



Northern Ireland
Assembly

Committee for Finance

OFFICIAL REPORT (Hansard)

Public Procurement Common Framework:
Department of Finance

27 January 2021

NORTHERN IRELAND ASSEMBLY

Committee for Finance

Public Procurement Common Framework: Department of Finance

27 January 2021

Members present for all or part of the proceedings:

Dr Steve Aiken (Chairperson)
Mr Paul Frew (Deputy Chairperson)
Mr Jim Allister
Mr Pat Catney
Ms Jemma Dolan
Mr Philip McGuigan
Mr Maolíosa McHugh
Mr Matthew O'Toole
Mr Jim Wells

Witnesses:

Mr Des Armstrong Department of Finance
Mr Michael Watson Department of Finance

The Chairperson (Dr Aiken): If members are content, we will move to the oral evidence from the Department of Finance on the public procurement common framework. We have Des and Michael. Are you ready, Des?

Mr Des Armstrong (Department of Finance): Yes.

The Chairperson (Dr Aiken): We have an empty chair. I would have loved to do that so often.
[Laughter.]

Mr O'Toole: I bet you wish that was you.

The Chairperson (Dr Aiken): Des, can you make your opening statement, please? Thank you.

Mr Armstrong: If it is OK with your members, I will ask Michael to give you the background to the common framework, as he has been closely involved with colleagues across the Cabinet Office and the other Administrations. Michael is the resident expert on common frameworks.

The Chairperson (Dr Aiken): Yes, please.

Mr Michael Watson (Department of Finance): Thanks, Des. I will give you an overview. Public procurement was identified as a policy area that will benefit from a framework, as were many other areas, as we left the European Union. Previously, the devolved Administrations have all had memorandums of understanding and accords with the Cabinet Office to coordinate public procurement

and engagement with the European Commission. The Cabinet Office has been leading on that work. It is one of the many work streams that are part of the operational readiness preparations for EU exit that included a range of other procurement functions that needed to be agreed and drawn up.

The framework is at a very high level. It is a vehicle whereby the Administrations will come together to discuss and make one another aware of policy rather than legal developments to ensure that we have a consistent internal application of public procurement policy in the UK to allow suppliers to easily access and bid for opportunities in all the various regions.

The framework will allow for consultation and an exchange of information. The framework is worded to respect that each devolved Administration can develop its own policies and what needs to happen to use public procurement to further wider objectives in each area. We will do that on a "no surprises" basis, and we will always try to make sure that we do not inadvertently put a policy in place that will prevent suppliers in each of the areas bidding for work. That is very important. At a minimum, we will agree to honour any international obligation resulting from any future trade agreements or free trade agreements, such as the Government procurement agreement (GPA). There is a resolution dispute process in the pact, which, I understand, is standard in all common frameworks provided by the constitution group in the Cabinet Office.

We are coming to the end of phase 3, awaiting Joint Ministerial Committee (European Negotiations) (JMC(EN)) agreement on that outline before going into phase 4, which will require deeper consultation with stakeholders.

I hope that that is sufficient detail, but I am happy to take questions.

The Chairperson (Dr Aiken): Does anyone have any questions? I am trying to bring up my system, which has crashed, so I am having difficulty bringing up my papers.

Mr Allister: As concisely as you can, what has been the impact of the EU protocol on where we go?

Mr Armstrong: The issue with the common framework is that it is clearly stated that there is no intersection between the common framework and the protocol. The framework is really about establishing common public procurement policy, sharing information, and the devolved Administrations discussing common issues and matters of concern, so it does not really run through to that impact.

Mr Allister: You can assure us that there is no protocol impact on procurement?

Mr Armstrong: That is a different issue, I suppose. Issues are likely to arise with supply chains, but they would be dealt with in contracts that are in place on impact on performance rather than anything related to the common framework on public procurement.

Mr Allister: So, if there were EU rules touching upon the do's and don'ts of procurement, that would not impact on the work that you are doing?

Mr Armstrong: In terms of what we are doing at the moment and the fact that we have moved towards Board of Trade agreement membership, the regulations require European member states to treat World Trade Organization members as they would suppliers in member states for work that is above threshold. So, there is some read-across in the public procurement regulations and the EU directives.

Whether that diverges as we go forward, I cannot say. What we have in place now are public procurement regulations amended to take account of the withdrawal. That places us in the regulations as being a World Trade Organization (WTO) member, and, therefore, entitled to participate in public procurement competitions across the EU and be treated the same as other member state suppliers.

Mr Allister: I understand that WTO membership gives you the right to trade. What I was interested in is that if the EU were to bring in further provisions governing how procurement had to be organised and arranged, would that impact upon us?

Mr Armstrong: The issue would be that the World Trade Organization member would have to decide whether it wished to participate in the EU-regulated competition on the terms that had been agreed by

the EU, and that the EU would treat World Trade Organization members or suppliers as they would treat any member state. That is the point.

Mr Allister: OK. Thank you.

The Chairperson (Dr Aiken): Pursuant to Jim Allister's question, there is an issue in public procurement, as many of our companies would not describe themselves as Northern Ireland or GB only; they regard themselves as UK companies. However, if they are bidding — let us say that they are based in Wolverhampton, for the sake of argument — while receiving support from the GB Government, how does that play with competition rules and provide a level playing field? Given the significant amounts spent on public procurement and the amount of money that would go out to contract, would Northern Ireland have to apply the EU acquis — go through the EU common procurement document and publish it in the EU official journal — or do we stay purely in the UK system?

Mr Armstrong: I will need to consider that. Michael might have a view, and I will come back to you.

Mr Watson: Yes. At present, the amendments to the procurement rules still only require us to publish on the new find a tender service (FTS), which has been introduced as a replacement for the 'Official Journal of the European Union' tenders electronic daily (OJEU/TED) system that was previously part of European requirements. The only way we would continue to advertise on OJEU/TED was if European funding was still being applied in the procurements. In that case, we would still have to follow some European rules. Under the Government procurement agreement, our only requirement is to have a single portal for the UK so that any supplier who is a member of the World Trade Organization can access procurement opportunities in a single portal.

The Chairperson (Dr Aiken): OK. Your understanding is that there is no way that a contract in Northern Ireland that is done by a UK company, based on UK procurement rules, will be chased by, say, a company in the Irish Republic saying that it could not bid for that contract under the protocol and the provisions of the trade and cooperation agreement (TCA).

Mr Watson: The GPA will require that, similar to the European rules, for anything that is above the specified thresholds, which is approximately £120,000 for goods and services and £4.5 million for construction, we will have to follow the principles of transparency, fairness and non-discrimination as laid out within what would have been the European rules. When it falls below that threshold, it is not clear that anybody has to comply with laws. Previously, that was controlled by the Treaty on the Functioning of the European Union (TFEU), and it was more of a cross-border trade issue. Clarity is needed as to whether that would impact on the protocol.

The Chairperson (Dr Aiken): Which of course would be a matter for the Specialist Committee and the Joint Committee working groups if they were ever set up.

Mr Watson: Possibly, yes. It is more of a constitutional issue in trade. With trade not being a devolved matter, it is very difficult for us to have anything to say about that.

The Chairperson (Dr Aiken): If the new framework is adopted, will the Assembly need new legislative powers to deal with this?

Mr Watson: No, it is non-legislative.

The Chairperson (Dr Aiken): Even though we are dealing with procurement issues, the Department of Finance has set itself up as a procurement board, and we are dealing with substantial amounts of Government moneys for procurement, you do not believe that we will need any more legislative powers than we have at the moment?

Mr Armstrong: Chair, if I could come in on that. This has always been the issue. When we were part of the EU there were requirements that came directly through EU directives into legislation and regulation. However, there were also local policy measures whereby individual devolved Administrations could make its own policies. The legislation does not describe the type of contract that you might want to use to run a procurement process, so, Northern Ireland could move to a NEC3 construction contract, for example. That is a local policy decision; it was not in the existing legislation.

There has always been a discussion about whether we needed a procurement Act. The position that we have taken, to this point, is that we will deal with these things through administrative action rather than by a procurement Act. Scotland took a slightly different view and produced the Procurement Reform (Scotland) Act 2014. However, it is possible that there might be a decision to strengthen any policy initiatives by putting additional legislation in place.

The Chairperson (Dr Aiken): There is also an opportunity here. Thank you for your evidence and analysis, so far. Having listened to you, I feel that there is probably nothing to stop us having a Northern Ireland-first procurement process, which, previously, we were told we could not have because of rules on EU competition. Is there any reason why we cannot go for a Northern Ireland-first procurement process for all government contracts?

Mr Armstrong: I suppose that that is a possibility. The issue is what might happen if others adopted the same approach. A guidance note from England says that, in the short term, they should focus on local suppliers for below-threshold procurements — the thresholds that Michael laid out. That concerns us, as it would prevent Northern Ireland firms from bidding.

When we run a procurement competition, we need to make sure that we do not inadvertently rule out opportunities for Northern Ireland firms. We should always promote the Northern Ireland firm to be involved, or have the opportunity to be involved, in any contract that we put in place. Examples have been brought to us in the past couple of weeks where things could have been made locally, but a product from the EU has been bought from a catalogue.

One of the things that we are looking at is supply chains, as that allows us to look at what we can do with Northern Ireland suppliers. The reshaping of the Procurement Board to bring in representatives from industry and manufacturing will allow us to shine a light on what we have been doing in the past with regard to specifications and looking for opportunities for Northern Ireland firms.

The Chairperson (Dr Aiken): I will call it the Des and Michael (Northern Ireland-first) Bill. We look forward to putting that through.

Mr O'Toole: Would a Northern Ireland-first policy undermine the purpose of having a UK common framework?

Mr Armstrong: Yes. One of the issues with the common framework is achieving a balance between things that are needed in a local context and the impact that it might have on the suppliers that operate across the various jurisdictions. Otherwise, why would you have procurement as a devolved matter?

In England, you see that Merseyside wants to support suppliers in Merseyside, and Manchester wants to do the same, but the white vans plying down the M62 like to have business in both areas, so there are issues with localism. However, rather than putting up a barrier and saying that we do not want anybody to work in Bradford other than folk from Bradford, for instance, it is about making sure that we look at the opportunity from the total of the procurement and contract and that we encourage participation in that rather than saying that we do not want people or organisations from other areas.

Mr O'Toole: The protocol gets blamed for everything from the Black Death to JR being shot in 'Dallas', but procurement is not covered by the Northern Ireland protocol; it is not about trading goods. This is not about the politics of it, one way or the other; it is just how this stuff works. Presumably you, perforce, will procure pretty regularly from contractors of different kinds in the Republic, and Northern Ireland providers, whether in construction or anything else, will be contracted in the Republic.

I realise that the issue is covered by the GPA, but has any assessment been done of the likely impact? If I understand this correctly, and I do not, as it is a technical area, the issue should be covered by the principle of non-discrimination in the general procurement agreement in the WTO. However, it is not the deep or legally binding set of level playing field guarantees for providers that you get in the EU, whatever you may think of the EU.

Since we no longer have those protections, have any conversations been had about the impact on providers in the South with whom you regularly contract because they are the best or most convenient suppliers? Likewise, could there be an impact on Northern Ireland providers who contract on the other side of the border?

Mr Armstrong: It is a developing situation, and we need to be made aware of any such impact. The Minister has reshaped the Procurement Board so that, for example, we have a member from the construction industry whom we have asked to give us a watching brief on the impact on construction. We meet the Procurement Board next week and will ask for an update. Such feedback from supplier membership organisations is very useful, as they are feeling the heat from the practical outworkings. We need to keep a watching brief on that. However, there will always be an issue where trade and procurement clash.

Mr O'Toole: Yes

Mr Armstrong: However, how those are evolved is probably the sticking point.

Mr O'Toole: There will be a lot of contractors working, for example, on a new hospital in Dublin or a school somewhere else in the South, and they would have won contracts as a matter of course. Have you heard any anecdotal evidence about that sort of work drying up or being jeopardised? Obviously, some of it is impacted by COVID-19.

Mr Armstrong: We have not heard anything directly on that. The big issue has been the closing down of the construction industry [*Inaudible*] at this time. We are aware that some suppliers operating in Northern Ireland and Southern Ireland might have stopped buying in anticipation of issues arising at the end of the transition period, but that is while being able to fully service the contracts that they were involved in.

The issue in the South of Ireland is that that has closed down; they are left with material that they need to shift so that they can replenish the stock for any future contracts. Over the next wee while, we need to focus on what work we can do to with the construction industry to get feedback and find solutions. For example, we could be a bit clearer or more transparent about where contracts are operating at the moment with regard to the [*Inaudible*], and what the impact of that is on those contracts and what flexibilities we might allow in contract terms in the short-term to allow for any difficulties that may be occurring.

Mr Catney: If the framework is adopted, we are looking at new powers being devolved to the Executive. Will the new legislative powers be devolved to the Executive for public procurement? What will the powers look like? That is all that I have to ask you.

Mr Armstrong: The framework will not be based on legislation. The overriding legislation will be in the adjustments to the public procurement regulations. This is a commitment not to do anything at policy level that would have an impact, without further consideration, on another party. Therefore, if we intend to do something in Northern Ireland on a policy area, the framework will commit us to discuss with England, Scotland and Wales our intention to do things and to take into account any impact that it might have there.

Similarly, if Scotland, England or Wales decide to do something on a policy area, they need to allow us an input for Northern Ireland so that they are aware of any impact on us. It is not legislation; it is more official-to-official discussions. That is the intention at the moment.

Mr Catney: Is there a timeline for phase 4 for the public procurement framework development process? Are we talking about years?

Mr Armstrong: Michael, do you want to update us on progress on the various phases?

Mr Watson: It is not that phrase 4 will take long. The problem is that we have not yet managed to secure the JMC's agreement to complete stage 3, although the timeline is months rather than years. The public procurement one, as it says in the framework, is not critical because we already have the legal framework in place to keep procurement operable. However, I imagine that it is a matter of months once the agreement is reached at JMC(EN).

Mr Catney: Chair, will that definitely come back to the Committee for us to consider and respond to?

The Chairperson (Dr Aiken): Yes. How long will the Committee have to consider and respond to the public procurement common framework?

Mr Watson: We would be led by the Cabinet Office on that, Chair, as it sets the timelines. However, I imagine that it would be at least three to four weeks. There is a series of engagements to *[Inaudible]* stage 4 again.

The Chairperson (Dr Aiken): Three to four weeks. OK, thank you, team.

How will the concordat will be signed off on? What happens if Northern Ireland's Ministers decide that they are not going to sign?

Mr Watson: It is probably reasonably within their rights not to sign it. The concordat just sets the framework out again in another document. We have had a concordat since the late 90s. All the Administrations have; it is not something new to us. There is still a need to coordinate some procurement reporting activity as a member of the GPA, which would have to come from the UK; it could not come from individual Administrations. Therefore, there will be a need for something in there. There may be some negotiation on the exact content of the concordat, but it is quite within your rights to say that you do not agree with it.

The Chairperson (Dr Aiken): It is quite within our rights to say that we are not going to sign it. However, by your implication, it makes no difference whether we sign it or not.

Mr Watson: That is a fair assessment. *[Laughter.]*

The Chairperson (Dr Aiken): Thank you, Des and Michael, very much indeed for your time.

Mr Watson: Thank you, Chair.