Procurement Law Reform

Let's start the discussion

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Introduction

It remains likely that with effect from 1 January 2021 the UK will have severed its ties with the European procurement law regime and the UK will have become a freestanding member of the GPA in its own right with far greater autonomy under the direct aegis of that treaty regime to regulate its own internal procurement laws and procedures. It has long been the case that Europe has dictated the substantive law, including for example the Remedies directive and a raft of highly influential decisions from the European Court of Justice that have materially influenced how procurements have been managed in the UK. In some areas the UK has been able to respond and achieve its own policy objectives or, at least, to dilute those of Europe in particular through exercising its right to determine the procedural rules for procurement challenges within the UK.

Making critical procedural decisions for arguably ulterior or at least defensive reasons was never going to be optimal in terms of producing a coherent body of procurement law. Instead, it has become increasingly clear over the last 20 years that this dynamic has led to a series of procedural anomalies and tensions that has arguably led to the UK's procurement challenge regime being one of the most dysfunctional in Europe, if not the world. This could be eliminated with effect from next January and thus we now have the perfect opportunity to take a step back and consider precisely how we might shape our procurement laws and procedures for the future.

The purpose of this paper is to help trigger a preliminary debate by flagging in summary form some of the more glaring problems – both contentious and non-contentious – which we have encountered in recent years whilst highlighting at a high level some potential ideas for change / reform that may or may not warrant further discussion.

Potential Ideas for Reform

At the highest and arguably most radical level is the question of whether the UK effectively abandons its current procurement regime wholesale. In Australia both at a Commonwealth and a State level the key levers for enforcing procurement regulation are administrative in nature with larger procurements having to appoint an independent probity adviser to report on the conduct and outcome of the procurement process and a separate regulator has responsibility for investigating corruption or other improper practices. The role of the courts is largely restricted to the regime that existed in the UK before the introduction of the PCR with legal challenges being restricted to judicial review and/or claims based on a breach of an implied contract (Blackpool and Fylde Aerodrome case). The level of actual procurement challenge in Australia (as a very new signatory to the GPA) is still extremely low and the perception is that the regulatory approach works well and is not too cumbersome or costly to operate. Australia is therefore an alternative model that could potentially provide the UK with a radically different form of regulation for government contracting whilst still remaining compliant under the terms of the GPA.

The most obvious alternative to wholesale reform is to retain the current basic structure for procurement regulation in the UK but invite a sharing of ideas as to what is or is not working well from both sides of the contracting authority and contractor divide and come up with a regime that actually works in a more functional manner and which maximises the potential for effective administrative resolution of procurement issues (on both sides of the divide) rather than often locking people into a "rush" to legal challenge.

With this in mind we highlight below a series of issues which we consider have contributed to the current dysfunction / confrontational approach in our challenge regime or lead to frustrations for procurement professionals looking for more user friendly procedures in day to day management of public purchasing processes:

1. Procedures

Do we need all the procurement procedures currently on offer in the PCR? The level of outsourcing and public private partnerships in the UK has left public sector bodies with enhanced commercial and procurement structuring skills. The more flexible approach to regulating purchasing in the utilities sector should be considered, where contracting authorities have free access to the negotiated procedure. The principles of transparency and equal treatment would still apply, and lessons learned from preliminary market engagement and early preparation of procurement documentation should not be allowed to fall away. With those general principles in mind, authorities would be able to structure dialogue and/or negotiation phases to suit the requirements of the contract they are letting. This will remove the costs of determining whether competitive dialogue or competitive procedure with negotiation (CPN) (both of which currently rely on the same permitted grounds for use) is the right path to follow for a procurement, and the risk of being caught out when the more limited approach to negotiation in CPN precludes ultimate development of the most sustainable and value for money solution.

2. Sectors

Having determined the optimum choice of procedures and appropriate levels of further regulation to engender transparency, impartiality and equal treatment, in the interest of costs and advisor familiarity is there any reason not to use the same rules across all sectors – transport, defence, utilities, concessions and public purchasing?

3. Legal challenge

There should arguably be a single all-encompassing jurisdiction/procedure for all forms of procurement related legal challenge getting rid of the currently difficult distinction leading to parallel JR/PCR cases in a variety of instances causing confusion over limitation periods and the radically different procedural rules for judicial review and PCR cases. This should be true for all cases above / below threshold. Alternatively, one option would be to have different tiers so that Central Government procurement is regulated and enforced differently from procurement undertaken by local government, NDPBs and utilities.

The current requirement for all PCR challenges to be dealt with in the High Court has failed (if that was the intention) to act as a deterrent to challenges but has arguably blunted the beneficial effects of using challenges to enhance procurement practices and spread knowledge of best practice more broadly. Serious thought should be given to emulating some or all of the best practice from across the continent:

a. Establish a speedy specialist tribunal with regional centres to deal with all procurement related litigation (whilst a radical departure for the UK this could be an area where a more inquisitorial style approach to proceedings would have real merit – see comments on disclosure and confidentiality below). This option should be considered both as an option for all public procurement or alternatively as a second tier jurisdiction covering local government, NHS bodies and similar entities.
b. Allow an option for authorities to build adjudication or arbitration into ITTs as a means to resolve procurement issues rather than through the courts or a tribunal
c. Provide an expedited paper only procedure for the tribunal/arbitrators to deal with preliminary clarification/interpretation issues in relation to ITTs and/or the conduct of a procurement
d. Restrict the jurisdiction of any tribunal or arbitrator to dealing with issues of any breach of procurement law and directing rectification/resolution of the breach. Require any claim for damages or compensation to still be brought in the High Court in civil proceedings but only if initial breach has been established by the tribunal.
e. Ensure that the automatic stay remains but obviate the need for distinct applications to lift the stay on *Anisminic* type grounds by having the whole dispute resolved more speedily within a tighter timeframe.

4. Disclosure

The current regime – as it has emerged through case law – is arguably unsatisfactory in most procurement cases. A contracting authority is expected to provide early disclosure at point of issue

(which mirrors obligations in judicial review) but is then also obliged to provide standard disclosure once a claim is underway. This is very often disproportionate to the issues in dispute and often the bulk of disclosure relates to issues more connected to quantum of loss rather than a determination of whether and to what effect there has been a material breach of procurement law: it adds to the complexity and cost of the proceedings (particularly regarding confidentiality and IP information) and, of course, the costs of the proceedings.

5. Witness Evidence

In the alternative there is a case that even if High Court litigation is retained this could, certainly as far as liability is concerned, be based on witness evidence prepared in judicial review style without the need for witnesses at trial unless the court has ordered cross examination on a specific issue.

6. Costs

Consideration should be given in the context of a tribunal structure to abolishing costs awards in most cases so each party bears their own costs but is not at risk of the others. An alternative would be to cap costs liability to maximum bands linked to the value of the contract being procured so any adverse legal cost is proportionate to the value of the contract at stake.

7. The perverse incentive for incumbent challenges

There is no doubt that in many cases where the profitability of a contract is materially greater to an incumbent than the cost of litigation (especially if that also disrupts a competitor) there is a perverse incentive to challenge so as to allow the incumbent to continue contractual performance beyond the date when their contract was due to terminate. Consideration should be given to the net profit earned by such a challenger through continuing to perform the contract during the period of any unsuccessful challenge being accounted for either (1) in diminution of their total damages claim if their challenge is successful (in such cases this will almost always be restricted to wasted bid costs – as even though their challenge was legitimate it is additional profit they would not otherwise have earned); or (2) should be accounted for to the public authority if their challenge is ultimately unsuccessful as they should not profit from unsuccessful litigation. This would go a long way to deterring vexatious commercial challenges.

8. Limitation

Should we reform the current unsatisfactory and one sided approach to limitation so that if a bidder has clearly raised an issue by way of clarification or otherwise during the bid process, time for them to challenge on that issue will not start to run until an award notice is issued – so they only need to challenge if they have in practice been prejudiced by the potential default? The current regime where the innocent party who is not under any legal duty in terms of compliance with procurement law will be prejudiced (because they are forced to bring a claim (possibly with a High Court issue fee of £10,000) at a time when they cannot demonstrate any causal loss), whilst the breaching party will be advantaged by their own failure to detect or rectify their breach (absent deliberate concealment) is perverse and arguably alien to normal concepts of procedural justice in the UK. Should we extend the

limitation period for damages claims in respect of ineffectiveness claims to 6 months from contract award so it is in-line with the liability limitation period, or (in-line with the proposal above) bar damages claims until liability has been established with the consequences of a potential declaration of ineffectiveness being deferred to the High Court as well as damages?

9. Feedback / Evaluation

We should introduce a requirement that in any case where a public authority cancels a procurement and decides to retender (as opposed to re-evaluating) the winning bidder is entitled to see the feedback provided to the losing bidders. In any case where the public authority either decides to re-evaluate or cancel a tender post sending out an award notice the winning bidder must be provided in advance with a copy of any objection or challenge leading to the decision plus a statement of the justification for determining that cancellation or re-evaluation.

10. Confidentiality

Should we reform regulation 21 of the PCR to create a presumption of confidentiality for key elements of a tender unless and until, in the case of the winning bid, the contract has been concluded and there is no risk of any re-evaluation, and:

- require public authorities not to provide feedback that breaches confidence except on terms that ensure that no individuals within an unsuccessful bidder who have received such feedback can or will be involved in any re-tender?
- require public authorities to construct ITTs (in line with best practice) so as to avoid pricing mechanisms that can be "reverse engineered" so a losing bidder can accurately estimate the pricing of the winning bidder's bid in any subsequent related procurement process? Whilst feedback must be provided, the courts have repeatedly failed to understand how fundamentally unfair the disclosure of a winning bidder's pricing is to a losing bidder [in any case where there is to be a straight re-tender especially where the contract is likely to be re-let in a relatively short timeframe so factors impacting pricing will have remained largely static.

11. Confidentiality rings

The current regime is unsatisfactory and often over-convoluted. The PCR could be extended to provide in advance for a model confidentiality ring (to be tailored by the parties only following court/tribunal approval on a by exception basis) or the courts should more actively exercise their case management powers to compel the early agreement of a ring. The lack of a ring in certain cases should not be used as a pretext by public bodies to delay appropriate disclosure so as to try to disadvantage a prospective challenger in terms of the limitation period within which to bring a challenge. If as happens on the continent any tribunal was permitted to adopt a more inquisitorial type approach there would be considerable scope for the tribunal to view commercially sensitive material itself and then decide what should or should not be disclosed to a challenger. This could potentially get closer to the regime used in competition related inquiries by the Competition and Markets Authority for sharing commercially sensitive material with third parties.

12. Exclusion

Recent experience in the UK and on the continent shows that the current regulations around discretionary exclusion are far from clear with considerable ambiguity as to how an authority decides to disqualify, how such a decision should be publicised, how other public bodies take account of such an exclusion and/or how a decision is made that a body has sufficiently "self-cleaned?". Should decisions to exclude be made public and should other public bodies be under a duty to consider exclusion where any such notice is extant? The High Court would be far too cumbersome but if there was a tribunal instead then arguably a declaratory ruling could be obtained to confirm exclusion if disputed and/or to terminate the exclusion if a bidder claims to have self-cleaned. In particular, some of the discretionary grounds are arguably too rigid – eg past performance but only if a court (or similar) has effectively ruled on the complained of behaviour. This requirement hopefully avoids subjective victimisation of bidders but equally it is potentially so rigid as to render the whole mechanism redundant. This has led to initiatives such as UK Cabinet Offices PPN on past performance – which has not been received particularly well.

13. Abnormally low tenders

There have been repeated high profile failures by authorities to ensure that they are getting genuine and sustainable value for money. One issue here is a need to ensure that evaluation criteria are genuinely directed to achieving outcomes that are MEAT so that "price" is not allowed to be the dominant factor. Further, the current caselaw has arguably created a bizarre Catch 22 whereby the rules on abnormally low tenders are only engaged in those cases where an authority wishes to exclude an abnormally low bid, and leaves wholly unresolved any guidance as to the threshold or other factors that determine when an authority is obliged to undertake such a consideration in the first place. It is ironic that other bidders often have a far clearer understanding of when a competitor has put in an unsustainably low bid and where that has happened an authority has decided to proceed with them regardless, then arguably there should be additional constraints on the ability to vary or otherwise alter the contract in future. In particular, if a tenderer puts in a low bid as part of a deliberate policy to try to gain market share then they should be obliged to show that they have the financial resources to perform the contract on its terms for the duration of the term unamended. Further, given the repeated experience of unsustainably low contract bids failing, often due to a bidder making unrealistic assumptions about movements in future economic / fiscal conditions then "gambling" in that way should arguably become a ground for discretionary exclusion if established.

14. Framework agreements

There is a general sense of laxity around how frameworks operate in practice:

- The lack of clarity around the extent to which the criteria for the evaluation of mini-competitions need to be specified in the framework and the extent to which criteria used to allow a bidder to qualify for the framework can then be re-opened in a mini-competition;
- The failure to require feedback and a standstill period for mini-competitions is arguably now an anomaly with a wide divergence of practice between authorities in how they behave even when using the same framework. Often authorities who were not involved in establishing a framework

will use it to draw down goods or services when they don't properly understand how it has been structured and/or where they nonetheless want to materially alter the evaluation criteria. This is messy and often an abuse of the framework mechanism.

- Framework Agreements could potentially be an area where some form of arbitration or adjudication mechanism could be built in as an alternative process for resolving procurement disputes in a quick and cost-effective manner.

There should be far greater clarity on the restrictions on single provider frameworks so that goods and services to be drawn down under a single provider framework are clearly defined and priced in advance to establish the price/scope of any services or goods being acquired under such a framework or the nature of the work to be undertaken as there will be no further competition on this. Single provider frameworks should not be used as a way to allow one preferred contractor to effectively be referred a large amount of wholly generalised work with no clarity as to the price or other terms having been set in advance.

15. VEATs

There is arguably a need for greater clarity on the difference between VEATs and the two scenarios in regulation 72 which require notices to be advertised that they have been relied on for a contract change. This appears to be an unintended lacuna in the current drafting of the PCR because the latter notices are the two which were previously included as a requirement in the rules regulating the conduct of the Negotiated Procedure Without Notice. It appears that if one wants to limit the risk of a subsequent ineffectiveness legal challenge (or curtail the time period for the making of such a challenge) you have to unilaterally advertise, but neither the standard VEAT form nor the standard regulation 72 transparency form, anticipate what should be done in this instance.

16. Industrial, environmental and social value

Sustainable purchasing should not be inhibited by legislation whose original purpose was to open up a market economy across Europe. Legal uncertainties (including that award criteria must relate to "the subject matter of the contract") have limited evaluation of sustainable public procurement policies, such as apprenticeships and broader environmental and social sustainability concerns, within the procurement process itself. Reformed procurement law introduced into the UK should clarify that award criteria and technical specifications in support of these policy objectives have equal status to those relating to what is actually being purchased. Certainly industrial, social and environmental objectives can enhance long term value for money, and should be competed whilst a contract is still in procurement, rather than subsequently seeking to include the authority's requirements in the contract agreed with the preferred bidder.

Conclusions

Whilst time may be limited procurement law is an obvious area of regulation where the UK is likely to take back full control over how procurements are conducted next year. As we hope this article highlights at a very summary level there are numerous areas where the potential for reform should at least be debated and should presumably be considered through the prism of how the UK now wishes to structure its domestic market for public contracting as it in turn seeks to encourage UK business to adopt an increasingly global as opposed to European centric approach to business. Procurement regulation by its very nature needs to consist of a series of checks and balances that protect and positively promote the interests of both public sector and private sector participants in the public / utility contracting markets. It may be that at this juncture little changes but it would be unfortunate if that was an outcome reached by default rather than as a result of careful and well informed consideration.

This brief article is our initial contribution to that process of consideration. We intend to contribute further through public engagement and more detailed and considered analysis of options for change and the reasons why such change may be worthy of further thought.

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