditions would have entailed the acceptance of a different tender. The judgement is well worth a read and includes useful lessons for us all.

New Procurement Act

There have been few Court cases involving substantial modifications. One reason for this may be the generally limited amount of publicity around modifications. This is going to change under the new Procurement Bill which allows far greater flexibility for Contracting Authorities to make modifications to public contracts, but also requires 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.

4. The new Procurement Bill - Moving from MEAT to MAT – What Does It Mean for Procurement Teams?

There is an ongoing debate among procurement professionals about the change in the New Procurement Bill to the basis of assessing competitive tenders from Most Economically Advantageous Tenders (MEAT) to the Most Advantageous Tenders (MAT).

Is there a do-nothing option?

At first glance, some of you may say there is little difference. In many cases, this is likely to be true. This is because the Most Economically Advantageous Tenders (MEAT) can also be the Most Advantageous Tenders (MAT), and often is.

However, the shift to MAT is about enabling contracting authorities to take advantage of the freedom to award tenders on other evaluation criteria beyond purely economic advantage. This will support the Government in delivering its policies around generating greater social value, the environment and climate change, attracting local suppliers, and buying from small and medium-sized (SME) suppliers.

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4. The new Procurement Bill - Moving from MEAT to MAT – What Does It Mean for Procurement Teams? (Continued)

Under the 2015 regulations, the Most Economically Advantageous Tenders shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Regulation 68. This may include the best price-quality ratio, which shall be assessed on the basis of criteria such as qualitative, environmental, and/or social aspects, linked to the subject-matter of the public contract in question. Some have argued that the disadvantages of MEAT is that the methodology could restrict the assessment of social and environmental considerations.

Under MAT, it is not mandatory to select the most economically advantageous tender. Price, therefore, would not have to be taken into consideration under the new “MAT” approach. However, this is only likely in practice to be relevant in exceptional circumstances. Price in some form is very likely to form part of the award criteria in most procurement processes. Therefore, as far as compliance with the New Bill is concerned, there is a “do-nothing” option. However this may amount to a lost opportunity.

Taking advantage of MAT

Doing nothing is not in the spirit of the new Bill and certainly not in-flow with the Government’s vision for the future of public procurement.

Procurement teams are most likely going to need to make a shift from MEAT to MAT in situations where:

- Contracting Authorities are looking to deliver greater social value and develop local niche markets. In such cases, removing or limiting the impact of price in a tender assessment and prioritising other criteria like localisation requirements will give teams more opportunity in relation to meeting these procurement aims.
- There is a desire to counter the potential bias towards larger suppliers that tend to be able to compete better on price (benefiting from economies of scale) than smaller organisations. MAT tender assessment should allow smaller players to be more successful where tenders are assessed based on the most advantageous offer beyond competitive pricing.
- Precise measurement of value in financial terms may be difficult, but there are other clear measures of the wider value that is desired from tenders.

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4. The new Procurement Bill - Moving from MEAT to MAT – What Does It Mean for Procurement Teams? (Continued)

How do procurement teams make the shift?

For many contracting authorities, the challenge will be in developing the necessary wider criteria for MAT assessments that can withstand scrutiny and be trusted by contracting authorities and the supplier markets.

Using price as one of the key determinants for awarding tenders is universally accepted and relatively easy to apply across a range of tenders. It is also embedded in procurement processes and it will require some degree of culture change to adjust to alternative assessment approaches.

Using other criteria as required for MAT assessments will also require organisations to establish various reliable measures of value for the various criteria.

In order to make the shift, procurement teams should:

- Assess their procurement pipeline for 2024 to determine which procurements will benefit from MAT tendering assessments.
- Develop frameworks for assessing tenders on the basis of MAT and ensure that such frameworks are robust enough to hold up to challenge and scrutiny.
- Develop guidance to support the use of MAT assessments for their organisations.
- Consider obtaining specialist advice around the risks involved in applying different criteria for assessment when using MAT.

What about the rest of the organisation? Staff who want to take advantage of MAT-based procurement should work with procurement teams to develop tender documentation to ensure there is good correlation between the tender specification and requirements, business needs, benefits, and the criteria included in the MAT assessments.

What should be on your organisation's to-do list

Procurement leads in organisations should work with their leadership teams to:

- Assess the opportunities involved in applying MAT and where necessary, update their procurement strategies accordingly.
- Develop an action plan for moving from MEAT to MAT including, commissioning the development of assessment frameworks, processes, and associated templates to capture data and information for MAT assessments.
- Implement governance and assurance mechanisms to sign-off on adopting MAT assessments in larger, high-risk, and high-value procurements.

Our feeling is that the move from MEAT to MAT will in most procurements have little impact, however time will tell if contracting authorities take the opportunity to use MAT to procure for greater social value.

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5. The Aussies and Kiwis are coming the Free Trade Agreements with Australia and New Zealand have prompted amendments to current procurement regulations.

These changes have been introduced in light of the requirements of the UK's new Free Trade Agreements with Australia and New Zealand and apply to all public procurement. The main change to current procurement regulations is the removal of the use of the Prior Information Notice for making a call for competition (and the Periodic Indicative Notice in the Utilities Contracts Regulations 2016 (UCR 2016)). This applies to both the Public Contracts Regulations 2015 (PCR 2015) and the UCR 2016. Whilst not widely used, it is important for contracting authorities and utilities to be aware of this change.

There are also changes in the procedure to calculate the value of lots and procurements which apply to the PCR 2015, UCR 2016 and Concessions Contracts Regulations 2016 (CCR 2016). The amendments provide that where the value of one or more lots cannot be estimated then the aggregate value of the lots awarded cannot exceed 20% of the aggregate value of all the lots which can be estimated.

Other changes also provide that where the value of a contract cannot be estimated, contracting authorities must treat it as being equal to the relevant threshold, and therefore apply the full regime.

A new provision has been added that prevents contracting authorities from terminating contracts in such a way that "circumvents their obligations" under PCR 2015. For all the details see [PPN 05/23: Implementing new Free Trade Agreements](#).

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 (Continued)

TRAINING

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

Please write to walter.akers@rsmuk.com for details or to book your place on any of the following courses:

- Beginners Guide to Public Procurement (Level 1)
- **NEW:** Advanced Guide to Public Procurement (Level 2)
- How to Undertake Compliant Tender Evaluations
- Public Procurement Challenges and Case Law Update
- Introduction to Contract Management (Level 1)

JOIN US ON OUR NEXT FREE WEBINARS

These webinars are a focused 45-minute discussion by experts, covering topical and current issues about UK Public procurement & contract management.

Benefits & Pitfalls of Framework Agreements Monday 26 June 2023 (12:30 – 13:15)

The use of framework agreements is popular with Contracting Authorities. The reasons are not hard to understand as frameworks save time and effort in reducing the procurement process. However, framework agreements are not without risk. In this webinar we will discuss the benefits, dangers and when best to use framework agreements and when they should be avoided.

[Click here to join webinar 26 June 2023 at 12:30 - Benefits & Pitfalls of Frameworks](#)

How to ensure your service insourcing is successful Thursday 13 July 2023 (12:30 – 13:15)

The pendulum on outsourcing is swinging back as more and more organisations are now looking to bring services back in-house. There are several reasons why insourcing is now seen as attractive, but there are also many difficulties and successful insourcing is often not easy to achieve. In this webinar we will discuss the risks and priority areas that you need to get right to achieve an effective insourcing.

[Click here to join webinar 13 July 2023 at 12:30 - Insourcing](#)

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