



Article by Gareth Oldale

## **TRANSPARENT PROCUREMENT PROCEDURES CLEARLY ON THE AGENDA**

### **Introduction**

In the first of a series of articles, Gareth Oldale, who has recently joined the Sharpe Pritchard Projects department, examines the proposals of the new coalition government to increase transparency in central government procurement.

Following the general election on 6 May and the formation of the Conservative-Liberal Democrat coalition on 12 May, the new government waited just eight days before unveiling immediate plans to increase transparency in the public sector.

As part of the coalition's "programme for government" (the "Programme"), Messrs. Cameron and Clegg stated that the government needs "to throw open the doors of public bodies, to enable the public to hold politicians and public bodies to account (and) help to deliver better value for money in public spending". The Programme stipulates several policy areas where government aims to become more transparent, including:

- steps to open up government procurement, reduce costs and publish government ICT contracts online;
- create "a level playing field" for open-source software and enable large ICT projects to be split into smaller components;
- require "full, online disclosure" of all central government spending and contracts over £25,000;
- require all councils to publish meeting minutes; and
- require all councils to publish items of spending above £500 and publish contracts and tender documents in full.

### **Cameron's call to central government**

Shortly after the publication of the Programme, David Cameron wrote to government departments setting out a timetable for specific requirements to help increase transparency in public procurement. Those requirements are now being implemented by the Office of Government Commerce ("OGC"), which has recently published a policy note explaining how the new requirements will impact upon central government.

## **The new requirements**

- (i) From 1 July 2010, all new central government ICT contracts should be published “in as full a set of documentation as possible” on the website of the relevant government department. This requirement applies to all ICT contracts with terms which either do not contain confidentiality clauses or where such clauses have not been finalised. Departments should avoid including confidentiality clauses in current and all future ICT contracts. Some exceptions (for example, national security or personal privacy-related contracts) will apply in limited circumstances.
- (ii) From September 2010, all new central government tender documents for contracts over £10,000 will be published on a single website and will be made available to the public free of charge. The OGC envisages that contract advertisements and additional tender documents will need to be published in this way, although the decision-making process as to which procurement procedures to use will not be affected.
- (iii) From January 2011, all new central government contracts will be published in full. Work is currently underway to determine whether any exemptions will apply to this requirement, although it appears likely that any such exemptions will be limited in scope and availability.

## **Further guidance to follow**

Further guidance will be published in due course, providing information in respect of the timing of publications, the format of publications, any exemptions and new transparency clauses. The newly-formed Public Sector Transparency Board will oversee the new transparency agenda as a whole and will provide guidance and support to government departments in delivering the new requirements.

Guidance for local government authorities will be addressed separately; the centralised public bodies have been addressed first as some changes have already started to impact upon them, whereas the local government changes are not scheduled to take effect until January 2011.

It is important to note that “central government” means not just central government departments, but also non-departmental public bodies for which they are responsible. Furthermore, the new requirements do not have retrospective effect and as such will not apply to contracts which are concluded and signed prior to the start dates highlighted in bold above.

## **Potential pitfalls**

It is not clear as yet whether any sanctions will be implemented for breaching the new requirements, nor which body would have policing and enforcement powers in the event of a breach. At present, the proposals are still subject to ministerial approval and are not set out in any statute or statutory instrument. The enforceability of the new requirements is therefore difficult to quantify. Indeed, in the Prime Minister’s letter to government departments, Mr Cameron states that “the Deputy Prime Minister and I would be grateful if departments would

take immediate action” to implement the new requirements. Similarly, the OGC’s policy note is drafted such that, in many cases, the requirements “should”, rather than “must”, be followed.

If the new requirements are implemented as currently drafted, they will undoubtedly create a greater administrative burden for central government departments. However, the impact of the proposed changes will perhaps be felt even harder in the private sector.

### **Possible private sector concerns**

For private sector organisations, keeping confidential information confidential is often of paramount importance and key to success in business. Particularly for those organisations which are heavily reliant upon public sector contracts and which expend considerable time and cost providing successful tender responses, the notion of such information (including pricing structures, service delivery methods and customer satisfaction proposals) being openly available for industry competitors to access and use could present a difficult barrier to public sector engagement. It could even lead to some private businesses, who consider the cost of publishing their confidential information too great a sum to pay, deserting public sector contracts altogether. As such, the new requirements could have the effect of restricting, rather than increasing, competition in the public sector.

There also appears to be a potential discord between the new requirements and the Freedom of Information Act 2000 (“FOIA”). The FOIA provides that information which is held by public authorities is, in broad terms, exempt from disclosure if it is a trade secret, if its disclosure would be likely to prejudice the commercial interests of any person or if the disclosure of that information would constitute a breach of confidence. Such a conflict certainly needs to be addressed and resolved.

Furthermore, case law demonstrates that private sector organisations are willing to apply lateral thinking to existing legislation to try to prevent the disclosure of confidential information; this trend could certainly continue if the new requirements are implemented. In the recent case between Veolia ES Nottinghamshire Limited (“Veolia”), Nottinghamshire County Council and others, which is currently awaiting judgment in the Court of Appeal, counsel for Veolia constructed a line of argument to try to bring Veolia and its confidential information within the remit of the European Convention on Human Rights (the “Convention”) (see article by Tim Farr which summarises the earlier High Court judgment in this matter).

The Convention traditionally provides rights to individuals, rather than businesses. However, Veolia’s counsel submitted to the Court that Veolia is a “legal person” and that as such it is entitled to the same rights to respect for its privacy and to prevent unjustified interference with its private property (i.e. its confidential information) as individuals. Private sector contractors will certainly await the Court of Appeal’s judgment with interest to learn if this line of argument is successful.

## **A transparent future?**

As the coalition government continues to push for greater transparency in the public sector, it will be interesting to see how the new requirements will be implemented in practice and, perhaps more pertinently, how the changes will impact upon interaction between the private and public sectors. The OGC's policy note advises affected parties to take legal advice on issues arising from the new requirements. The team at Sharpe Pritchard certainly echoes this sentiment and would be happy to answer any queries.

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**This note is intended to provide a brief overview of the legal principles under discussion.  
It is not intended to be a comprehensive guide or to constitute legal advice.**

