



Transforming Public Procurement: summary of the Procurement Bill

On 11 May 2022, the Government introduced the much-anticipated Procurement Bill (the Bill) into the House of Lords where it received its first reading. The Bill follows an extensive consultation process on procurement reform following the UK's withdrawal from the EU

The reforms in the Bill are significant and wide-ranging and follow on from the December 2020 Green Paper on Transforming Public Procurement (the **Green Paper**) and the Government's response to the consultation on the Green Paper, published in December 2021 (the **Response**).

The Bill represents the Government's post-Brexit approach to the proposed procurement regime. There are significant linguistic and stylistic differences in the Office of the Parliamentary Council's drafting, compared to what we are used to under the current Public Contracts Regulations 2015 (which represent a copy-out approach of the European Directive into domestic law).

The Bill will extend to contracting authorities in England, Wales and Northern Ireland, but Scotland has decided to remain outside the framework of the Bill.

The Bill is set out in 13 Parts covering:

1. Key definitions
2. Principles and objectives
3. Award of public contracts and procedures
4. Management of public contracts

5. Conflicts of Interest
6. Below-threshold contracts
7. Implementation of international obligations
8. Information and notices: general provisions
9. Remedies for breach of statutory duty
10. Procurement oversight
11. Appropriate authorities and cross-border procurement
12. Amendment and repeals
13. General

Additionally, much of the substance of the new procurement regime is to be found in the 11 schedules to the Bill (which include areas such as the rules around thresholds, exempt contracts, direct award justifications, mandatory and discretionary exclusion grounds, and new rules around grounds for permitted contract modifications).

This briefing provides a high level summary of some of the key issues that we have identified in the Bill, and explains the Government's proposed timeline for implementation of the new regime.

Key definitions

Part 1 of the Bill sets out the key definitions that are used throughout the Bill. Given that the Bill represents the Government's aspiration to condense numerous sets of procurement regulations into a single, consolidated, set of rules, it may take a little time to fully grasp which of the definitions relate to more specific procurement regimes (such as utilities and defence procurement) and those that have more general application.

Usefully, in addition to the key definitions in Part 1, the Bill includes (at Clause 112) an index of defined expressions (setting out the expression, alongside the legislative reference within the Bill where that expression has been defined, or where the Bill explains how it is to be interpreted). This is, however, not comprehensive and there are a number of new expressions that remain unexplained.

Principles and objectives

Part 2 of the Bill sets out the key procurement objectives (at clause 11) that contracting authorities must have regard to when carrying out procurements, including:

- (a) delivering value for money;
- (b) maximising public benefit;
- (c) sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions; and
- (d) acting, and being seen to act, with integrity.

Additionally, there is a general requirement for suppliers to be treated the same (unless there are differences which justify different treatment).

As trailed in the Government's Response and the Green Paper itself, proportionality does not appear as a principle in itself, and is instead woven into the Bill where the context requires. Unsurprisingly, transparency remains a key principle throughout the Bill, and contracting authorities should get to grips now with all of the publication requirements throughout the lifecycle of the procurement (and into the term of a public contract).

National Procurement Policy Statement

Part 2 also includes a new statutory duty on contracting authorities to have regard to the Government's strategic priorities for public procurement in the National Procurement Policy Statement (**NPPS**) (published from time to time under Clause 12).

A quirk of the current drafting, the current NPPS, which was published separately in June 2021 (and which already requires contracting authorities to consider specific national priority outcomes alongside any additional local priorities in their procurement activities), seems not to be covered by this statutory duty (as it predates the Bill). The drafting leaves the door open for refreshes and updates to the NPPS, and contracting authorities should expect a revised NPPS once the Bill has passed through Parliament and is enshrined in law.

Award of public contracts and procedures

As set out in the Green Paper, the Bill has delivered on the promise to reduce the number of procurement procedures, with an aim of moving towards a more flexible approach to awarding contracts. A single-stage "open procedure" remains for simple (off-the-shelf) procurements, and it is now open to contracting authorities to structure their procurements in any way that they consider appropriate (subject to the remainder of the rules, and certain minimum time limits set out in Clause 52 of the Bill). This flexible approach to structuring procurement procedures seems to represent the "Competitive Flexible Procedure" as trailed by the Green Paper, and we expect further guidance as to how contracting authorities might benefit from its use in due course.

Additionally, the Bill confirms the move to "Most Advantageous Tender", and clarifies when contracting authorities are permitted to make modifications to the terms of a procurement, and when amendments are permitted to the award criteria and their relative importance (i.e. weightings). A recurring theme throughout the Bill – contracting authorities will need to ensure that they draft their Tender Notices to allow for such modifications if likely to be needed, and ensure that any subsequent modification is recorded and republished as required.

Noticeably absent from the Bill is any specific detail around the previously trailed central supplier registration system around selection – we are yet to see whether any further guidance arises on this point, or whether any further regulations addressing this suggestion are made under the general powers set out elsewhere in the Bill.

The Bill also refreshes the legal framework on exclusions and sets out a UK-specific list of mandatory and discretionary grounds for exclusions (set out fully in Schedules 6 and 7 of the Bill). The Bill also provides for a five-year time limit for both mandatory and discretionary exclusion grounds and clarifies the trigger point for mandatory grounds. Of note, the discretionary exclusion ground for breach of contract or poor

performance seems to make good on the Green Paper's promise of making this an easier area to navigate. The exclusion ground is no longer limited to circumstances of poor performance resulting in early termination of a prior public contract (or damages, or other similar sanctions), and provides a more flexible approach to exclude providers who have not performed a relevant prior contract and have not improved their performance having been provided an opportunity to do so).

Commercial purchasing tools

The Bill also brings forward the Government's proposals around Dynamic Markets and Framework Agreements (both open and closed frameworks). The approach to closed frameworks reflects expectations framed by the Green Paper, whilst the approach to open frameworks has been clarified in the drafting. Clause 47 confirms that an "open framework" is effectively a scheme of successive frameworks – the framework must provide for what is essentially a replacement framework at least once in the first three years of the term, and then at least once in each period of five years beginning with the day of the award of the second framework in the scheme. This adopts a revised approach to what was envisaged under the initial proposals but should hopefully meet the demands of UK clients.

For both Dynamic Markets and Framework Agreements there is a mechanism to charge access fees to suppliers (based on fixed percentages of the estimated value of the contract to be awarded), but the proposals that profits made by central procurement organisations (the new "central purchasing bodies") in relation to such access fees should be put towards purposes in the public good are conspicuous by their absence, but perhaps this position will be put forward in the forthcoming regulations.

Management of public contracts, information and notices

The Bill reflects the general notion of an enhanced transparency regime set out in the Green Paper, and a key takeaway for contracting authorities should be the continued requirement for transparency, alongside a general increase in reporting and publication requirements.

Contracting authorities will also have to publish a number of new notices at different stages of the procurement lifecycle (for example, a "Contract Detail Notice" once a contract has been awarded). Contract documents will also need to be published (on a redacted basis) if the total value of the awarded contract has a threshold value of £2 million or more.

As an example, the Bill sets out the following procurement notices which may (or must) be published throughout the lifecycle of the procurement:

Notice	Clause	Compulsory / Voluntary
Planning and Pipeline Notice	84	Compulsory for contracting authorities who consider that they will pay more than £100m under relevant contracts in the coming financial year
Notice of Planned Procurement	14	Voluntary
Pre-Market Engagement Notice	15	Voluntary
Tender Notice	20	Compulsory where a contracting authority intends to award a public contract under clause 18
Contract Award Notice	48	Compulsory before entering into a public contract (which does not appear to include call-offs awarded under a framework or contracts concluded under a dynamic market)
Contract Detail Notice	51	Compulsory
Contract Change Notice	70	Compulsory (except where exemptions in 70(2) apply)
Contract Termination Notice	73	Compulsory
Dynamic Market Notice	39	Compulsory where a dynamic market is to be established
Transparency Notice	43	Compulsory where there is a direct award within the meaning of clause 40 or 42
Payments Compliance Notice	64	Compulsory
Below Threshold Tender Notice	79	Compulsory where a contracting authority intends to advertise for the purpose of inviting tenders for a below threshold procurement

Conflicts of interest

An area not previously covered by the Green Paper, clause 74 (in Part 5 of the Bill) imposes a duty on contracting authorities to take all reasonable steps to identify, and keep under review, actual or potential conflicts of interest.

Whilst this is not necessarily a new consideration (a requirement to effectively prevent, identify and remedy conflicts is already set out in regulation 24 of the Public Contracts Regulations 2015), Part 5 of the Bill goes further than the current obligations, requiring assessments of conflicts prior to publishing a Tender Notice or Transparency Notice, and imposing a duty to mitigate against conflicts under clause 75.

Below-threshold contracts

Part 6 of the Bill includes a new below-threshold regime based largely on the existing below-threshold rules introduced into Part 4 of the Public Contracts Regulations 2015 following the Lord Young reforms.

The specific thresholds listed in clause 79 remain silent on the treatment of VAT for the purposes of calculating value, and we would expect further guidance on this point, but contracting authorities should note the thresholds for notifiable below-threshold contracts (i.e. contracts that need to be advertised via a below-threshold tender notice) are recorded as £12,000 for central government authority (to be defined in further secondary legislation) and £30,000 for any other contracting authority.

Implementation of international obligations

The Bill reflects that fact that the UK is a signatory in its own right to the World Trade Organisation's Agreement on Government Procurement (the **WTO GPA**). Additionally, the Bill sets out various specified international agreements in Schedule 9 and prohibits discrimination against "treaty state suppliers" (being a supplier entitled to any benefits of one of those agreements in Schedule 9).

Procurement oversight

Part 10 of the Bill provides for the possibility for an appropriate authority to investigate compliance by contracting authorities with the new procurement rules. Clause 96 introduces general information gathering powers for the appropriate authority and places an obligation on contracting authorities to comply and provide requested information.

Following the conclusion of any procurement investigation, the appropriate authority will be able to publish the outcome of the investigation and issue recommendations and guidance on best procurement practice.

Remedies

Of particular note in the context of remedies, the Bill introduces a new test for the court to consider when hearing applications for the automatic suspension to be lifted. This replaces the current *American Cyanamid* test with a simpler, single-limbed, test and, in making a decision as to whether to lift the automatic suspension, the court should have regard to the public interest (including the general principle that public contracts should be awarded in accordance with the law, and in avoiding delay in the supply of public contracts), the interests of the suppliers (including whether damages are an adequate remedy), and any other matters the court considers appropriate.

The automatic suspension itself has been tweaked and, of note, clause 90 sets out that a contracting authority's ability to enter into a contract is not automatically suspended where the contracting authority is notified of the commencement of proceedings after the end of a relevant standstill period.

Amendments and repeals

The Government's Response hinted that the procurement reforms would also make amendments to section 17 of the Local Government Act 1988 which prohibits local authorities from taking into account non-commercial considerations when entering into or terminating public contracts and in decision-making in procurements.

This has been under particular scrutiny recently given the imbalance that section 17 has created in the application of PPN 11/20 (re. reserving below threshold procurements by supplier location).

Clause 104 makes provision for secondary legislation to be made to disapply section 17, and so local authorities should keep an eye on the horizon for the proposed regulations.

What comes next?

Contracting authorities will need to spend significant time navigating the Bill as well as keeping an eye out for secondary legislation and statutory guidance. At least in the short term, the legislative framework does not feel like it has been simplified. The significant stylistic differences are likely to raise numerous questions whilst

we get to grips with them: do the differences signify the desire of the UK Government to take the procurement rules in a different direction? Do they seek to provide the same meaning as the previous rules? Or is the difference an omission or oversight?

The Bill and associated secondary legislation are likely to take approximately nine months to complete its passage through Parliament and there is then expected to be a six month "go live" period to prepare for implementation once the legislation has been concluded. The secondary legislation and guidance will be needed to put flesh on the bones of the Bill – much of the detail of how the new regime will work in practice is yet to be published and the Government has indicated that further stakeholder consultation is likely.

The Public Procurement Team at Trowers & Hamblins will be providing regular updates, insights, podcasts and webinars into the Procurement Bill as we review and consider its details. Please join the conversation and do not hesitate to contact us if you have any questions.

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