Procurement Bill: Call for evidence

Shoosmiths LLP written evidence

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Introduction

This document has been prepared in response to the Government's call to Public Procurement experts to provide their views to the House of Commons Public Bill Committee, on the proposals contained in the Procurement Bill. Shoosmiths Procurement team set out below their views.

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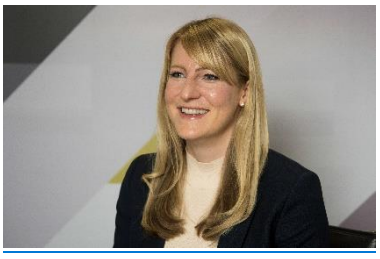

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The Procurement Bill (the "Bill") – Call for Evidence

Response from Shoosmiths LLP

PART 1 - KEY DEFINITIONS

There are still some areas requiring clarification, such as light touch contracts, as the type of services to be included will be contained in the regulations which are yet to be published. We would recommend that the types of services to be included are the same as the current regulations.

PART 3 - AWARD OF PUBLIC CONTRACTS AND PROCEDURES

Chapter 3 - DIRECT AWARD

42 Direct award to protect life, etc

42(1) The Bill introduces a key change around direct awards, in that, Ministers are provided with an express right to specify contracts or categories of contracts which can be awarded directly and as if a direct award justification applied. Whilst the Minister must consider whether it is 'necessary' to protect human, animal or plant life or health, or public security or safety, how widely this provision may be interpreted remains to be seen. Additionally, there are no detailed provisions for how the Ministers' duty may be discharged, other than an obligation to keep the regulations under review and revoke when considered that they are no longer needed. We are concerned that this will make it more difficult to challenge direct awards made pursuant to such regulations and therefore will allow direct awards to be made without sufficient scrutiny.

43 Switching to direct award

43(1) The Bill introduces a further key change where, subject to a few exceptions, in advance of making a direct award, a contracting authority will be obliged to publish a transparency notice setting out its intention to do so. Under the current regime, an authority can issue a *voluntary* transparency notice in order to mitigate the risk of a claim of ineffectiveness and to start time running for a claim for breach of the PCRs. However, the 10-day standstill period for a voluntary transparency notice is not replicated in the Bill. Instead, the Bill simply requires the transparency notice to be published before the contract is awarded. We consider that, whilst this is likely to give some certainty for recipients of direct awards as to when a contract is 'safe' from challenge, the lack of a standstill period may make it more difficult – or even practically impossible – for a party to challenge a direct award before it is entered into. Further, and perhaps counterintuitively, the obligation to give a transparency notice forms part of a patchwork of transparency obligations in the Bill, which lacks a standalone general duty of transparency (as exists under the current regime).

Chapter 5 - AFTER AWARD, STANDSTILL PERIODS AND NOTICES

50 Contract award notices and assessment summaries

50(1) The requirement for a contracting authority to publish a contract award notice stating that they intend to enter into a contract and any other information yet to be specified in the regulations before entering into the contract, is a departure from the current position that a contract details notice is required to be published after the contract is entered into.

The requirement to publish a Contract Award Notice pursuant to this new clause does provide more time for potential challengers to raise a challenge, whereas under the current regime some contracting authorities tactically do use bank holidays and weekends which does reduce the time that challengers have in an already tight timeframe. This proposal would be beneficial to suppliers also as the standstill period doesn't start with the feedback provided in the proposed assessment summaries, but instead starts with the publication of the Contract Award Notice which would in some circumstances allow potential challengers more than the 8 working days proposed to consider any feedback provided by the contracting authority which can only be beneficial to potential challenges.

50(4) The Bill requires the contracting authority to provide an assessment summary and, if different, information on the most advantageous tender. Though we do not have much information on the details of what will be contained in these assessment summaries, this does sound more limited than the existing requirements to provide information related to the "characteristics and relative advantages of the tender selected". This may obviously be an advantage for contracting authorities in terms of the detail they are required to provide. However, for a losing bidder, any reduction in information on a tender affects their assessment of if they have good robust grounds to challenge a decision. This clearly impacts their ability to bring a procurement challenge, especially at a time where there are reports of VIP lanes in public procurement, a lack of scrutiny is not helpful.

This is advantageous for contracting authorities. It reduces administration time and therefore costs for authorities but looking at losing bidders, a concern would be that there would not be sufficient information provided in the assessment summaries for bidders to understand the merits of bringing a challenge and this may in turn lead to opaque decision making which is not ideal for challengers. The information that is required under the current regime, whilst is often open to further requests being made by suppliers, does at least provide suppliers with, in the main, enough information to decide whether to bring a challenge.

50(4) We agree with the proposed wording change in reference to the shift in contract award criteria. The amendment from the "most economically advantageous tender" to the "most advantageous tender" means the other, perhaps more important criteria, will be considered at the same level of priority to financial impacts. These may ultimately drive the relevance of environmental, social and governance concerns by contracting authorities when looking to tender, but more importantly will be beneficial for a wide range of suppliers. Though pricing will always be important in public contracts, this may see suppliers not having to underbid to win the contract where other criteria are of equal importance to the contracting authority.

51 Standstill periods on the award of contracts

51(5) We are in agreement that the change in wording from "days" to "working days" was much needed and a huge improvement. Though this is still a very tight deadline for a challenge to be fully considered, the use of "working days" is significant as the clock will no longer tick over the weekend and bank holidays which has proven to be an issue for timing of potential challengers. Any increase in time allows potential challengers and their legal teams to fully formulate a challenge and gather information needed to support that challenge.

Chapter 6 – GENERAL PROVISION ABOUT AWARD AND PROCEDURES

57 Excluding Suppliers

57(1) The new bill introduces the concept of excluded supplier and excludable supplier. Any tender that comes from a supplier that is classed as an excluded supplier has to be disregarded, whereas a contracting authority has discretion to disregard the tender making it very similar to the previous regime.

57(5) A new ground that has been introduced that results in the supplier being listed as excluded is the "improper behaviour" ground which requires the contracting authority to treat the supplier as an excluded supplier if it determines that a supplier has acted improperly such that the supplier is at an unfair advantage and the only way to avoid this, is to exclude them.

This new ground could allow contracting authorities to take a wide approach in determining what counts as "improper behaviour". This does need to link to the supplier being at an unfair advantage which may act as security from the ground being abused.

57(5) Another new ground gives the contracting authority the discretion to exclude a supplier where is has committed a "sufficiently serious" breach of a "relevant contract". Such a breach must have resulted in termination, the award of damages or a settlement agreement between the supplier and the contracting authority, and a relevant contract would cover all public contracts including those outside of the UK. The ground would also capture poor performance where the

supplier was given proper opportunity to improve performance and failed to do so. See our comments below on the test for whether a supplier is excluded or excludable as to how these grounds will affect suppliers.

58 Considering whether a supplier is excluded or excludable

58(1) A key difference in the changes is that before classing the supplier as excluded or excludable the contracting authority has to consider whether the circumstances giving rise to the exclusion ground are likely to occur again. Compared to the previous "self-cleaning" method, this is for the contracting authority to consider and may allow the supplier to show commitments that future steps will be taken rather than showing measures already taken. The supplier also has to be given the opportunity to make representations and supply evidence. Overall, this is favourable to suppliers as it allows ample opportunities to effectively self-clean and makes it more difficult for authorities to exclude suppliers as they have to make sure they have sufficient reasons to exclude. There will be possibilities of a dispute in terms of what a contracting authority considers sufficient steps, versus a supplier's view that they have done whatever they can which could lead to potential challenges if suppliers feel wrongly excluded.

58(2) The onus here for evidence to be provided in relation to circumstances arising again is placed on contracting authorities. It is currently unclear what evidence suppliers could provide to satisfy a contracting authority that the circumstances will not be repeated.

59 Notification of exclusion of supplier

59(1) Sub-contractors are now expressly referred to in exclusions. Authorities can exclude suppliers if their intended sub-contractor is excluded or excludable. This means suppliers are now treated as excluded in connection with information on their intended sub-contractors. This is a change from the mandatory and discretionary exclusions in the existing regime as these only applied to the supplier bidding for a contract. This does rely on self-reporting to an extent but, similar to the current regime, when these issues come to the surface, it may result in the loss of awarded contracts, potential claims and also affect suppliers' chances of being awarded future contracts.

62 Debarment List

62(1) The new bill proposes a publicly available record of suppliers for those added by a Minister of the Crown. The intention seems to be to make it easier for contracting authorities to identify suppliers that should be excluded, however once added to the list, this translates to an exclusion from bidding for all public sector contracts. This is significant for suppliers in the public sector as other authorities will likely check this list when tendering. The consequences of this are significant both commercially and reputationally since the reasons for exclusion will now be made public.

There are also only limited ways to be removed from the list making it harder for suppliers to be removed. The detail on how appeals would work will be set out in future regulations, but it seems, in reality, it will be difficult to get off that list.

PART 4 – MANAGEMENT OF PUBLIC CONTRACTS

73 Modifying a public contract

73(1) The Bill proposes extensive changes to the rules around modification of public contracts, including introduction of the new concept of 'convertible contracts'. This is a significant departure from the current regime, as contracts that were originally below the financial threshold can be modified to become public contracts without having to have first been tendered or procured, which therefore allows contracting authorities to avoid running a competition. We envisage that this may result in potential challenges, by parties who were not given the opportunity to compete for the contract.

In addition, the new modification ground for urgency does not contain parameters such as placing a limit on the value of the modification which could result in significant modifications being made with limited scrutiny.

74 Contract change notices

74(1) The Bill also requires that contracting authorities must publish a contract change notice before modifying a public contract or a convertible contract when using certain specified grounds. Further, the Bill prevents contracting authorities from modifying a public (or convertible) contract before the end of any standstill period as stated in the linked contract change notice. In our opinion, this introduces an increased risk of challenge of the modification while proposed contract modifications are ongoing.

PART 6 - BELOW-THRESHOLD CONTRACTS

85 Regulated below-threshold contracts: duty to consider small and medium-sized enterprises

85(1) Although the bill contains additions to assist the participation of small and medium sized enterprises in procurement, such as allowing suppliers to provide alternative evidence where audited accounts are not available in order to clear the financial records hurdle, and only requiring suppliers to put in place the required insurance cover at contract award rather than incurring the costs of that up front, there are still blocks on the ability of SMEs to challenge.

The court fees for issuing a procurement challenge are high, £10,000 for any claim with a monetary value above £200,000, and there do not appear to be any proposals to make relevant changes to benefit SMEs. Together with the costs of the urgent legal advice and the preparation of court proceedings, we expect SMEs to continue to be dissuaded from pursuing remedies for breaches of the procurement rules. We would like to see such barriers being removed to allow for increased access to justice for SMEs.

PART 9 - REMEDIES FOR BREACH OF STATUTORY DUTY

103 Time limits on claims

103(1) We appreciate that there has been some change to the time limits for bringing claims. Our view, however, is that this should be taken further to allow parties proper time to evaluate their claims. In the world of litigation outside of the public procurement sphere, there is usually ample time for parties to discuss the relevant dispute, with a view to reaching a settlement without incurring the cost of issuing proceedings. The relevant limitation period for public procurement challenges is just 30 days (beginning with the date when the claimant first knew or ought to have known that grounds for starting the proceedings had arisen). Up against a very tight deadline, potential claimants rush to seek urgent legal advice and, in order to protect their position as best as possible, may prepare and issue a claim in advance of having had adequate opportunity to discuss the matter with the contracting authority.