



Reform of UK Public Procurement Law Impact on the Transport Sector

On 6 December 2021 the Cabinet Office published its response to the consultation on proposals for wide-ranging reform to the regulation of public procurement. The response paves the way for the Procurement Bill which will set out a new framework for the regulation of public procurement and replace the Public Contracts Regulations 2015, the Concessions Contracts Regulations 2016 and the Utilities Contracts Regulations 2016. It is envisaged that the Procurement Bill will become law in 2023.

For the procurement of goods, services and works in the transport sector, this will bring significant change that suppliers will need to be aware of:

- The Utilities Contracts Regulation 2016 will be repealed. For TOCs that were acting as utilities in the procurement of their own supply contracts, this means that those procurements will be governed by the new Procurement Act when it comes into force provided they are above the relevant threshold (currently £378,660 for goods and services and £4,733,252 for works).
- The Cabinet Office has specifically recognised the benefits of the use of qualification systems by utilities and intends to incorporate into the new legislation an equivalent mechanism whereby utilities (such as Network Rail) can permit suppliers to apply to be qualified suppliers and use lists of qualified suppliers in procurement procedures.
- There will be only three different procedures for contracting authorities/utilities to choose from when running a procurement – a new flexible procedure, an open procedure for “off the shelf” competitions and a limited procedure for use only in exceptional circumstances (e.g. exceptional urgency).
- In keeping with the SME agenda, the government will establish a central digital platform so that suppliers only have to submit data once to qualify for any procurement. It is intended that the platform will be free to use.
- In terms of choosing who to contract with, contracting authorities/utilities will be able to take greater account of past performance in the delivery of previous public contracts with the threshold for being able to exclude providers lowered. Further, the ability to exclude bidders for specific actions will be broadened to cover the actions of individuals or entities with whom the bidder has a close connection.
- Contracting authorities/utilities could be required to take into account specific award criteria that are not directly linked to the subject matter of the procurement in order to reflect policy priorities. This continues an increasing trend of central government using public procurement as a facilitator of policy change – for example through the Social Value Model that already requires all central government contracting authorities to incorporate social value into their evaluation models (with a weighting of at least 10%).

- The principle of transparency will be brought to the fore, with enhanced disclosure requirements on contracting authorities/utilities at each stage of the procurement process, including pre-procurement in relation to the planned procurement pipelines.
- The process for challenging breaches of public procurement law is intended to be expedited and streamlined, with a dedicated procurement judge in the Technology and Construction Court and an intention to focus on pre-contract remedies rather than damages. The disclosure of key evaluation documents (i.e. the evaluators' scoresheets) will be frontloaded to accompany the contract award notices, giving bidders more information from the outset to determine whether there are grounds for challenge.
- With the objective of tackling payment delays in public sector supply chains, contracting authorities will be able to look at the payment performance of any supplier in a proposed supply chain. Further, sub-contractors will be granted the right to have direct access to contracting authorities to escalate payment delays.
- The legislation will aim to clarify the situations in which a public contract can be varied post-award, with options being considered for a "safe harbour" for changes required as a result of developments outside of the contracting authority's control in complex procurements. Contract amendment notices will be required to be published when any change to a public contract is made, allowing better transparency for providers of post-award events.

How we can help

We are a nationally recognised team specialising in public procurement law and procurement litigation. We would be happy to talk to you further to discuss how we can help your organisation prepare for and adapt to the proposed changes. This might include:

- An informal discussion with you
- Training for you or your teams
- A workshop

Depending on your requirements, this may well be something that we are able to offer free of charge.

Please do not hesitate to contact us if you require any further assistance.



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