

Decision Maker: Resources, Commissioning and Contract Management
Portfolio Holder

Date: 3 February 2021

Decision Type: Non-Urgent Non-Executive Non-Key

Title: POLICY: PUBLIC PROCUREMENT UPDATE

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Chief Officer: Mark Bowen, Director of Corporate Services

Ward: N/A

1. Reason for report

1.1 This report provides an update to Members on recent public procurement policy developments.

2. **RECOMMENDATION(S)**

2.1 Executive, Resources & Contracts Policy Development & Scrutiny Committee are asked to note the report and provide comment.

2.2 The Resources, Commissioning & Contract Management Portfolio Holder is asked to note the report and endorse the proposed arrangements for response to the Green Paper: Transforming Public Procurement as set out in paragraphs 3.35 and 3.36.

Corporate Policy

1. Policy Status: New policy.
 2. BBB Priority: Excellent Council.
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Financial

1. Cost of proposal: N/A
 2. Ongoing costs: N/A.
 3. Budget head/performance centre: N/A
 4. Total current budget for this head: £N/A
 5. Source of funding: N/A
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Staff

1. Number of staff (current and additional): N/A
 2. If from existing staff resources, number of staff hours: N/A
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Legal

1. Legal Requirement: Statutory requirement.
 2. Call-in: Call-in is not applicable.
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Customer Impact

1. Estimated number of users/beneficiaries (current and projected): N/A
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Ward Councillor Views

1. Have Ward Councillors been asked for comments? N/A.
2. Summary of Ward Councillors comments:

3. COMMENTARY

- 3.1 On 31 December 2020, the Brexit transition period expired which means the United Kingdom is no longer obliged to follow EU law. However, this has had little impact on the duties and obligations placed upon public contracting authorities, such as local authorities, in conducting public procurement.
- 3.2 This is because public procurement is governed by UK law, such as the Public Contract Regulations 2015. While it is in the gift of the UK to amend, scrap or replace such legislation, nothing will change unless or until changes are enacted in legislation.
- 3.3 While it is expected that UK public procurement legislation will be amended and flexibilities explored in due course – and the Government has issued a Green Paper on Public Procurement in December 2020 exploring this - it is unlikely to lead to fundamental change in the approach to public procurement. This is because the EU principles, processes and requirements that previously influenced UK legislation were themselves based on World Trade Organisation principles and processes governed through Government Procurement Agreements (GPA). From 1 January 2021, the UK rejoined GPA but as a sovereign state and so the same principles and processes will continue to underpin UK legislation.
- 3.4 Specifically, the only change in legislation so far is the Public Procurement (Amendment etc.) (EU Exit) Regulations 2020. The only substantive change arising from that legislation is that above threshold procurements will now be published in the new UK Find A Tender Service website as opposed to the Official Journal of European Union website.
- 3.5 The Government has issued guidance (Procurement Policy Note 11/20) in December 2020 which allows for some additional flexibilities in public procurement processes. And, more significantly, a Green Paper: Transforming Public Procurement was also issued in December 2020 which sets how potential changes in public procurement policy and legislation.

Procurement Policy Note (PPN) 11/20

- 3.6 PPN 11/20 was issued in December 2020 and although it is aimed specifically at Central Government Departments it encourages other contracting authorities to apply the same principles.
- 3.7 The guidance states that for any openly advertised below threshold opportunity, the opportunity can be reserved by location and/or organisation type. Below threshold means below £189k for Supplies and Services; below £663k for Social Services or similar; and below £4.7m for works or concessions.
- 3.8 What this means for us is that if we are openly advertising an opportunity, we can specify – on a case by case basis and only where there is sufficient justification – that the opportunity is reserved by location and/or provider type.
- 3.9 By location, we can specify either that the provider must be based in the UK (meaning based or established and has substantive business operations, not by location of corporate ownership) or that they must be based in a single specific county (metropolitan or non-metropolitan). By organisation type, we can specify that bidding organisations must be Small Medium Enterprise and/or a Voluntary, Community and Social Enterprise.
- 3.10 While additional flexibilities are welcome, it is unlikely that this will have significant impact on the outcome of procurement in Bromley. Procurement in Bromley at this threshold tends not to attract significant cross border interest. The market tends to gravitate towards sensible geographical interest (because, for example, it may not be cost effective for a non-local provider to relocate or travel to deliver a service).

- 3.11 Previous assessments have shown that a significant proportion of Bromley contracts at this threshold are already held with SME/VCSE providers and held locally (locally meaning within reasonable travel to work patterns such as London, Kent, Surrey). This is because the market tends to respond appropriately to the requirements being put out there.
- 3.12 Our own Local Rules policy already stipulates that if a Request for Quotes process is being undertaken (£5k to £100k) then at least one of the three quotes sought must be from a Bromley based provider. So we can and should already be ‘reserving’ smaller value contracts to support the local economy and SMEs, to a point.
- 3.13 However, it gives us an option to be more locally and/or organisationally specific when appropriate and justified – which may in turn encourage such organisations to respond to opportunities, knowing such limitations apply.
- 3.14 Care will need to be taken if reserving by county – as only a single county can be reserved this may unnecessarily exclude local providers such as providers in Kent if reserving for Greater London or vice versa.

Green Paper: Transforming Public Procurement

- 3.15 Issued in December 2020, the Green Paper sets out proposed changes to the UK procurement regime. The consultation period on the proposals ends on 10th March 2021. The timetable for implementation of any change in legislation has not been specified – but general opinion is that it is not likely until late 2021 / early 2022.
- 3.16 The paper is detailed and so only the key points are summarised here. A link to the full paper is provided in the Background Documents section.
- 3.17 The key points of **Chapter 1**:
- Proposes the key principles of UK procurement:
 - Public Good
 - Value for Money
 - Transparency
 - Integrity
 - Fair treatment of suppliers
 - Non-discrimination
 - National Procurement Policy
 - New oversight body within Government.
- 3.18 The proposed principles are broadly similar to those we currently operate under via the current legislation and other related Acts such as Social Value 2012 and Local Government Act 2012. However, the introduction of Public Good together with the introduction of a National Procurement Policy indicates an intent to leverage the public purse to achieve national priorities such as social value, reducing waste, supplier diversity and resilience.
- 3.19 The potential oversight body is indicative of a theme within the paper of a potential increase in centralisation and oversight; however, it is unclear whether the intended target is central

government departments or whether it will have an impact on sub-central contracting authorities such as ourselves. The capacity of such a unit to intervene in local issues may be a factor.

3.20 The key points of **Chapter 2**:

- A simpler regulatory framework, combining the current sets of regulations (Public Contracts, Concessions, Utilities and Defence) into a single set of regulations.

3.21 This is welcome but is unlikely to result in substantive change in practice or procedure.

3.22 The key points of **Chapter 3**:

- Replacing the existing procurement procedure with three routes only:
 - Open procedure – largely unchanged;
 - Competitive flexible procedure – this will combine all the existing procedures under one heading;
 - Limited tendering – essentially replicating current arrangements for negotiated procedure without prior publication (direct awards).

3.23 The flexible procedure is similar to the approach for the existing ‘Light Touch’ process. What this means is that it should give contracting authorities greater flexibility to design their procurement processes to meet the requirement – i.e. ‘pick the best bits’. However, this is not a free hand; any process will still need to meet both the principles and a redesigned set of rules which appear largely similar to existing arrangements.

3.24 The limited tendering procedure is essentially the same as current arrangements but with a greater emphasis on ‘crisis’ as grounds for its use, clearly in response to the current pandemic; and additional rules concerning transparency and publication of notices for use of this procedure.

3.25 The additional flexibility in designing a procurement process is welcome and gives us the greatest opportunity to be flexible and creative in how procurement procedures are designed (within reason and, most importantly, set out beforehand and stuck to). However, it also comes with risks – inconsistencies of approach between contracting authorities may incur challenge.

3.26 The key points of **Chapter 4**:

- Change of emphasis from Most Economically Advantageous Tender (MEAT) to Most Advantageous Tender (MAT);
- Additional grounds for exclusion, including feasibility of centrally managed debarment list;
- Exclusion for past poor performance – enhanced arrangements;
- Revisions to selection criteria including a potential supplier registration system (i.e. submit once, use many times).

3.27 The change from MEAT to MAT is to ensure that wider considerations, such as social value or broader economic benefit (nationally/locally) can be taken into account in an evaluation. This is unlikely to significantly change existing practice but may be a helpful additional flexibility.

3.28 Other proposals appear sensible on paper but may be problematic in practice – such as the accuracy of any centralised database that could automatically exclude suppliers. Similarly, steps for increased exclusion grounds – such as poor performance against Key Performance

Indicators on a contract – may inadvertently lead to increased burden in contract management and risk of challenge.

3.29 **Chapter 5** proposes a range of technical changes to the use of frameworks and dynamic purchasing systems that should give contracting authorities additional flexibilities in the use of such procurement routes.

3.30 **Chapter 6** outlines a range of proposals to support open and transparent contracting, including:

- A change in the award process, requiring contracting authorities to publish basic information on the proposed award (both winners and losers) before the award can be made;
- Data published in format compliant with Open Contracting Data Standard – which will affect how we publish notices;
- A proposed central platform of data (debarment lists, planned procurements, complaints, challenges and similar);

3.31 While open and transparent contracting is an important principle, care must be taken that it does not inadvertently result in additional or unforeseen burdens to contracting authorities in complying with them. The administration implications of a central platform of data (plus the risk of challenge for out of date or inaccurate data – plus the definition of what constitutes a complaint) will need to be considered carefully.

3.32 **Chapter 7** focuses on a range of proposals to the management of legal challenges and remedies. The overriding aims of such changes is to reduce the time taken on procurement legal challenges, reduce incentive for speculative challenges and an increased focus on pre-contractual remedies (e.g. running the procurement again) and a cap on damages. All proposals appear welcome – but the devil will be in the detail.

3.33 Finally, **Chapter 8** concerns contract modifications. This largely indicates an intent to clarify existing legislation, together with the introduction of the criteria of ‘crisis’ as a rationale for a contract modification, again as a response to the current pandemic.

Response to Consultation

3.34 As set out in paragraph 3.15, consultation on the Green Paper is open to 10th March 2021. The paper is detailed and further consideration is required to fully understand the detail and implication of all proposals within the paper.

3.35 It is proposed that a formal consultation response will be made by the Director of Corporate Procurement (or delegate) in Agreement with the Portfolio Holder for Resources, Commissioning and Contract Management, such a response being informed by any comments or points made by Members of this committee in advance of the deadline date.

3.36 In general, it is suggested that the response reflects the following statements:

- We support revisions to the Public Contract regime that supports flexibility, efficiency, value for money and effectiveness of public procurement maximising wherever possible the ability to support and strengthen the local economy and local priorities;
- When considering amendments to the regulations, care must be taken to ensure as far as possible that this does not result in additional unnecessary burdens and increased time and cost in undertaking public procurement.

Non-Applicable Sections:	Policy Financial Implications Legal Implications Personnel Implications
Background Documents: (Access via Contact Officer)	PPN 11/20: https://www.gov.uk/government/publications/procurement-policy-note-1120-reserving-below-threshold-procurements Transforming Public Procurement: https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement