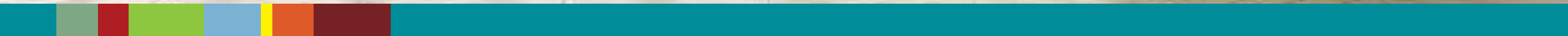


HAMMAR SOUTH WEST SEMINAR

**ALL CHANGE IN PROCUREMENT -
Procurement Bill and case law update**

2nd March 2023



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COVERAGE

Current status of the Procurement Bill

Contracting authorities, coverage and exemptions

Procurement objectives and procedures

Procedures, notices and time limits

Prequalification and exclusion

Frameworks and dynamic markets

Standstill and contract management

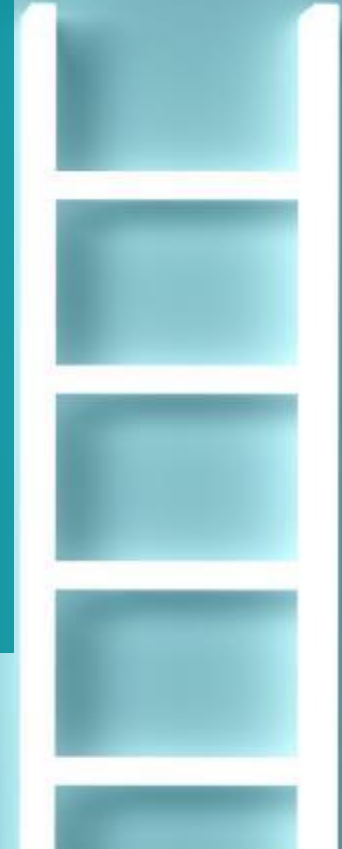
A few important cases and a couple of PPNs

**PROCUREMENT BILL -
WHERE ARE WE NOW
AND HOW DID WE GET
HERE?**



I have to say that the scale of change between the Bill as drafted and the Bill before us today does not inspire confidence that what we end up with will be without significant loopholes. Even as we start Committee stage today, the Minister has put his name to 71 amendments. That is a noticeable number, following on from the hundreds we had in the other place.

Florence Eshalomi MP, House of Commons
Committee Member, Procurement Bill Committee



CONTRACTING AUTHORITY CONFUSION



Contracting authority = any (legal) person

- **wholly or mainly funded out of public funds**
or
- **subject to public authority oversight**

that “does not operate on a commercial basis”

**Commercial subsidiary “treated as public authority”
for relevant subcontracts**

**Ability to exempt NHS bodies (Amendment 27) –
Health and Care Act 2022 - “provider choice regime”**

BELOW THRESHOLD CONTRACTS

“Procurement” and “covered procurement” (above threshold and not exempt)

“Regulated below threshold contracts” – public contracts unless exempt, concessions or utilities

Part 6 replaces Part 4 – in similar terms – not clear yet if Contracts Finder to be subsumed into FTS – left to Regulations

EXEMPTIONS

Exemption disappplied where CA considers the works / services / supplies could reasonably be supplied under a non-exempt contract

No longer applies to Teckal (group structure) arrangements

BUT – still applies to

- Land transactions
- Employment contracts

Implications for these types of contracts

GROUP STRUCTURES

Narrowing of “activities test”?

- Activities must be “for” or “on behalf of” parent
- Rather than “entrusted”

Can a subsidiary carry out non-charitable activities “on behalf of” a charitable parent – case law to follow!

Multiple “Teckal” now covered and requirement for “no reasonable alternative” removed – Government amendments

CLASSIFICATION OF ACTIVITIES

“Works” to be defined in Regulations

No definitions of services or supplies / goods

Implications for the classification of

- servicing (gas, electrical etc)
- responsive work
- supply and fit

Light touch services remains

- relevant to threshold

WORKS AND THE LAND EXEMPTION

Works contract = a contract whose main purpose is

- **carrying out works**
- **to facilitate construction of a complete work (not under the contract) that complies with a specification in the contract**

Exemption for “*the acquisition of land, buildings or any other complete work...*”

Classification of “package deals” – Wiener Wohnen?

“No reasonable alternative” requirement

VALUATION

Maximum amount payable under the contract

Includes amounts already paid

No specific point of valuation

- **implication of value increases?**

Mixed contracts – treated as above threshold if services / supplies element above threshold and “could reasonably be supplied under a separate contract”

AGGREGATION RULES



Must aggregate values where “goods, services or works could reasonably be supplied under a single contract”

Must aggregate unless “good reasons not to”

Possible guidance on “reasonableness” and “good reasons”

PROCUREMENT OBJECTIVES



Delivering value for money – Lab amendments to add social value defeated in Committee

Maximising public benefit

Sharing information with tenderers (transparency ?)

Acting (and being seen to act) with integrity

NB. Does not include equal treatment

NATIONAL PROCUREMENT POLICY STATEMENT

Sets out the Government's strategic priorities in relation to procurement

Separate Wales version

Duty to “*have regard*” – means follow unless good reason not to

Oratory School v Schools Adjudicator case



PROCUREMENT PROCEDURES

Open procedure – as now

Competitive flexible procedure

- anything you like
- subject to compliance with principles etc

Direct award

- limited circumstances
- similar to current but slightly wider

NOTICES

Pipeline, planned procurement and preliminary market engagement notices

Tender notice and “associated tender documents”

Contract award and contract details notices – or procurement termination notice

Contract change notice, contract performance notice (KPIs), payments compliance notice, info about payments over £30,000, contract termination notice (incl on expiry)

MINIMUM TIME LIMITS



Participation period (prequalification)

- 25 days
- 10 days if urgent

Tender

- 25 days - provided electronic tendering and all docs provided – add 5 days for each that doesn't apply
- 10 days if urgent or qualifying planned procurement notice issued

CONDITIONS OF PARTICIPATION

A high jumper in mid-air over a bar on a red track. The jumper is wearing a blue and white leotard and is captured in a classic Fosbury Flop position. The background is a red running track with white lane markings.

Prequalification / selection criteria

Proportionality requirement

Legal and financial capacity

Technical ability

- but not previous work for authority
- must comply with rules on technical specs and permit equivalent qualifications

Potentially more flexibility over “means of proof”

CONFLICTS OF INTEREST

Must take “all reasonable steps” to identify and keep under review actual or potential conflicts of interest

Applies to anyone “acting for authority” or “influences a decision” - including external advisers

Must take reasonable steps to prevent unfair advantage or disadvantage

Must prepare a “conflicts assessment” before submitting tender notice, keep it under review, and confirm they have done so when publishing contract details notice

SUPPLIER EXCLUSIONS

Excluded, excludable suppliers and the debarment list – opportunity for hearing (challenge?) if not on debarment list

Acting improperly – can exclude only if unfair advantage cannot be avoided by other means

Breaches of procurement requirements – no longer subject to materiality test (HL Government amendment)

AWARD CRITERIA - FROM MEAT TO MAT

Value for money –
but without economic advantage?

Determined by reference to award criteria

Average value pricing legitimated

Can “refine” criteria and weightings pre
ITT in competitive flexible procedure

FRAMEWORKS

Basic framework requirements remain

Below threshold value call-offs unregulated?

Open and closed frameworks – “nothing new under the sun”

Potential for longer frameworks “nature of goods, services work means a longer term is required”

DYNAMIC MARKET

Prequalified “approved list”

Can apply to any works/services/supplies

Sit within competitive flexible procedure

Minimum 10 day tender period – no longer able to shorten (as under DPS)

Fees chargeable as percentage of estimated contract value

Still very few details yet on how it is intended to operate



STANDSTILL

Contract award notice will start standstill period

“Assessment summary” of each supplier’s tender and the MAT

8 working day standstill period

CONTRACT MANAGEMENT

“Procurement” includes contract management

Prohibition on managing contracts “except in accordance with the Procurement Act”

Implied terms and express terms

Threshold for compulsory KPIs now £5million

VARYING CONTRACTS

Additional grounds – e.g. materialisation of known risk

Contract change notice (unless de minimis)

- before change is made
- “voluntary standstill period

Publication of amended contracts valued over £5million (where CCN required)

BRACEURSELF v NHS ENGLAND, 2022

Bad news

- **evaluation panel misunderstood tender on one question = manifest error**

Good news

- **Overall mark for bullet pointed question okay**
- **Silo marking acceptable**
- **Verbatim evaluation notes not needed**
- **Breach “not sufficiently serious” for damages**

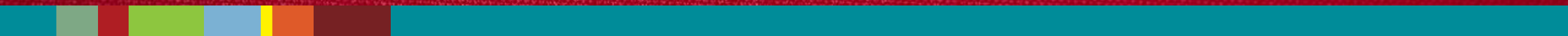


***CONSULTANT CONNECT v 3 NHS
INTEGRATED CARE BOARDS, 2022***

Product demonstration – not evaluated

Mini comp under framework (challenger supplier not on it) – only 1 “capable” supplier

Clear “fix” – NHS had decided who they wanted and then decided how to get them



BROMCOM v UNITED LEARNING TRUST

Averaging of scores “not transparent” - Must be a moderation process to agree a score and reasons

Tender submission discipline required so tenders cannot be changed post the submission deadline

Clarification needed to prevent “manifest errors”

Discount under other contract should not have been considered

Challenge time limit didn't start until amended standstill letters provided

SIEMENS v HS2

Conflict of interest – panel member's declaration of interest form omitted reference to pension from one tenderer – stopped time limit running

Time limit for challenge ran from when challenger “knew facts that clearly indicate (but not necessarily absolutely prove) an infringement

RECENT PPNs

PPN 3/22 – Data protection including template clauses and provisions for international data transfers

- **International Data Transfer Agreement (replacing Standard Contract Clauses)**

PPN 2/23 – Anti-modern slavery

- **including template clauses**



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QUESTIONS?

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