

# New Procurement Regulations Update



## Background

- Single legal Framework – PCR 2015 restrictive, complex, includes multiple provisions from separate EU Directives.
- Provisions substantially the same – terminology differs from EU, often for the sake of it.
- More transparency, but not on the Contracting Authorities, much more openness about commercial information.
- Enhanced power of supplier exclusion, debarment and KPI & poor contract performance now explicitly allowed.
- In practice, there are limits to any radical path - UK has to meet WTO GPA requirements .
- Need to be aligned with EU for Trade Agreement.



- PCR 2015 based on transparency, equal treatment, non-discrimination and proportionality. (TFEU).
- The EU rules were all about cross border trade and not about VFM or fairness. NB. This is obvious from the lack of successful challenges under the current Remedies regime.
- In addition, new rules require CA's to include VFM, maximising public benefit and integrity.
- The new rules allow public procurement to deliver Government policy.
- The new rules require the tenders to be on Most Advantageous Tender (MAT) as opposed to the current Most Economically Advantageous Tender (MEAT).



- New rules replace 5 separate procedures containing different rules E.g. time limits, supplier engagement, structure.
  
- Two types of competitive tendering procedure;
  - a single-stage tendering procedure without a restriction on who can submit tenders.

or

  - such other competitive tendering procedure as the contracting authority considers appropriate, which may involve limiting the number of participants across multiple stages.

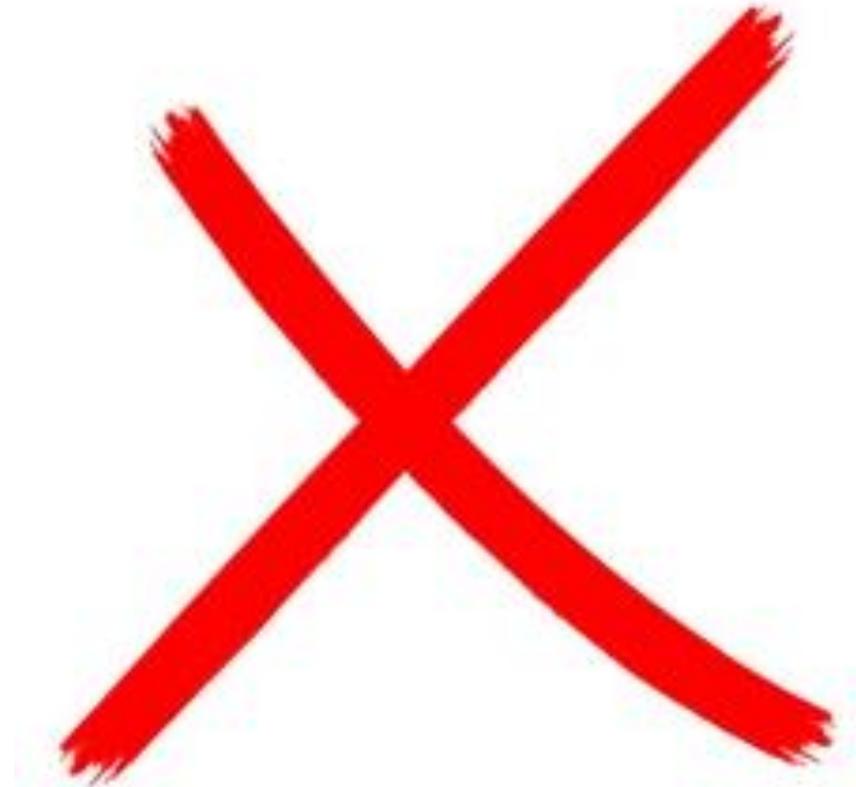
  
- This means that contracting authorities will have considerable flexibility to design procurements in a way that suits their needs, subject to ensuring consistency with the procurement principles and objectives.

- New rules intended to make it easier to scrutinise decisions.
- CA's required to publish;
  - a "pipeline notice" for CA's expecting to procure >£100 million on certain types of procurement
  - a tender notice at the commencement of the selected procedure;
  - more detailed information about the evaluation to unsuccessful bidders;
  - a contract award notice before (instead of after) entering into a public contract;
  - information about contracts after they have been concluded;
  - a copy of any public contract >£2 million < 90 days;
  - information about payments by CA's for the public;
  - a contract implementation notice to update on performance against KPIs
  - a contract change notice in advance of implementing amendments; and
  - a contract termination notice ahead of the expiry or termination of a contract.



# Exclusion from procurement

- New rules include provisions on excluding suppliers from procurements.
- CA's have to establish if Suppliers are;
  - an "excluded supplier": a supplier which meets a mandatory exclusion ground and where the CA thinks that the circumstances will reoccur; or
  - an "excludable supplier: a supplier which meets a discretionary exclusion ground and where the CA thinks that the circumstances will reoccur.
- CA's must allow suppliers the opportunity to challenge whether exclusion provisions apply and provide evidence to that, including reasons the ground for exclusion will not happen again (self-cleaning for example)
- where a Primary supplier's proposed subcontractor is an excluded or excludable supplier, the CA must give the Primary an opportunity to replace the subcontractor with a suitable alternative before a full exclusion decision is made;
- A significant change to these rules is the introduction of "debarment"



# Exclusion from procurement



- CA's will have enhanced powers to exclude suppliers on the basis of prior poor performance (KPI's)
- CA's can exclude suppliers if they are thought to be a threat to national security. Needs Ministerial consent;
- Suppliers can be excluded if they have behaved improperly in the process and have obtained an unfair advantage: for example, through providing information that is incomplete, inaccurate or misleading; or accessing confidential information; and
- CA's can exclude a supplier from a framework or from their right to compete for contracts under the framework will be an implied term where the supplier becomes an excluded or an excludable supplier after the framework is awarded.

- Protection against risk of contracts being awarded to unfit suppliers.
- CA's must notify Minister when they exclude a supplier, or when a subcontractor is replaced due to being an excluded or excludable supplier. The Minister will then consider whether that supplier should be considered for addition to the "debarment list".
- An entry on the debarment list must:
  - state which of the relevant exclusion grounds the Minister has decided to apply to the supplier; and
  - indicate, in respect of each ground, whether it is a mandatory or discretionary ground and when the Minister expects the ground to cease to apply.
  - The Minister must give notice to the supplier before adding its name to the debarment list and the Bill provides an express right for a supplier to appeal the decision to enter its name.

- A supplier can apply to the Minister to be removed from the debarment list at any time. In its application, the supplier must:
  - show that there has been a material change in circumstances since added to the list; or
  - include significant information that has not previously been considered by a Minister.
  - The Bill also contemplates the possibility of a Minister launching an investigation into whether a supplier is an excluded supplier or an excludable supplier.
  - If such an investigation is launched, it will have powers to request documents and assistance from contracting authorities and the supplier under investigation for the purposes of preparing a report.
  - An investigation may result in a supplier being added to, maintained on or removed from the debarment list.

# Supplier Information

- CA's are to use a single digital platform for supplier registration.
- Businesses will only have to submit certain types of information to demonstrate their credentials once to be considered for a public sector procurement.
- This is expected to include declarations in relation to the exclusion grounds and any supporting evidence relating to self-cleaning, as well as standard form information relating to financial standing.
- This won't include all Supplier information E.g. Sustainability, or e-procurement so still duplication.



- Contracting authorities will be required to set and publish at least three KPIs (!!!) before entering into any contract with a value exceeding £2 million.
- Not if the contracting authority considers that the supplier's performance under the contract could not appropriately be assessed by reference to key performance indicators.
- Needs to be assessed against KPIs at least annually during the lifetime of the contract; and
- Publish certain information about the supplier's performance.
- Publication of information about contract performance (this is business review data)

- There is also a new requirement for the contracting authority to publish information about contract performance if:
- a supplier has breached a public contract and the breach results in: (i) termination of the contract, (ii) the award of damages or (iii) a settlement agreement between the supplier and the CA; This will include compensation payments, reimbursement of costs, liquidated damages and arguably free stock provision. (this is no longer commercially confidential data.)
- If the CA considers that a supplier is not performing a public contract to its satisfaction and has failed to remedy the breach or improve performance after being given a proper opportunity to do so.(this could prove tricky in disputes, as the reputational damage at risk prior to resolution and remedy is after the event)
- Rules are the same as the discretionary exclusion ground for breach of contract and poor performance.

- The legislation retains the existing grounds permitting contracting authorities to award contracts without competition but with some changes.
- 1 = The CA cannot award an excluded supplier from a direct award. Unless there is an overriding public interest to do so, or where the justification for direct award is extreme and unavoidable urgency.
- 2 = a direct award can now be made where necessary to protect life or public safety during an emergency situation, even where the circumstances leading to that situation were foreseeable. This new ground has been created in recognition of the fact that the existing extreme urgency ground did not provide sufficient latitude to contracting authorities to make direct awards during the COVID-19 pandemic. Even less protection for suppliers, and therefore questionable whether they were allowed in the first place using the placement of explicit provision in new rules?
- 3 = CA's must observe a standstill period after making a direct award, unless the direct award is made on the grounds of extreme and unavoidable urgency or to protect life. The standstill period is triggered through the publication of a contract award notice. Still no remedy for suppliers.

# Modifications to Contracts

- “Substantial modification” is simpler. In particular, changes to the term of a contract will only be substantial where greater than 10%;
- A contract modification is allowed if it could be achieved by a direct award.
- CA’s will generally be required to publish a contract change notice CCN before making the change;
- a requirement to observe a standstill period between the publication of a CCN and implementing a modification; and modifications may trigger an requirement to republish the contract for transparency.
- *It is not yet fully understood the administrative impact of this, as surely the number of CCN’s in BIVDA members daily routine would be unmanageable, and monitoring and tracking Contract Change REQUESTS impossible for CA’s. Perhaps less practice of adding products and services after award and better specifications?*

- Largely the same provisions as current Remedies rules.
- Reform of court proceedings E.g. Disputes/ Challenges.
- Standstill 8 working days instead of 10 calendar days. (no more Friday's and bank holidays!)
- Similar to current Remedies, an automatic suspension prevents a CA entering a contract if it is notified of a claim before it has entered into the contract.
- The automatic suspension will also apply to planned modifications to contracts and certain direct awards;
- Does not apply if CA notified of the claim after standstill expires. *(Under the current regime, the automatic standstill is still available outside the standstill period if the authority has not concluded the contract)*
- A new test will apply when the court is required to determine whether to lift the automatic suspension
  - *Still in all but name – the public interest test E.g. is it legal, does delay adversely affect the CA, are damages sufficient and... anything else!*
- The court does not need to set aside a contract or modification if there is an overriding public interest in allowing the contract to continue. Can change length and scope.

# Things to consider

- Transparency welcome but a burden and needs balance on commercial information and supplier confidentiality.
- CA's taking in to account new principles, even more complex?
- Conflicting objectives (national/ local)?
- Damage of scrupulous debarment decisions on suppliers? Guidance needed.
- KPI's used to exclude instead of improve? Low threshold to future business based on specific Trust contract performance (often contributed to by Trust actions)
- Self-regulating = suppliers have to behave as Government expects with transparency provisions.

# Questions?



# DCB0129

- **INDUSTRY ISSUE =**

Some Customers, Suppliers, and some consultants have interpreted that every individual analyser in a solution needs a DCB0129 Risk Assessment.

- **NHS DIGITAL RESPONSE =**

Individual analysers software does not need a DCB0129 assessment, only the middleware. Also further clarification, that if an analyser is not connected to middleware, but direct to LIMS analysers still don't require it, only the LIMS and if no connectivity at all, then the analyser should.