

HOW POTENT ARE THE NEW FLEXIBILITIES IN THE NATIONAL PROCUREMENT STRATEGY AND PIPELINE LEGISLATION?

HOW CAN YOU EXPECT CLIENTS TO REACT PRACTICALLY?

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MORE IMAGINATION **MORE IMPACT**



BRIEF REMINDER – GREEN PAPER (1)

- Published December last year; over 250 paragraphs
- Worth signing up for updates: latest update was last month
- CO collating responses – 600+ responses were received, largely supportive:

“Contracting authorities were supportive of a more flexible approach and recognised the benefits to be gained”

- There will be a summary of responses – they have clearly resulted in change in some (as yet unspecified) areas - then draft legislation and implementation period; not in force before 2023
- Recognition of large L&D need: formal training plus *“support [for] communities of practice where ideas and experiences can be shared...particularly important for encouraging the behavioural and cultural change that will be so crucial to realising the benefits of the reform”*
- Plenty of detailed reviews out there – here’s ours:

<https://register.gotowebinar.com/recording/536828168333976847>

- There are plenty of simplifications, consolidations and new flexibilities (eg CFP), but:
 - very ambitious; lots for ca’s to assimilate - OK for large ca’s and utilities but unlikely to reduce the burden, and onerous for smaller authorities and SMEs
 - arguably conflates reforming procurement law with reforming procurement; will rule changes really lead to efficiency and innovation?
 - ... and do we want innovation in public sector procurement? (risky, complex)

GREEN PAPER (2)

- Some proposals are not more flexible than the existing rules or add complexity (eg frameworks)
- Less SIs but more bureaucracy – a retrograde step?
 - 16 references to guidance on topics such as limited tendering, transparency, past poor performance, use of the new crisis exception and MAT as well as digital strategy and roadmap, National Procurement Policy Statement plus case studies
 - Many new forms – see para 173 – and central debarment list
- New bodies: possible procurement tribunal (good); new unit to oversee procurement (?)
- Devolved Administrations:
 - Wales has now confirmed that it will join the Bill
 - Northern Ireland closely involved
 - CO working with Scottish Government to support alignment with the Scottish regime

GREEN PAPER – WHAT’S MISSING?

- No ‘whitewash’ procedure; no more VTNs (para 239); odd distinction from contract change
- No clarification of the (what are now called) Limited Tendering grounds eg ‘only one operator can deliver’
- No exclusion for private sector utilities (driven by UK/EU TCA)
- No reform of DoI (*AEW v Basingstoke*)
- Contract change: very important and problematic area in practice; GP notes uncertainty for ca’s in this area and “*ensuring maximum flexibility*”. What’s proposed?
 - “*Full overhaul*” not considered necessary
 - PCR as a basis: loss of flexibility for utilities
 - Re-ordering of definitions: still problem of £5M amendment to £150M IT outsourcing; and no link to nature of contract
 - New requirement for:
 - (Mandatory) Contract Amendment Notice save for smaller changes
 - Standstill of 10 days in most cases
 - Green Paper refers to 30-day challenge period if CAmN; no DoI if CAmN published, but...

BRIEF REMINDER – NPPS (1)

- Trailed in the Green Paper (paras 37 - 47)
- NPPS (and accompanying PPN 05/21) of 3 June 2021; brief, and divided in to the following ‘national priorities’ :
 - **Social value:**
 - encourages broad view of VFM, not necessarily lowest price
 - creating new businesses, jobs and skills
 - tackling climate change and reducing waste
 - improving supplier diversity, innovation and resilience
 - **Commercial and procurement delivery** - having in place the right policies and processes to manage procurement activity, especially complex projects, including:
 - publication of procurement pipelines
 - being alive to the commercial realities affecting the procurement (including market conditions)
 - conducting project validation reviews and delivery model assessments (Make vs Buy)
 - pilots, KPIs, risk allocation, assessing supplier health, resolution planning
 - having systems and data reporting capabilities to assist decision-making and enable monitoring of performance
 - collaboration between authorities

BRIEF REMINDER – NPPS (2)

- **Skills and capability for procurement:**
 - consider organisational capability and capacity
 - benchmarking against "*relevant commercial and procurement operating standards and other comparable organisations*"
- Nothing ground-breaking in text (but see below), much of detail familiar. ca's have always been able to take into account such criteria when awarding contracts, so no "new flexibility" (apprenticeships, SMEs, VCSEs, environmentally friendly approaches, etc.); but
- Another nudge from HMG to procure with social value or "public good" in mind (other recent examples include the updates to the Sourcing Playbook, PPN 06/20 and PPN 06/21)
- Represents a more centralised procurement strategy than we have seen previously, which is what the Green Paper hinted at and what the NPPS was billed to achieve
- Intention to legislate to require that 'regard be had' to NPPS and to mandate procurement pipelines for larger ca's "*when Parliamentary time allows.*" Likely to be done via the Minister for Cabinet Office's powers to introduce regulations under s 39 of the Small Business Enterprise and Employment Act 2015 ("SBEEA")
- See generally AG briefing:

<https://www.addleshawgoddard.com/en/insights/insights-briefings/2021/competition/national-procurement-policy-statement/>

NPPS, PPNs AND GUIDANCE - SOME CONCERNS (1)

- More seems to be being done by way of PPNs (20 since 1/2020) and Guidance:
 - Quality of guidance needs to improve if it is to help rather than hinder - eg PPN 12/10:
“Where a development agreement falls outside some or many of these parameters there may be a greater likelihood that the agreement has the characteristics of a public works or public works concession contract.”
 - Is there a democratic deficit and an absence of scrutiny when justiciable obligations are created by PPN, via the NPPS or through Guidance? (NB powers to amend NPPS and Guidance). CO will say it consults stakeholders, but does this involve full consultation with the general public or private sector?
 - Possible enforceability of guidance / non regard to guidance - see below
- Impossible balancing act:
 - Award Criteria “crowding”? (para 12 NPPS references Award Criteria)
 - But (NPPS para 15) don’t “gold plate”!
- What is status of Guidance (PPNs, NPPS etc): Good Law Project case ([2021] EWHC 346 (Admin)) has underlined that (even before legislating) guidance has teeth – the Court said:
 - *“Failure to follow published policy, absent good reason for departing from it, is an established ground for judicial review.”*
 - *“the Transparency Policy says that it is “advised” that contracts should be published within 20 days following the award of the contract or the end of the standstill period. Does that in some way attenuate the obligation to comply (absent good reason to depart from it)? In my view, the answer is “No””*

SOME CONCERNS (2)

- *“there is no uniform drafting style for the policies adopted by public bodies. Some talk about what the public body “should” or “must” do, some “recommend” and others “advise” a particular course of action. When drafting policy, there is generally no need to distinguish strictly between the mandatory and the hortatory, because policy can always be departed from for good reason.” and “some policies, by their own terms, will leave a measure of discretion or leeway to the decision-maker”*
- *The aim (in this case to support “the functioning of competitive, innovative and open markets by providing all businesses with information about public sector purchasing and service providers’ performance”) “would be significantly undermined if the time limit [for publishing contracts] were to be understood as imposing no legal constraint at all on Government, even in the absence of good reason for departing from it.”*
- *DHSC Official unaware of 20-day commitment: “I doubt whether a public body could ever justify departure from a published policy on the basis of a reason not considered at the time of the departure but only ex post facto”*
- *So, careful scrutiny of PPNs and of the NPPS (and promised future guidance) required; if transparently-available materials reveal non-consideration, may be actionable*
- *Admittedly, some of these issues may already be subject of other guidance (eg Green Book)*
- *JR under SBEEA re NPPS or generally re guidance not subject to 30-day time limit unless overlap with PCR claim (CPR 54.5(6): not a “decision governed by the PCR”)*
- *May change if SBEEA provisions are superseded by a PCR provision*

A HYPOTHETICAL EXAMPLE

- A large local authority plans to outsource a suite of IT and data-related services, plus supply of cloud services and some hardware
- A large amount of work is conducted in preparing for the procurement, including market engagement, but pressure of time means that it seems the procurement team have not considered some elements of the NPPS in preparing their procurement. Specifically, there has been no:
 - assessment of supplier health or resolution planning
 - attention given to improving supplier diversity
 - mention of climate change issuesand this is evident from the materials published by the authority in connection with the procurement
- You are advising a new market entrant who was invited to negotiate. The process is ongoing.
- Your client considers that several features of the ITN will sway the award decision in favour of large industry players, whose record on climate change and MSA is questionable, and who have been the subject of solvency rumours in the media after a number of recent high-profile contract problems
- Is there a basis for your client to bring action based on non-consideration of the NPPS?

FUTURE BATTLEGROUND?

- Other areas in which one can foresee that there will be increased scope for challenge include:
 - Past poor performance: upping the ante if central debarment list adopted
 - Disclosure of sensitive information
 - Re-opening of Frameworks and position of incumbents
 - Allegations that Contract Amendment Notices don't adequately describe the change (see *Faraday*)

WHAT SHOULD IN-HOUSE TEAMS BE DOING?

- Be ready to train your teams once the reforms crystallise:
 - Better-prepared bidders will win more business
 - ca's competing for attention from the best bidders: what rep will you have?
- Period of dual running: role for lawyers in managing this
- Looking forward: watching brief re contract changes in our contracts and notices regarding competitors' contracts?