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Get Your Act Together: Unveiling the Future of Public Procurement Law

Laura Hunter

Commercial Management Officer, NI Water



James Flanagan

A&L Goodbody



A&L Goodbody

UK Procurement Act

The Key Changes to Procurement

17 October 2024

Key Changes

- Single legal framework;
- Enhanced transparency through requirements to publish Notices;
- Modifications;
- MAT instead of MEAT;
- New award procedures;
- Greater consideration to SMEs;
- Changes to standstill period;
- Requirement to publish KPIs;
- Time Limits;
- Enhanced powers to exclude; and
- Exclusion and Debarment List.

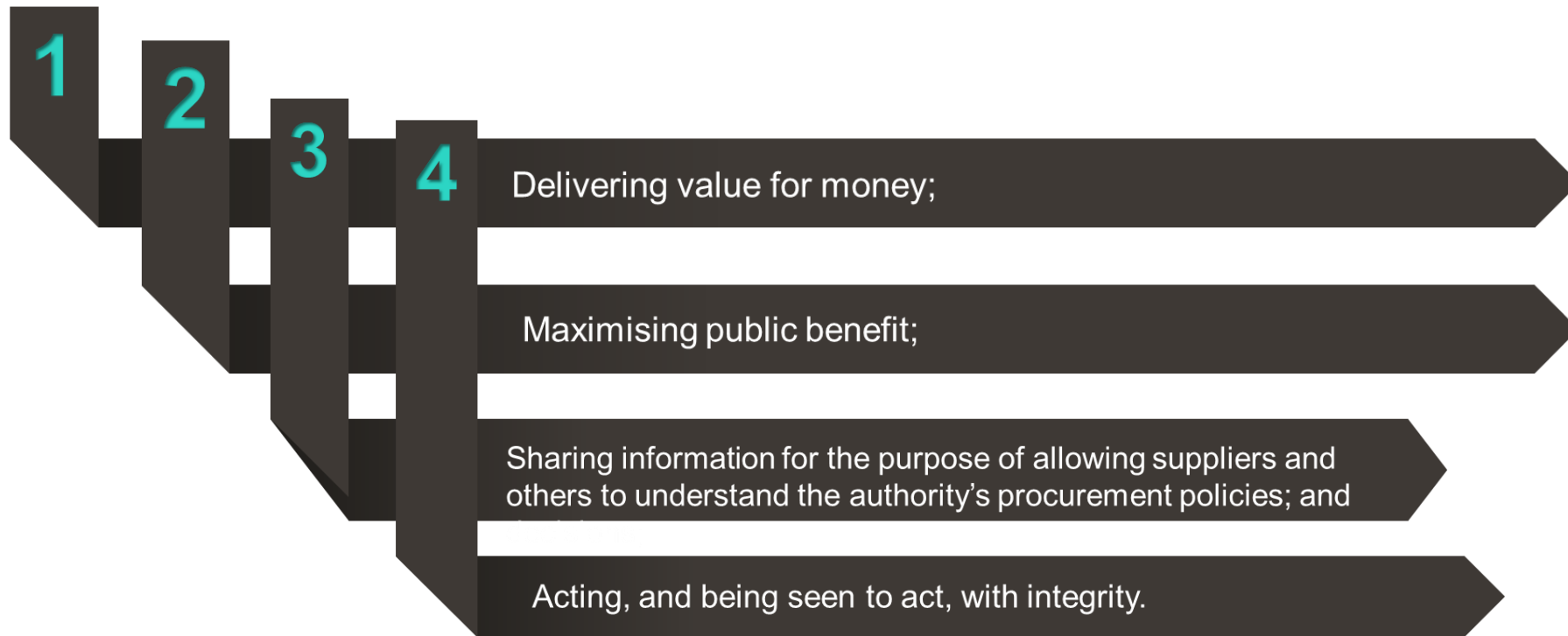


Single Framework

- The Act aims to establish a **single legal framework** for the award of public contracts, utilities contracts, concession contracts, and defence and security contracts by contracting authorities.
- At present, public procurement is currently legislated by the four following pieces of legislation:
 - 1 The Public Contracts Regulations 2015;
 - 2 The Utilities Contracts Regulations 2016;
 - 3 Concession Contracts Regulations 2016; and
 - 4 Defence and Security Public Contracts Regulations 2011
- It is hoped that this will **reduce** administration and to create a **fairer and more open** competitive system. The new approach means organisations can seek the information they need from one single source.

Objectives

- A significant departure from the current legal position is the objectives. A contracting authority must now have regard to the importance of several objectives including:



Contracting entities should be aware that this provision replaces the Regulation 18 principles of equality, non-discrimination, transparency, and proportionality that were outlined in PCR 2015.

- > More flexibility to contracting authorities

Introduction of Notices



One of the key aims of the Act is to promote transparency in procurement; the Act contains a range of new notices, that will be published and cover the full procurement cycle, from planning to contract expiry.

These notices include:

Pipeline Notice

Planned Procurement Notice

Preliminary Market Engagement Notice

Tender Notice

Transparency Notice

Dynamic Market Notices

Qualifying Utilities Dynamic Market Notices

Contract Award Notice

Modifications

- Enhanced transparency requirements for contract modifications.
- Section 74 permits modification of a public contract if:
 - > Compliant with Schedule 8 (“Permitted contract modifications”)
 - > Not a substantial modification; and
 - > Below threshold as outlined in Section 74(4) .
- Additional Changes:
 - > “Substantial modification” has been simplified – only substantial where greater than 10% increase or decrease in estimated value for goods and services, 15% for contract works;
 - > A contract can be modified where its purpose could otherwise be achieved through direct award;
 - > A requirement to observe a standstill period between the publication of a contract change notice and implementing a modification according to Section 76; and
 - > Modifications may trigger an obligation on the part of the contracting to republish the contract in accordance with Section 75.

MAT instead of MEAT

The Most Economically Advantageous Tender (“**MEAT**”) has been replaced with Most Advantageous Tender (“**MAT**”).



Allows authorities to consider a broader spectrum of criteria, not just price or cost.



Allowing for a balance with **other non-monetary benefits** such as maximising public benefit and integrity.



Price will likely continue to be a key aspect.

Direct Award

- This is a familiar procedure.
- Authorities must now ascertain if a supplier is excluded.
- However, a direct award can still be made to an excluded supplier if:
 - > There is an overriding **public interest**; or
 - > Justification is of an **extreme and unavoidable urgency**.
- For example:
 - > It is necessary to construct, maintain or operate critical national infrastructure.
- The Act also contains a new “Direct Award to Protect Life” which was likely introduced as a result of COVID.



Frameworks

Familiar Process

A Framework is defined as a contract between a contracting authority and one or more suppliers that allows the contracting authority to run “mini-competitions” or “call-off” contracts within the selected supplier pool of the framework agreement.

Time Limits

Under the current legislation, a framework is generally capped at a 4-year maximum, and bidders cannot offer to provide their services at higher prices than those offered at the start.

The 2023 Act, frameworks can exceed 4 years if the reasons are set out in:

- The original tender; or
- A transparency notice.

Open Frameworks

Major change

- Frameworks can run for up to **8 years** provided it is re-opened for others to join at least once in the first **3 years**.
- Existing suppliers can stay on or re-bid.
- The Open Framework must provide:
 - > For the award of a Framework at least once during the period of three years beginning with the day of the award of the first Framework and each period of five years beginning with the day of the award of the second Framework; and
 - > For the expiry of one Framework on the award of the next; and
 - > The final Framework to expire at the end of the period of eight years beginning with the day on which the first Framework under the scheme is awarded.

SMEs

- The new legislation provides for greater recognition of small and medium enterprises (SMEs).
 - > Greater visibility of work through notices
 - > New central platform
 - > Audited accounts not required
- Competitive Flexible Procedure will allow greater consideration of SMEs
- Unsuccessful bidders will receive an assessment summary
- Dynamic Markets and Open Frameworks will not lock SMEs out
- Duty to consider lots

Time Limits

- The Act specifies new time limits to govern competitive tendering procedures.
- Minimum lengths are provided for “Participation Period” and “Tendering Period”. These are new definitions and are as follows:
 - > **Participation Period**
 - > **Tendering Period**
- In the current legislation, it is specified that tenders must be returned within 30 days.
- Contracting authorities have a degree of discretion when devising their procurement time limits, provided the shortest minimum periods are adhered to.
- Contracting authorities must have regard to a list of factors when determining appropriate time limits, including the nature and complexity of the procurement; sub-contracting; the complexity of any modification to the tender notice or tender documents; and the importance of avoiding unnecessary delay.
- These time frames are outlined in Section 54 e.g., “contracting authority considers there to be a state of emergency – 10 days”.

Exclusions

- The 2023 Act significantly strengthens exclusions and debarment provisions.
- It will be easier for contracting authorities to take account of poor supplier performance.

New definitions:

- “Excluded supplier” – a supplier which meets a mandatory exclusion ground and where the contracting authority considers that the circumstances will reoccur.
- “Excludable supplier” – a supplier which meets a discretionary exclusion ground and where the contracting authority considers the circumstances will reoccur.

Debarment

- One of the most significant changes is the concept of a debarment list.
- This will **prevent** a supplier from being awarded any public contracts **until removed**. Suppliers will be placed on this list following a referral to the appropriate authority.
- A supplier may be placed on a debarment list where a contracting authority excludes them from a procurement on the basis that they are:
 - > “excluded” – to whom a mandatory exclusion ground applies; or
 - > “excludable” – to whom a discretionary ground applies.

Suppliers will be placed on the debarment list following investigating from an “appropriate authority”.

Under Section 59(6) a “relevant appropriate authority” is defined as:

- (a) If the contracting authority is a devolved Welsh authority, the Welsh Ministers;
- (b) If the contracting authority is a transferred Northern Ireland authority, the Northern Ireland department that the contracting authority considers it most appropriate to notify;
- (c) In any other case, a Minister of the Crown.

Conclusions



Secondary legislation required to be seen



More transparent regime



It is interesting to note certain principles have been relegated to “must have regard” to the importance of acting with integrity – creates a more complex picture.



Thank you



Mark Prenter

Senior Commercial Lawyer, NI Water



Background

Comes out of Brexit

Go Live Date
24th Feb 2025

Aims

Simpler, more
flexible, embed
transparency

Brings various regs
under one umbrella
(some variations for
NI & Utilities)

Contracts awarded
under UCRs will
continue under
UCRs

Call offs from
frameworks or mini
competitions under
DPS will continue
under UCRs

Central Digital Platform

Suppliers will need
to register

In time will be a
valuable source of
data

NI Water's Perspective

Evolution not
revolution

Walk before we
run

eTendersNI

Bidders should not
see any big
changes

Some information
will pull directly
from Central
Digital Platform

Transparency Requirements

Pre-market
engagement

Standstill on
“Direct Award
Contracts”

Changes to
supplier feedback

Publishing of KPI
results

Immediate Impacts

Change of naming
conventions

Longer timescales



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Q&A

