Where are the legal and practical uncertainties around dynamic markets under PA 2023 – and to what extent are they vulnerable to challenge?

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Key provisions

- Section 34 - Competitive award by reference to dynamic markets
- Section 35 - Dynamic markets: establishment
- Section 36 – Dynamic markets: membership
- Section 37 – Dynamic markets: removing members from the market
- Section 38 – Dynamic markets: fees
- Section 39 – Dynamic market notices

The concept of a dynamic market

- Combines elements of:
  - Dynamic purchasing system (Reg. 34 PCR 2015/Reg. 52 UCR 2016)
  - Qualification system (Reg. 77 UCR 2016)
- No longer limited to *"commonly used purchases the characteristics of which, as generally available on the market, meet their requirement"*
- Not available for the award of a concession contract except for utilities contract

Essential operation of a dynamic market

Core provisions – see opening of section 34:

(1)A competitive flexible procedure may provide for the following suppliers to be excluded from participating in, or progressing as part of, the procedure—

> ***(a)suppliers that are not members of an appropriate dynamic market, or***
>
> ***(b)suppliers that are not members of an appropriate part of an appropriate dynamic market.***

(2)Subsection (3) applies in relation to the award of a public contract under section 19 if the competitive flexible procedure provides for suppliers to be excluded as set out in subsection (1).

(3)In assessing tenders under section 19, a contracting authority must disregard any tender from a supplier that is not a member of—

> ***(a)the appropriate dynamic market, or***
>
> ***(b)the appropriate part of the appropriate dynamic market.***

Establishment of a dynamic market - 1

- Arrangements constituting DM do not constitute a contract for purposes of PA 2023: section 35(5)
- Requirement to publish notice: see Regulations 25(1) and 25(2)
- Core requirement under section 36(1):

(1)A contracting authority may set conditions for membership of a dynamic market or part of a dynamic market only if it is satisfied that the conditions are a proportionate means of ensuring that members—

> ***(a)have the legal and financial capacity to perform contracts awarded by reference to membership of the market or the part of the market;***
>
> ***(b)have the technical ability to perform such contracts.***

Establishment of a dynamic market - 2

- Assessment of proportionality fact- and context-specific. But section 35(1) not to be exercised in a way that constrains membership:
- Section 36(2) in relation to legal and financial capacity:

(2)A condition set under subsection 1(a)may not—

> ***(a)require the submission of audited annual accounts, except from suppliers who are, or were, required to have the accounts audited in accordance with Part 16 of the Companies Act 2006 or an overseas equivalent;***
>
> ***(b)require insurance relating to the performance of the contract to be in place before the award of the contract.***

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- Section 36(3) in relation to technical ability:

(3)A condition set under subsection (1)(b) may relate to suppliers' qualifications, experience or technical ability, but may not—

> ***(a)require suppliers to have been awarded a contract by a particular contracting authority,***
>
> ***(b)break the rules on technical specifications in section 56, or***
>
> ***(c)require particular qualifications without allowing for their equivalents.***

- Section 36(4):

(4)When considering whether a condition is proportionate for the purposes of subsection (1) a contracting authority must have regard to the nature, complexity and cost of contracts to be awarded by reference to suppliers' membership of the market.

- What might this mean in practice?

Establishment of a dynamic market - 4

Section 36(4) – some potential problems:

(1) What is meant by *“cost of contracts to be awarded by reference to suppliers’ membership of the market”?*

(2) No requirement in Regulation 25(2) to indicate estimated value of contracts

(3) How are the three factors to be weighed against each other?

Establishment of a dynamic market - 5

Section 36(6) – additions to membership:

(6)A contracting authority must—

(a)accept applications for membership of a dynamic market or part of a dynamic market at any time during the term of the market;

(b)consider such applications within a reasonable period;

(c)admit to the market or the part of the market, as soon as reasonably practicable, any supplier that—

(i)is not an excluded or excludable supplier, and

(ii)satisfies the conditions for membership;

(d)consider whether to admit to the market or the part of the market any supplier that—

(i)is an excludable supplier, and

(ii)satisfies the conditions for membership;

(e)inform a supplier of the outcome of their application, together with reasons for the decision, as soon as reasonably practicable.

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- Sections 34(4) and 34(5) are also relevant:

(4)A contracting authority must, before excluding suppliers or disregarding tenders under this section, consider any applications for membership of the market or part of the market from suppliers that have submitted a request to participate in the competitive flexible competitive flexible procedure, or submitted a tender as part o the competitive flexible procedure.

(5)Subsection (4) does not apply in relation to an application for membership if, due to exceptional circumstances arising from the complexity of the particular procurement, a contracting authority is unable to consider the application before—

> ***(a)the deadline for submitting a request to participate in the procedure, or***
>
> ***(b)where there has been no invitation to submit such requests, the deadline for submitting a first or only tender.***

- See also requirements of section 54

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Further issues:

(1) How do the provisions of section 36(6)(d) dovetail with section 58?

(2) How does authority proceed when it discovers relevant matters while considering an application for membership?

(3) How does section 34(5) work in these circumstances?

Removal of members of a dynamic market

Section 37 – removal of suppliers:

(1)A contracting authority must remove a supplier from a dynamic market if the authority considers that the supplier is an excluded supplier under section 57(1)(b) (debarment by reference to mandatory exclusion ground).

(2)A contracting authority may remove a supplier from a dynamic market if—

(a)the authority considers that the supplier—

(i)is an excluded supplier under section 57(1)(a),

(ii)does not satisfy the conditions for membership, or

(iii)has, since becoming a member, become an excludable supplier, or

(b)the authority discovers that, on becoming a member, the supplier was an excludable supplier.

(3)The reference to a supplier becoming an excludable supplier includes a reference to a supplier becoming an excludable supplier by virtue of a discretionary exclusion ground that—

(a)did not apply before the supplier became a member, or

(b)applied before the supplier became a member by reference to different circumstances.

(4)Before removing a supplier from a dynamic market, a contracting authority must inform the supplier of its decision to do so, together with reasons for the decision.

Operation of a dynamic market - fees

Section 38 – fees:

(1) Documents establishing a dynamic market other than a utilities dynamic market may provide for the charging of fees to suppliers that are awarded a contract by reference to their membership of the market.

(2)Fees charged by virtue of subsection (1) must be set as a fixed percentage to be applied to the estimated value of the awarded contract.

(3)Documents establishing a utilities dynamic market may provide for the charging of fees to suppliers in connection with obtaining and maintaining membership of the market.

Dynamic markets – where will the challenges lie?

- Ensuring that conditions for membership of the DM are appropriately set at the outset
- Handling tension between attracting membership while also ensuring appropriate conditions set
- Determining conditions on a sufficiently forward-looking basis
- Handling exclusions from the DM

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