

Procurement Act 2023 – reform and what it means to your organisation

10 June 2024



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Procurement Act 2023 Finance Update

John Wallace - June 2024

Pre Brexit Position

- The current procurement law comes almost entirely from the EU.
- EU procurement law was based on principles:
 - The right for one business to trade across the EU without discrimination based on nationality
 - Transparency of opportunities and decision-making
 - Fairness between competitors (equal treatment)
 - Proportionality in design and operation of procurements
 - Internal market to operate fairly and avoid protectionism.
- More detailed rules in the form of directives to supplement procurement principles.
- Most recent reform package was in 2014.
- This package was implemented in England and Wales by the **Public Contracts Regulations 2015.**



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Interim Post Brexit Period

- On the completion of the Brexit process, the UK rolled over the Public Contracts Regulations 2015 and has made only small amendments to account for our departure from the EU.
- **The UK has continued its membership in the WTO's Government Procurement Agreement (GPA) on much the same terms as the EU.**
- The UK has agreed internationally to maintain a procurement law of broadly the same scope

Government Review



Government's view:

- Current law made it much harder for us to create opportunities for innovative companies to win business.
- Modern and innovative approaches... have been bogged down in bureaucratic, process-driven procedures.
- We need a progressive, modern regime which can adapt to the fast-moving environment in which business operates.



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Timetable for Reforms

- Passed House of Commons in first half of 2023.
- 6-month lead-in period between the Act receiving Royal Assent and it being commenced as the new regime.
- During that period, the Cabinet Office are offering a suite of official learning and development packages, including certification.
- John Wallace has been invited to be the Single Point of Contact for the housing sector (supported by G15).
- **Commencement 28th October 2024.**



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Procurement Act Coverage

The Act will catch Registered Providers.

- In 2004, following an earlier judgment of the Court of Justice of the European Union, the Government took the view that housing associations were caught by the procurement regulations.
- **The Government has included RPs in its coverage schedules under the Government Procurement Agreement and there is no clear sign yet of an intention to exclude housing associations.**
- Commercial subsidiaries are likely to be exempt but, if contracts are given to them as a group company without competition, they must follow the Act when issuing sub-contracts.

New Act Objectives

New UK procurement objectives:

- delivering **value for money**
- maximising **public benefit**
- **sharing information** about policies and decision-making
- acting, and being seen to act, with **integrity**.
- **treating suppliers the same** unless a difference justifies otherwise and avoiding unfair advantage or disadvantage
- removing and reducing barriers to SMEs
- Contracting authorities must have regard to **Government's strategic procurement priorities**. Current statement (2024) includes matters such as creating new businesses, tackling climate change, improving supplier diversity and innovation

New Procurement Act Highlights - Positives



- Raising the Profile of the Profession
- Commercial / Strategic behaviours rather Administrative
- Design our own process
 - Pre Tender engagement
 - Innovation
 - Relationships
 - Negotiation
 - Supplier Performance Improvement
 - Value improvement
 - Remember what happens in the private sector

New Procurement Act Highlights – Not so Positive



- Transparency / Transparency / Transparency
- Transparency is a major part of the Act and will lead to more bureaucracy.
- Procurement pipelines
- Contract variations
- Redacted contracts
- Key performance indicators
- Contract termination etc...etc.....

A Procurement Review Unit, in the Cabinet Office, will be able to audit authorities' compliance with procurement law.

Single Point Of Contact



Identify the senior procurement practitioners in each organisation across the housing sector



Analyse L&D attendance information provided by the CO to identify organisations where uptake could be improved



Encourage uptake from those organisations



Attending conferences and speaking opportunities to support engagement and uptake



Support the Cabinet Office communication plan



Act as a point of contact for the housing sector and provide advice based upon CO L&D provided information



Lead the creation of “communities of practice” nationally and regionally to share understanding and to support implementation. Avoid duplication.

Collating Registered Providers' Details

Regulator – 1,336 Registered Providers – 2.55m homes

>50 homes – 573 RPs with 2.54m homes (99.76%)

>100 homes – 542 RPs with 2.53m homes (99.42%)

>1,000 homes – 227 RPs with 2.45m homes (96.26%)

Focus on the 227 RPs covering 96% of the homes

Communities Of Practice

Gwen Beeken / Anna Norbury
Procure Plus / Irwell Valley (NW)

Sandra Sewell
Crown Commercial (WM)

Laura Summerell
Paradigm (Home Counties)

Maria Schingen
LiveWest (SW)

Alan Heron – Place for People
Gil Brown – Housing 21
Steve Tyree – Eastern Procurement
Drew Frame – Consortium Procurement



Sara Wetherill
Thirteen Housing (NE)

Clare Murdoch
South Yorkshire (Y)

Michael Simpsons
East Midlands (EM)

Mark Wagg
Freebridge (East)

Emma Briggs
MTVH (London)

David Smith – SEC
(South)

Governance Landscape

The Department of Levelling Up, Housing and Communities is responsible to Parliament of housing with the Housing Regulator having oversight and statutory authority for these housing associations and the National Housing Federation and the Chartered Institute of Housing provide guidance and support.

Unlike other public sector areas, housing associations do not have national or regional governance structures to coordinate delivery, monitor performance or deliver best practice.

In view of this, procurement teams within housing associations are structurally isolated with networking and collaboration therefore challenging.

Given the ongoing regulatory challenges across the sector and the launch of new Consumer Standards, a National Association could bridge the structural gap and deliver significant benefits to procurement teams and the sector, residents & communities.

Service Offerings

Leveraging the scale of the association

Assessment tools (best practice)

Engagement with government and national bodies

Influencing the future landscape

Competency development – technical and business skills

Leverage our buying power

Market Knowledge & Market Management

Increased access to professional development opportunities

Conferences, podcasts, forums

Collaboration

Networking

Benchmarking

Act as a Community

Colleague Development

Mentoring opportunities

National Housing Procurement Association



Finance and Procurement Reform update

Rebecca Rees, Partner – Head of Public Procurement

10 June 2024

Agenda

1. Overview of the Act
2. Benefits of Procurement

Introduction: Benefits of Procurement

- Procurement = power and an enabling function
- Reform provides flexibilities
- Impacts the entire organisation
- Take the opportunity to have a spring clean
- It is MORE than an administration function
 - Administrative process should be left to the procurement team – their problem!
 - Instead: what do you need to get from the procurement? Where do you need to end up?
 - What are the benefits of "procurement done well"?
 - Team effort: careful articulation and subsequent management of requirement is your responsibility!

Ensuring transparency and compliance throughout the procurement journey

- Noticing regime "hard bakes" transparency throughout the procurement life-cycle
 - Before during and after procurement
 - Into contract management
- Don't forget internal compliance and auditable records too
 - Consider current Regulation 84 requirements
 - Disclosure obligations in the event of a challenge
- Assessment summary requirements
 - A change in emphasis but does not reduce requirement
 - Lots of guidance from recent case-law: e.g. moderation consensus

Conflicts of interest

- Part 5 of the Procurement Act 2023: contracting authorities to identify and manage conflicts of interest.
- Conflict of interest defined in section 81 of the Act: includes personal, professional or financial interest of a Minister or a person acting for or on behalf of the CA in relation to a covered procurement
- Includes a person who influences a decision made on or behalf of a CA.
- What does a CA have to do?
 - Prepare a conflicts assessment at the outset of a covered procurement (eg before a tender notice)
 - To include:
 - Details of conflicts or potential conflicts = duty to identify
 - Steps taken or to be taken to mitigate the risk that a supplier has an unfair advantage or disadvantage = duty to mitigate
 - Steps taken or to be taken to mitigate the risk of the *appearance* of a conflict or potential conflict
 - Must keep assessment under review/revise if necessary/confirm the assessment has been undertaken in any relevant transparency notice
- If conflict cannot be avoided or mitigated: supplier must be treated as excluded / exclude the supplier from any competitive tendering procedure

Contract Management and Reporting

- Consider your commercial life-cycle requirements: Part 4 of the Procurement Act 2023
 - Contract management (training need?)
 - KPIs – contracts more than £5million
 - At least 3 KPIs
 - (not for frameworks, concession, light touch, utilities contract awarded by a private utility)
 - assess KPIs at least once in every 12 month period and on termination
 - Publish results – including failure to perform/termination
 - Payment Compliance Notices
 - payment performance against 30 day payment period (across the organisation)
 - every 6 months
 - Information about payments made (across the organisation)
 - more than £30k payment under a public contract.
 - Within 30 days of the last day of the quarter in which the payment was made
 - Contract variations: safe-harbours set out in section 74 and Schedule 8

Exclusion and debarment regime

- "excluded" supplier – mandatory exclusion grounds (see section 57(1) and Schedule 6)
- "excludable" supplier – discretionary exclusion grounds (see section 57(2) and Schedule 7)
 - NB: check when it happened (depending on the ground):
 - 3 or 5 years
 - whether or not before the Act came into force
- Is the ground continuing or likely to occur again?
- Has the supplier self-cleaned?
- Is the supplier on the debarment list (see section 62)
- NB: also applies to an "associated person" (defined in section 26(4)) - means a person that the supplier is relying on in order to satisfy the conditions of participation (see section 22(8))" or "sub-contractor" – but CA must notify the bidder if it intends to exclude/provide a reasonable opportunity to replace
- If a CA excludes a supplier – must notify the "appropriate authority": this could result in an investigation and consideration as to whether the supplier should be placed on the debarment list

Debarment list

- A centrally managed/controlled list of under-performing/dodgy bidders – runs in parallel with an individual CA's due diligence on its bidders
- Takes difficult decisions out of the hands of individual CAs and represents a big stick BUT reduces market-players/competition: can remove the ability to bid for public sector work
- Application of exclusion grounds is going to be a significant area of challenge going forward: the risks have increased!
- Who goes on it? An excluded or excludable supplier: notified by a CA or as part of an independent investigation:
 - A bidder will stay on it until it is deemed not to be an excluded or excludable supplier (3 or 5 years)
 - Right of appeal within 8 WD of being notified ("debarment standstill period") – automatic suspension of entry onto the list ... or otherwise within 30 days
 - Will only be considered on the basis of a material mistake in law by the Minister (not opinion)
 - Otherwise removed on expiry of time-scale or material change in circumstances/significant new information

How to reduce risk of legal challenge

- Invitation Documents: VIP - do what you say you are going to do – esp. for the CFP
- Evaluation and moderation: a hot bed of breach and challenge(!)
- Assessment summaries: new practice/process
- Consider ALBs and don't reject a bid for being abnormally low until you have given the bidder a right to respond (*inter partes* process) – and don't be scared if they shout!
- Contract management and administration will help re poor performance
- Use Pre-Market Engagement responsibly
- Maintain accurate records and documents at all stages – treat them as if they will be disclosed!

Contact

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