

Briefing Notes

“Everything you need to know about procurement but were afraid to ask”

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Introduction

Mathew Baxter from the echelon consultancy gave a comprehensive presentation to the meeting about procurement, particularly focusing on the green paper proposals for changes to the procurement regime which would affect all registered providers of social housing. The government claims that the Green Paper will transform public procurement and Mathew was broadly in agreement that there would be several strategic benefits which could arise under the proposed new Regulations which are likely to become law in 2023. We have not yet seen the detailed proposals or the draft regulations.

The presentation was divided into 8 chapters with a high-level summary as follows:

Chapter 1 – Underlying principles of the procurement regime remain

The underlying requirements around transparency, fairness and equal treatment for suppliers endure. There is renewed emphasis on public benefit and social value and this is a matter that members may wish to ask their executive teams about implementation strategy to ensure that.

Chapter 2 – New legal framework

A single set of regulations for all entities including utilities and concessions etc will be produced. It is difficult to see immediate benefits, but at least this may encourage a more joined up approach across sectors to which public procurement applies.

Chapter 3 – New procurement processes

Currently, the vast majority of procurements are conducted under the open or restrictive procedures. Often, these will place RPs into a less flexible position where it is not possible to engage properly with the market without incurring procurement risk. If you wish to engage fully with the market, the competitive dialogue process is available but often this is turned into a long and drawn-out process which in the current climate would put the market off bidding.

The new “competitive flexible” procedure allows RPs to design their own process for engagement in the market. It is hoped that the regulator, CIH and/or NHF may have thoughts about what the competitive flexible procedure could look like in the housing sector for various procurements. Allowing RPs to design their own procurement process may be a double-edged sword because of the risk of allegations that the design does not support the principles of transparency and non-discrimination. Equally, the new process could give RPs the opportunity of engaging in a bespoke way with the market.

Board members may wish to raise with their executive teams about what a strategic approach to this process could look like for each housing association in its own specific circumstances.

Chapter 4 – Past poor performance

It is difficult in many circumstances to exclude suppliers from either bidding for or being successful in being awarded work currently. The government has listened to the feedback they have from the sector and from contracting authorities. There are proposals for national databases both to enable compliance-based information to be downloaded by RPs to make qualification stages of procurement process easier and simpler, but in addition, there may be a central department list managed by the Cabinet Office. This is essentially a database of contractors which may be excluded from procurement process. After 5 years they would be automatically removed from this list. This appears to be quite a contentious part of the Regulations which have yet to be thought through in detail. It is anticipated that there will be considerable challenge by suppliers if they are entered onto the central register as this may represent a considerable disadvantage within the market for those suppliers on the list.

Chapter 5 – New Dynamic Purchasing System (DPS)

Under a DPS, new suppliers may be added throughout the lifetime of the DPS. The potential downside of a DPS is that you must run a mini competition every time you have a requirement for works or services. The current DPS approach will be supplemented by a proposal for more open frameworks where a framework agreement can be for a longer term of 8 years (currently restricted to 4 years) but with the requirement that there is an opportunity for further suppliers to join the framework later from year 3 onwards.

Chapter 6 – Transparent contracting

There will be further options to produce and publish a greater range and number of notices which deal with everything from planning and pipeline for procurement to contract changes. In general, there is a much greater emphasis on transparency and therefore publication of a greater number of notices is said to aid this. However, it does increase the work on internal teams and does not really streamline the processes which was one of the aims of the Green Paper.

Chapter 7 – Challenges to procurement decisions

The proposal previously was that unsuccessful tenderers could only recover 1.5 x their bid costs which was a significant cap to the level of damages which unsuccessful tenderers could previously claim. This has now been deleted which unfortunately means that bidders will still be encouraged to submit claims. There is still a considerable question mark over the proposals around notification to unsuccessful bidders as there are proposals to make the current feedback letter optional, with it potentially being replaced by the ability of unsuccessful bidders to log into a system to understand the scoring and would be given less detail online.

Chapter 8 – Contract management

There is a significant struggle to resource the client side and to provide effective contract management by RPs. There are also proposals around tackling late payment and as commented above, a simpler regime around amending existing contracts, but greater transparency when this does occur.

In general terms, there appears to be considerable amounts of thinking to be done about any knock-on consequences of the changes – for example on the service charge consultation requirements. The timetable from government is still changeable although the current indication is that the legislation would be introduced in 2023 subject to parliamentary time.

Impact and questions

The Green Paper had several aspects which encourage better engagement with supply chains both to increase value and minimise risk. There are considerable opportunities in terms of the ability to design bespoke procurement processes which work for each housing association. There are around 50 new acronyms to learn which highlights the challenge of getting to grips with any new regime.

Members could consider:

- How their executive teams are gearing up to the transforming procurement regime. The regime does present greater opportunities but equally will need the same level of detail to ensure that the risk profile being followed in procurement processes reflects the overall corporate risk profile of the organisation.
- Continuing to review procurement processes from an audit perspective every so often to avoid the threat posed by bribery and corruption.

- Encouraging wider experiences of procurement processes and potentially shadowing a procurement process could be useful. Board members could also ask executive teams whether learning could be gleaned from utilities or care sector who have already had to grapple some of the aspects of the Green Paper – for example designing bespoke procurement processes.

Anthony Collins Solicitors LLP

1 March 2022

Resources

- [HACT social value and procurement toolkit](#)

Badenoch + Clark Procurement Recruitment

Badenoch + Clark, part of the Adecco Group has a strong reputation for specialist recruitment of both interim and permanent procurement roles at all levels. Their understanding of the housing sector will also ensure recruitment aligns with your procurement strategy.

Learn more at [Badenoch + Clark](#) or contact Hannah.Quinn@badenochandclark.com (Procurement Recruitment Lead) or Ruth.Young@badenochandclark.com (Head of Executive Search and Leadership Solutions) for more information.

HACT procurement advice

HACT can help turn the outcome you want into a procurement framework and provide independent assurance that your contractors are delivering the social value promised.

To learn more and an initial conversation contact

Frances Harkin | frances.harkin@hact.org.uk

Register for our next session

The role of remuneration committees and setting executive pay

Monday 14 March 4 - 5pm

We'll be joined by Martin Wheatley, who will be sharing his experience as Board Member and Chair of Remuneration and Selection Committee at Greatwell Homes to discuss executive pay.

Speaker: Martin Wheatley, Research Director Commission Smart Government, Board Member Greatwell Homes

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