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UK Public Procurement Law Digest: The 2011 Procurement Law Agenda

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The first 9 months of the new UK coalition government were marked, in public procurement terms, by the early freeze imposed by the Cabinet Office on all new central government procurements and the wide-ranging review of existing projects and commercial terms with the largest suppliers to government. In this issue of the *UK Public Procurement Law Digest*, we look at what public procurement issues are likely to be making the news over the next 12 months.

2011 ought to be the time when, as well as slowly thawing the project freeze, the coalition government begins to roll out its policy approach to procurement and determines which particular policy initiatives are going to result in new projects.

Overall, the key message that we expect to be making procurement law headlines in 2011 can be summed up in one word: simplification.

EFFICIENCY AND REFORM GROUP AND ITS AGENDA

To its credit, once the political changes as a result of the May 2010 General Election had been resolved and the new coalition government formed, the new administration acted quickly to formalise power and control over central government procurement practice and policy in the new Efficiency and Reform Group ("ERG") within the Cabinet Office. The ERG incorporates previous entities such as the Office of Government Commerce ("OGC"), Buying Solutions, and the Office of the Government CIO. This change has at least had the effect of putting in one place responsibility for all procurement policy across central government.

The ERG's most immediate practical objective was to identify measures to make cost savings through better efficiency and reform of procurement. As well as announcing an immediate moratorium on technology-based and other outsourcing projects across the central government, the key initiatives on which the ERG moved quickly were re-negotiating existing key contracts, and ensuring transparency of central government contracts with an emphasis on smaller, shorter contracts. The ERG also moved quickly to call in the main suppliers to the government and hold negotiations designed to result not only in cost savings on future government contracts but also a hand-back of fees billed under prior government contracts.

To less acclaim and to the on-going consternation of many in the industry, the moratorium continues to be in effect. As a result, there has been relatively little new central government procurement activity. The reins of power are still held tightly within central government, and many government departments are feeling frustration at not being able to proceed with key projects. The Cabinet Office remains focused on tight budgetary control in view of the UK's overall macro-economic situation.

However, signs are emerging of the likely key procurement law initiatives for 2011. These include:

- centralised contracts for committed volumes for commodity items;
- streamlining and simplifying OJEU-compliant procurements, thereby reducing project costs;
- better standardisation of approaches to procurements; and
- removing barriers for small to medium-sized enterprises ("SMEs") to participate in procurement.

At the same time, there has been a flurry of guidance notes and consultation papers on procurement law issues. These include a review of the competitive dialogue procedure by the Treasury - and, we submit, that it will be hard to find many people familiar with this procedure who disagree that it needs to be reviewed and simplified. There has also been guidance on transparency issues and the use of the accelerated restricted procedure, and an EU Commission Green Paper on the modernisation of public procurement policy at the European level.

We'll start our review with three developments of immediate practical effect.

MANDATED USE OF CORE PRE-QUALIFICATION QUESTIONS

The ERG has published a procurement policy action note which mandates that central government departments must use a set of core pre-qualification questions in all new procurements from 1 December 2010. These questions are intended to cover prospective service providers' organisational contact details; grounds for mandatory and discretionary rejection; economic and financial standing; and elements of technical and professional quality.

The aim of these mandatory core questions is to eliminate the great variety of questions asked at the pre-qualification stage by different government departments and to reduce bidders' time and cost requirements and to streamline the government's evaluation processes. While anything which helps to make tender documents simpler to put together and bids simpler to prepare is an improvement, there must be some doubt as to whether there genuinely is a "one size fits all" approach to pre-qualification questions. It will certainly be helpful to have a minimum mandatory set of pre-qualification questions but departments do need to have the ability to add particular additional questions to suit the parameters of their own individual projects.

USE OF ACCELERATED RESTRICTED PROCEDURE

In December 2008, the EU Commission responded to the global recession by allowing use of the accelerated restricted procedure for major projects procured during 2009 and 2010. This use was justified by urgency on the grounds of speeding up the procurement process so as to provide a boost to member states' economies during the global financial crisis.

The Office of Government Commerce has now announced that this relaxation in the rules has been extended to apply to any contract notice published in the Official Journal before the end of 2011.

For less complex procurements, the accelerated restricted procedure allows contracting authorities to begin a project with a time limit for responses of 15 days from publication of an OJEU notice instead of the usual 37 days.

TRANSPARENCY

The ERG has also published a guidance note implementing the coalition government's requirements for greater transparency in central government procurement.

Under the new rules, government departments must publish all new tender documents and contracts with a value over £10,000 on a Contracts Finder website[1]. All departments must also state which contracts have been awarded to SMEs. These commitments support the commitment made in mid-2010 that all new central government ICT contracts would be published online.

Departments are still expected to publish all relevant information in full, although some redactions of information are permitted in line with the exemptions provided by the Freedom of Information Act (including national security, protection of personal data, commercial sensitive material). However, as we have reported elsewhere in the *UK Public Procurement Law Digest*,[2] the number of potential grounds for redaction of information is decreasing and it is increasingly likely that all information, including even pricing information in central government contracts is likely to be published in future.

COMPETITIVE DIALOGUE

The competitive dialogue procedure was introduced into UK law by the Public Contracts Regulations 2006 ("PCR"). The aim was to provide greater flexibility in delivering complex projects. The competitive dialogue has been used across the public sector to deliver a broad scope of projects, and over 1,200 procurements have been undertaken using the competitive dialogue. However, many contracting authorities that have used the competitive dialogue have found that, in practice, it has led to more complexity and less certainty in procurement than the negotiated procedure which preceded it.

HM Treasury has published a review of the competitive dialogue procedure which reports that:

- some projects which are not obviously complex appear to have been procured using competitive dialogue;
- many contracting authorities are increasingly viewing competitive dialogue as the default process for all but the most straightforward procurements – which should not be the case;
- there is confusion in the market as to what is permissible under the open, restricted and negotiated procedures, and authorities would value more central guidance;
- the competitive dialogue is a positive addition to the range of procurement options where it is conducted appropriately but, where that it is not the case, the competitive dialogue can be burdensome and expensive; and
- there has been particular criticism of the lack of preparation, insufficient skills and capacity on the part of contracting authorities which has a negative impact on bid costs and procurement durations.

As a result, the Treasury has made a number of recommendations about the future use of the competitive dialogue procedure:

1. **Use of Competitive Dialogue**. Competitive dialogue should not be seen as the default procedure for all complex procurements. The Treasury notes the ERG is working on a procurement "superhighway" which should provide a decision tree for contracting authorities wishing to select the most appropriate route for procurement. Through simple questions covering value, complexity and nature of the items being procured, this ought to direct users to the most appropriate route for their particular procurement. The Treasury hopes this will give contracting authorities the confidence to use alternative procedures for less complex procurements.

[1] See http://www.businesslink.gov.uk/ContractsFinder

[2] See our February 2009 update and subsequent amendments: Freedom of Information: Disclosure under the UK Freedom of Information Act

2. **Justifications.** The Treasury recommends that all future projects which use the competitive dialogue rather that the open or restricted procedures should include the justification for such use in the published procurement documentation.

3. **Pre-procurement Preparation.** This is the most important stage of competitive dialogue procurement but also the most neglected and poorly executed. The ERG intends to issue guidance to address what should be done at this key stage. The ERG guidance will encourage authorities to engage with potential service providers before starting the formal competition process. The Treasury recognises that there are important benefits from engaging early, such as improving contracting authorities' understanding of potential outcomes and informing the service provider community of the procurement strategy and business case.

4. **Pre-qualification and Down-select.** The Treasury recommends that the ERG should develop a guide to the competitive dialogue procedure in order to inform new entrants to the market as to what can be expected during competitive dialogue procurements. This is intended to help SMEs get involved in more complex projects. The Treasury also warns against the dangers of taking too many bidders through to the final dialogue stage. Many contracting authorities are reluctant to move from three to two bidders in the down-select stage and so they artificially retain bidders even with little chance of success.

5. **Focus During Dialogue.** The Treasury believes that the competitive dialogue procedure offers a significant benefit in that it can be tailored to individual projects. However, there is a potential for significant abuse if the procedure is used by contracting authorities which have not done enough pre-procurement preparation and where authorities use the dialogue effectively as an opportunity for free consultation with the market. The competitive dialogue should be a chance to clarify and refine solutions rather than for the authority to develop its own specifications. The Treasury recommends that procurement timetables ought to be developed to allow for a realistic schedule of meetings to enable dialogue to take place. Taking time to establish a level of detailed assurance in advance of entering into dialogue should avoid costly overruns and impromptu requests for further information.

6. **Post-dialogue: Specifying, Clarifying and Fine-tuning bids.** The Treasury has considered what may occur at the post-bid stage and has decided that competitive dialogue works successfully at this stage.

7. **Evaluation of Bids and Debriefing.** The Treasury recommends that contracting authorities ought to publish a detailed guide to the evaluation approach to be taken, setting out the value of each piece of information requested and linking responses to the evaluation criteria. The need for this guidance mirrors the direction we have previously reported that the courts have been offering to contracting authorities through reported case decisions.

Overall, more guidance on the use of competitive dialogue is to be welcomed. However, it is unfortunate perhaps that this guidance does not go into more detail about the areas where competitive dialogue has been seen to have worked well or not so well. Equally, the message from the government still seems to be that the choice is between the open or restricted procedures on one hand and the competitive dialogue procedure on the other hand. The negotiated procedure - which many contracting authorities have historically found the most useful and flexible – still seems to be stuck in the back water and not officially recommended at all, even though it still remains a part of the PCR and the overall public procurement regime.

MODERNISATION OF EU PUBLIC PROCUREMENT POLICY

On 27 January 2011, the EU Commission published a green paper consultation on the modernisation of EU public procurement policy. The green paper contains lots of questions but no answers. The intention is that responses received to the green paper will feed into legislative proposals later in 2011. Although the suggested questions provide interesting insights into the direction in which the Commission might take EU procurement policy, it will be a long time before any of these potential approaches become part of the legislative regime.

Overall, the EU continues to commit itself publicly to simplifying and updating the EU public procurement rules so as to make the award of public contracts more flexible and to enable public contracts to support better other EU policies (*e.g.*, support for SMEs; encouraging social policy and mobility; incentivising better energy and resource efficiency). Public procurement plays a key role in the "Europe 2020" strategy which targets smart, sustainable, inclusive growth and encourages a shift to an efficient and low-carbon economy. Particular areas covered by the latest consultation include:

- whether the definitions of public works, supplies or services contracts ought to be rationalised;
- whether there is any sense in maintaining the distinction between part A services and part B services;
- whether the current financial thresholds at which the procurement regime applies ought to be increased;
- whether there should be a change in the exclusions from the procurement directives; and
- whether the approach to utility procurement continues to be correct.

Additionally, the EU recognises the frequent criticism that the public procurement procedures lack flexibility and are difficult or impractical to apply in certain circumstances so, for example, the Commission asks whether more negotiations should be allowed in public procurement, for example by allowing the negotiated procedure with prior publication to be used more generally. Also, the Commission questions whether past performance should be more explicitly allowed as an evaluation factor.

Interestingly, the EU Commission's Green Paper is reflected by a consultation exercise conducted by the Cabinet Office in the UK. This consultation has been designed to seek feedback on aspects of procurement law that are considered problematic, gather suggestions for rule changes, and identify whether any rules can be eliminated altogether. Further simplification of the competitive dialogue remains on the agenda – as does, intriguingly, greater use of an old favourite: the competitive negotiated procedure.

The Cabinet Office also floats the possibility of changes in the use of framework agreements, either by making them "open" to allow subsequent competitors to gain entry at points in time after the initial competition has closed, or by lifting the 4 year maximum duration.

GENERAL APPROACH

Overall, the Cabinet Office feels that many procurements have been taking too long and there is an acute sensitivity to time and cost in winning government contracts. The ERG aims to reduce the average procurement time down to a recommended 7 months even for the most complex procurements (as opposed to the current average of 11.1 months for a typical competitive dialogue process). The Cabinet Office stresses that the procurement law process is successful as long as procurements are run with good project discipline and departments focus on getting the requirements right and increasing the amount and value of pre-procurement activity. The overall message seems to be that a "rush to OJEU" is

to be avoided and effective planning is essential.

There has also been a move by the government to ensure that more procurements are open to competition from SMEs. This is reflected in a goal to increase the penetration of SMEs in procurements. While this is to be welcomed – and any moves to streamline the procurement process are likely to work in favour of SMEs – it is worth remembering that one of the largest procurements of recent times (the National Programme for IT (*i.e.*, "Connecting for Health") project run by the NHS) came close to a crisis point because of over-reliance on one particular SME software provider (iSoft). Any move in favour of SMEs must be tempered by an appropriate risk analysis to make certain that procurements do not become over-reliant on SMEs or, at least, SMEs without the appropriate level of financial stability.

OGC and the ERG are also working to develop a new model contract particularly for ICT procurement. The existing ICT model contract is viewed as cumbersome and only really appropriate for large-scale procurements. It is considered to be inappropriate for smaller procurements. OGC has indicated that it intends to move towards a "light" version of the model contract. This is expected to appear during 2011.

For a copy of Morrison & Foerster's consolidated digest of recent cases and decisions affecting UK public procurement law, please click here.

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