

Post-Brexit Challenges to Procurement Processes – Fair and Fast

The Government's Green Paper on 'Transforming Public Procurement' post-Brexit purports to overhaul the outdated public procurement regime in the UK. Whilst many of Britain's public procurement obligations remain relatively similar under the Government Procurement Agreement ('GPA') and EU-UK Trade Cooperation Agreement ('TCA'), Chapter 7 of the Green Paper outlines the Government's plans to redesign the process of challenging public procurement so that it is fair and fast. This article provides an overview of these proposals.

As it Stands

The current regulations include pre-contractual measures and both pre-contractual and post-contractual remedies which comply with the UK's obligations under the GPA to provide an effective means of redress. This system needs updated as it is a lengthy, complex and expensive court-based system which is situated in the Technology and Construction Court ("TCC") in London. A Commission Report from 2015 revealed that the average length for first-instance, pre-contractual, non-interim proceedings in the UK was just under 300 days. In stark contrast, many EU Member States set a maximum duration of between 15 and 60 days for review proceedings. The length, and thus the costliness, of this system makes it inaccessible to small businesses and the rigorous process is a hindrance to any quick resolution. Currently, access to justice is significantly impacted by the process and the Government propose that a new remedial system should be introduced which delivers decisions on procurement challenges faster, with more reliance on pre-contractual measures, the idea being that fewer post-contractual remedies are sought via the court process.

A Missed Opportunity

The consultation on the Green Paper closed in March 2021 and responses continue to be analysed. In May, the Regulation of Tenderers Bill 2021 ("*the Bill*") was announced. If passed, the Bill will introduce requirements around exclusion for abnormally low tenders and for companies with a history of poor performance. The Bill purports to fill in the gaps left by the EU (Award of Public Authority Contracts) Regulations 2016 by providing a new mechanism to identify and disqualify abnormally low tenders for construction works contracts.

Whilst the new exclusionary provisions are certainly a step in the right direction for the public tendering process, this legislation has arguably missed an important opportunity to introduce the exclusionary requirements proposed in the Green Paper based on a company's history of poor treatment of its supply chains. Introducing exclusionary requirements based on regular poor treatment of supply chains is a legislative action which has the potential to start changing the rocky financial landscape for SMEs. The call for provisions which encourage and enforce good payment practices has only gotten louder as small firms struggle to emerge from the COVID-19 crisis due to non-payment from major contractors without plausible excuses (Klein, '*Payment abuse: let's fix it*' Sept 2020).

Quigg Golden Comment

Despite an onslaught of events since 2018 which have highlighted the vulnerability of SMEs in the construction supply chain, in 2021 very little has changed to reform these issues. The Reporting on Payment Practices and Performance Regulations 2017 remain ineffective as reportage falls short of legislative action, as does Regulation 113 of the Public Contracts Regulations 2015, which requires a 30-day payment clause, as this is not policed. Arguably, wider reaching exclusionary clauses which concern supply chain treatment would result in better quality builds as well as much needed financial stability as Dame Judith Hackitt (2018) has pointed to poor build quality as being a by-product of poor payment practices.

Quigg Golden are the market leaders in construction and procurement law in the UK. Should any of the above issues affect you or your business, Quigg Golden can provide expert advice.

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