

**Manchester City Council
Report for Information**

Report to: Resources and Governance Scrutiny Committee – 9 November 2023

Subject: Update on New Procurement Regulations

Report of: Head of Integrated Commissioning and Procurement

Summary

This report provides an update on the new procurement regulations and advises the committee of the implications for future council procurement activity.

Recommendations

The Committee is recommended to:

- (1) Consider and comment on the information in the report
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Wards Affected:

All

Environmental Impact Assessment - the impact of the issues addressed in this report on achieving the zero-carbon target for the city

There is no direct environmental impact from this report but the report includes discussion about measures that will contribute to achieving the zero-carbon target for the city.

Equality, Diversity and Inclusion - the impact of the issues addressed in this report in meeting our Public Sector Equality Duty and broader equality commitments
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The issues addressed in this report will have an indirect impact on meeting Public Sector Equality Duty and broader equality developments by ensuring that the Public Procurement Regulations are applied in a way that ensures the council's suppliers share the council's values.

Manchester Strategy outcomes	Summary of how this report aligns to the OMS/Contribution to the Strategy
A thriving and sustainable city: supporting a diverse and distinctive economy that creates jobs and opportunities	The report outlines how the new procurement regulations will provide a mechanism to ensure that the council's suppliers contribute towards creating jobs and opportunities to support a thriving and sustainability
A highly skilled city: world class and home grown talent sustaining the city's economic success	The report outlines how the new procurement regulations will provide a mechanism to ensure that the council's suppliers create opportunities for local people to develop skills to support the city's economic success
A progressive and equitable city: making a positive contribution by unlocking the potential of our communities	The report outlines how the new procurement regulations can be used to ensure that the council's suppliers will work with communities to unlock potential
A liveable and low carbon city: a destination of choice to live, visit, work	The report outlines how the council's suppliers will contribute towards achieving carbon reduction targets
A connected city: world class infrastructure and connectivity to drive growth	This report does not include proposals that have specific connectivity implications

Full details are in the body of the report, along with any implications for:

- Equal Opportunities Policy
- Risk Management
- Legal Considerations

Financial Consequences – Revenue

None

Financial Consequences – Capital

None

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Background documents (available for public inspection):

The following documents disclose important facts on which the report is based and have been relied upon in preparing the report. Copies of the background documents are available up to 4 years after the date of the meeting. If you would like a copy, please contact one of the contact officers above.

Report to RAGOS on 19th July 2022 on Ethical Procurement and Forthcoming Changes to the Government Procurement Rules.

1. Introduction

- 1.1 This report provides an update on the progress of the new national procurement regulations as set out in the Procurement Bill 2022 which attained Royal Assent on 26th October 2023 and outlines the implications for the council and how the council intends to implement the new regulations.

2. Background

- 2.1 Since Brexit in January 2021, EU procurement law has no longer applied to the UK and the Government viewed this as an opportunity to reform UK's public procurement regulations to reduce red tape and to support British business by simplifying public sector procurement, encouraging innovation and improving transparency.
- 2.2 Proposals were initially set out in a green paper on transforming public procurement issued in December 2020 with the consultation on these proposals held open till 10th March 2021.
- 2.3 More than 600 responses were received as part of the consultation and this delayed publication of the response until December 2021. Although the Procurement Bill was first announced in the Queen's speech 2021, the Bill was not brought forward in the 2021-22 session and was announced for the second time in the Queen's speech of May 2022 and then further delayed until 2023.
- 2.4 The Bill finally received Royal Assent on 23rd October and the new regulations are expected to be in force from October 2024 onwards with a six-month notice period in advance of the final date.

3. Summary of the changes

- 3.1 As shown above there was significant interest in the new rules with over 600 responses to the consultation and, as a result, several proposals were removed or amended in the light of responses received. The Procurement Act 2023 does not stand alone as a definite statement of the new law but is a framework which includes powers for the government to make further secondary legislation (ie "regulations") to cover the detail of how the provisions of the Act will work in practice. For example, the detail of the required content of all the new notices required under the Act were recently consulted on and further draft regulations will be issued in due course.
- 3.2 There have already been two consultations in relation to these rules which were issued in July and October of this year. The first was in relation to the scope of the Light Touch Regime, Exemptions for Local Authority Trading arrangements, thresholds, consideration of "non-commercial matters" in awarding contracts and the disapplication of NHS Procurement. The second applied to the wide range of notices that will be required to meet the aspiration of wider transparency under the new regulations.

- 3.3 The areas of change with the most significant impact are considered likely to be:
- 3.3.1 **Transparency:** a significant expansion in the number of notices that an authority will need to publish about the procurement
 - 3.3.2 **Procurement processes:** new flexibilities to design bespoke procurement processes.
 - 3.3.3 **Contract performance:** a new requirement for all authorities to set and publicly report on KPIs for larger contracts valued at over £5 million.
 - 3.3.4 **Supplier debarment:** will be possible where mandatory or discretionary exclusion criteria are triggered.
 - 3.3.5 **New language:** the Act uses new language to describe familiar concepts (for example, “selection criteria” will be known as “conditions of participation” under the Act)

4. Opportunities

- 4.1. The changes under the new regulations that apply to contracting authorities which provide a blend of opportunities and challenges. The opportunities include the following which are explained in more detail later in this report:
- **Improved Commercial and Contract Management Capability**
 - The council has invested time and resources into improving contract management across all areas so is well placed to benefit from this
 - Ability to negotiate and innovate will achieve better outcomes (but will require development of new skill sets)
 - **Increase importance Social Value**
 - Requirement to include “Public Good” for all UK
 - Change from MEAT to MAT
 - **Reduce Procurement timescales**
 - Time saved due to new Supplier database
 - Not restricted to specific timescales
 - **Enable Better outcomes**
 - The ability to exclude suppliers with criminal convictions related to fraud, tax evasion, and poor performance
 - Flexible competitive procedure is likely to be most prevalent and provides buyers freedom to negotiate & innovate get best from the market.

5. Details of changes

Procurement processes

- 5.1 The main technical changes are the introduction of a set of new procurement procedures that will introduce more flexibility and, for example, encourage a greater level of negotiation with potential suppliers.

- 5.2 The existing regulations list seven different procurement procedures which will be replaced with three new simplified approaches. Thus, the Open, Restricted, Competitive Procedure with Negotiation, Competitive Dialogue, Innovation Partnerships will be replaced with:
- **Flexible procedure** that gives freedom to negotiate and innovate to get the best from the private, charity and social enterprise sectors
 - **Open procedure** for simpler, 'off the shelf' competitions
 - **Limited tendering procedure** to use in certain circumstances, such as crisis or extreme urgency
 - **The Light Touch Regime** remains for certain contracts
- 5.3 The flexible procedure is expected to be used for most procurements and the regulations are less prescriptive than the 2015 regulations which were often criticised for being inflexible for example in terms of timescales.
- 5.4 The criteria to be applied for the award of contracts has also changed from the Most Economically Advantageous Tender (known as "MEAT") to the Most Advantageous Tender ("MAT") which switches the emphasis from financial considerations towards a stronger focus on Social Value and Environmental Considerations of a submitted tender.

Supplier Exclusion

- 5.5 The Act contains provisions on exclusion of suppliers. The list of provisions for exclusion is extended to include misconduct (e.g., fraud, corruption or poor performance) which will result in the introduction of a new exclusions framework that is simpler, clearer and more focused on suppliers who pose an unacceptable risk to effective competition for contracts, reliable delivery, and protection of the public, the environment, public funds, national security interests or the rights of employees.
- 5.6 The current regime only allows prior poor performance to be considered where there has been a breach of contract which resulted in a serious repercussion such as termination or damages. The new Act allows this to cover poor performance and where the supplier has not improved their performance despite being given the opportunity to do so and also now applies to associated suppliers and subcontractors.

Challenges to award of a contract

- 5.7 One aspect of the current regulations that will be changed is the ability of unsuccessful suppliers to challenge a contract award. The proposals will introduce a fast track way of resolving disputes over tender awards which will, for example, prevent an incumbent supplier from challenging the award of a new contract to another provider in order to retain a current contract and also make it simpler and quicker to resolve any issues that may arise.

Social Value

5.8 The National Procurement Policy Statement was published as PPN 05/21 in June 2021 but has not yet been implemented due to technical legal issues. The PPN requires contracting authorities to have regard to national strategic priorities for public procurement alongside any additional local priorities. The PPN states that Contracting Authorities should consider the following social value outcomes:

- Creating new businesses, new jobs and new skills in the UK
- Improving supplier diversity, innovation and resilience
- Tackling climate change and reducing waste

5.9 The technical issue is not yet fully resolved and was the subject of a consultation in July this year. The government has yet to publish the results and the formal response to the consultation so it is not possible to provide a definitive position on how social value will be dealt with under the new regulations and what changes are required to the council's own approach to it.

6. Transparency Platform

6.1 The Green Paper included new regulations on transparency and publication of data relating to procurement that are intended to address issues created by misinterpretation of the data already published and to enable suppliers to access more information about upcoming opportunities and also about which new contracts have been awarded and the basis of that award as well as how existing contracts are being managed.

6.2 The Act introduces several new requirements for publishing notices throughout the procurement lifecycle from planning through to contract expiry. This is with a view to increasing transparency but is clearly will make aspects of the overall process more administratively burdensome particularly during the life of a contract.

6.3 Examples of notices include:

- planned procurement notices and preliminary market engagement notices (replacing PIN notices under the current regime);
- pipeline notices;
- transparency notices on the direct award of a contract;
- mandatory contract change notices; and
- termination notices on the termination of a public contract.

6.4 As mentioned above, the consultation on notices was issued in October and the results of the consultation have yet to be published so it is not possible to provide an exhaustive list at this stage.

6.5 It is also intended that a single electronic platform will be introduced as an extension to the current "Contracts Finder" website owned by the Cabinet Office. It is intended that the platform will include data on Suppliers, Tenders,

contracts awarded and terminated and contract management details for ongoing contracts above £5m in value.

7. The Procurement Review Unit

- 7.1 The Act also makes provision for establishing an “oversight unit” based at the Cabinet Office which is an extension of the current Public Procurement Review Service which was initially established to provide a clear, structured and direct route for suppliers (particularly SMEs) to raise concerns about public procurement practice.
- 7.2 This development is considered necessary to support the introduction of the new less stringent regulations. The general role of the new unit will be to oversee and spread best practice and enable all contracting parties to benefit from lessons learned which in turn should drive improvements in practice.
- 7.3 The unit will be known as the Procurement Review Unit and will also have powers to deal with contracting authorities that regularly breach the regulations.
- 7.4 The Unit is intended to have 2 main purposes:
- Monitoring – including of issues raised as the new rules are implemented, and to ensure understanding and compliance.
 - Intervention – including the issue of improvement notices to individual contracting authorities.

8. The Provider Selection Regime

- 8.1 Separately, the long-awaited regulations for the new Provider Selection Regime (which applies to healthcare procurements) were laid in Parliament in mid-October and will come into force on 1 January 2024 and provide a mechanism to avoid unnecessary competition in certain limited circumstances and to direct award contracts where it is considered that tendering would be unlikely to generate sufficient interest from suppliers to justify the exercise.
- 8.2 The draft regulations and statutory guidance have been shared with Public Health, Legal and Procurement colleagues to assist with planning.
- 8.3 Workshops will be held during the lead in period to run through the detailed workings as there will be new requirements not only in terms of procurement procedures but also for contract notices and auditing of decisions made under the Regime.

9. Training for the new regulations

- 9.1 The Cabinet Office has committed to produce a detailed and comprehensive package of published resources (statutory and non-statutory guidance on the key elements of the regulatory framework, templates, model procedures and case studies).

- 9.2 In addition, a programme of learning and development is being prepared and implemented to meet the varying needs of stakeholders with the aim of providing a suite of dedicated learning approaches covering the range of requirements from those who only need an overview of the changes through to more detailed and specific instruction on the new regime for practitioners in Contracting Authorities and finally intensive learning focussed on the behavioural and cultural changes required.
- 9.3 The package will comprise:
- Knowledge drops: a range of short broadcast presentations (available on demand) providing a high-level overview of the changes to the procurement regulations. These will be aimed at non-commercial leaders and others - including suppliers - needing a general level of awareness of the new rules.
 - Self-guided e-learning expected to comprise 10 x 1-hour modules, for all commercial staff in Contracting Authorities to gain a comprehensive grounding of knowledge and understanding of each element of the new regime, and culminating in the award of a Practitioner Certificate.
 - Deep dive webinars in the form of a three-day intensive course for a smaller group who will have completed the e-learning modules - those advanced commercial practitioners who need to become experts in operating within the new regime. It will comprise interactive virtual webinars in small cohorts which will allow learners to engage with subject matter experts. This element of the package is designed to provide learners with a deeper level of understanding on the application of the legislative change, build confidence and develop skills to support capability uplift, so that they can act as champions and super-users within their own organisations.
- 9.4 The formal learning and development will be supported by Communities of Practice where practitioners can support each other - sharing, discussing and reflecting on best practice, challenges, and opportunities within the new regime.
- 9.5 In addition, various law firms that work with public sector organisations are producing guidance and arranging seminars for Local Authorities which will provide practical advice and opportunities to share learning as the fine details of the new regulations become clearer.
- 9.6 A cross-GM procurement programme group has been established by GMCA to support planning for implementation of the new regulations, covering systems, processes, and training and development.
- 9.7 The new regulations will result in a redesign of all of the council's current procurement templates and guidance provided internally to contract managers and externally to prospective suppliers and the compilation and publication of significantly more data about supplier performance.

9.8 The Integrated Commissioning and Procurement will build upon the already established channels such as the Commissioning and Contract Management group and the newly introduced Directorate focused procurement and commissioning boards to ensure that colleagues across the council have full visibility of the new regulations and that the council is best placed to deal with the challenges and take advantage of the opportunities provided by the new procurement regime.

10. Recommendations

10.1 RAGOS are recommended to consider and comment on the contents of this report.