

In this note, we outline the key decisions taken by the UK Government in its response to the public consultation on "Transforming Public Procurement" that was published in December 2021 (**Government Response**).

The Government Response ([available here](#)) sets out its intentions for the forthcoming reform of UK public procurement law and highlights some important changes to the Government's original proposals.

Background

The principal legislation governing public procurement in the UK today is derived from EU law. Following Brexit, the Government has laid out plans to overhaul the current system in favour of an entirely new regime that will apply in England and, if they choose, in the devolved nations.

On 15 December 2020, the Government published a green paper entitled "Transforming Public Procurement" (the **Green Paper**, [available here](#)), with the stated objective of overhauling the "outdated public procurement regime". The Green Paper included a range of proposals with the overall aims of delivering a simpler regulatory framework, modernising procurement procedures and ensuring open and transparent contracting.

Following a public consultation on the Green Paper earlier last year, the Government issued the Government Response outlining which of the Green Paper proposals it intends to drop or alter and which it will retain in the forthcoming Procurement Bill (the **Bill**). The Government has also confirmed that any new legislation will not be implemented until 2023 "at the earliest", meaning that contracting authorities and utilities can continue with their procurement pipeline for 2022 on the basis of the existing rules.

The new regime has been heralded as a once-in-a-generation opportunity to reform public procurement law. This note sets out the main proposals that we expect to be implemented in twelve areas, in light of the Government Response.

1. Six "principles" of procurement become only three

The Green Paper proposed to enshrine in law six principles of public procurement that contracting authorities will be obliged to observe: (i) the public good, (ii) value for money, (iii) transparency, (iv) integrity, (v) fair treatment of suppliers, and (vi) non-discrimination.

In contrast, the Government Response proposes that only transparency, non-discrimination and fair treatment of suppliers will now remain as principles of procurement. The other three concepts – the public good (now re-framed as "the public benefit"), value for money and integrity – will become statutory "objectives" that are intended to influence authorities' decision-making. An additional objective of "promoting the importance of open and fair competition" has also been introduced.

We would assume that the objectives, unlike the principles, will not be legal obligations to be followed in all cases. However, this is not made explicit in the Government Response and it will need to be clarified in the draft Bill when this is published.

Despite some calls in the consultation to re-introduce proportionality as a fundamental principle, the Government has decided not to do so. Instead, proportionality will be introduced "where it is required" in specific regulations – for example, in the context of the timescales for a procurement procedure.

2. Central government oversight of procurement will remain

The proposal to establish a new unit to oversee public procurement, with powers to review and intervene in individual cases, received only limited support in the public consultation. Nevertheless, the Government has retained plans to create a new "Procurement Review Unit" (**PRU**) that will sit within the Cabinet Office and oversee procurement under the new regime.

The PRU will have "limited" powers to investigate contracting authorities' procurement functions and, where instances of non-compliance are identified, take steps to ensure compliance in the future. To limit the risk of discouraging authorities' legitimate activities, it is to be hoped that the mechanics of this process will be clearly (and narrowly) defined in the Bill.

3. A simpler regulatory framework – with more exceptions

One of the Green Paper's key proposals was to consolidate the many current public procurement laws into a single regulatory framework. The intention is that a single, uniform framework, consolidated to the greatest extent possible, will remove duplication and make procurement more agile and flexible, while still upholding fair and open competition.

The Government Response confirms that there will indeed be a single regulatory framework, but that additional concessions will be made to ensure that sector-specific features of the current rules are retained. In particular, the Government has confirmed that the current flexibilities and exemptions under the Utilities Contracts Regulations will be largely retained.

4. Fewer procurement procedures

The Green Paper proposed to reduce the number of procurement procedures available to authorities from the existing seven to just three, namely:

- i. a new "flexible competitive procedure" intended to replace the current restricted procedure, competitive dialogue and the competitive procedure with negotiation;
- ii. an "open procedure" that authorities can use for simpler, "off the shelf" competitions; and
- iii. a "limited tendering procedure" that authorities can use in specific circumstances, such as crisis or extreme urgency, similar to the current negotiated procedure without prior publication.

This proposal, in particular the new flexible competitive procedure, received a mixed response in the public consultation. While some welcomed the flexibility it will give authorities to design their own procedures, others were concerned that it might increase authorities' burden in the procurement planning stage if each procedure has to be designed from scratch. Helpfully, the Government Response indicates that guidance, including template options, will be issued in order to help contracting authorities and utilities to use the new procedures in practice.

5. Retaining the "Light Touch" regime

The Green Paper proposed to do away with the "Light Touch" procurement regime that currently benefits social, health, education and other services. Following a mixed response, the Government has confirmed that it will retain the differential treatment of many Light Touch services, including in relation to mandatory time periods and thresholds. However, the Government Response did not go into detail as to which services will remain subject to the Light Touch regime; which will be subject to the full procurement rules; and which will be exempted altogether.

6. Rewarding the Most Advantageous Tender

Another Green Paper proposal, that contracts should be awarded to the "Most Advantageous Tender" rather than the "Most Economically Advantageous Tender," has been retained.

The new terminology implies that procuring entities will have more scope to consider policy objectives when setting award criteria, such as environmental or social objectives, rather than purely economic considerations. As such, this is a potentially significant change.

The Government Response also confirms that the Secretary of State will have the power to prescribe award criteria that are consistent with "policy priorities"; which do not have to be linked to the subject matter of a contract. This is a substantial departure from the current regime and creates the possibility of the Government using public procurement as a means of directly implementing its wider policy agenda.

7. Major reform of rules on exclusion

The Government intends to establish a simpler and clearer framework for the exclusion of suppliers from procurement processes for misconduct, such as fraud, corruption or poor past performance. New exclusion grounds will be more focussed on suppliers that pose an "unacceptable risk to public confidence in procurement" and on key principles such as protection of the public, the environment and national security.

In another significant change, a five-year time limit will apply in cases of mandatory as well as discretionary exclusion. Under current rules, discretionary exclusion is subject to only a three-year time limit, which reflects the less serious nature of misconduct in these cases.

The Green Paper proposal for a central debarment list has also been carried forward. This will include the central registration of suppliers who may be excluded from procurements at an authority's discretion due to past poor performance.

8. Dynamic Purchasing to become "Dynamic Market" tool

The Government has indicated that it intends to adopt the term "Dynamic Market" for the new, more flexible dynamic purchasing systems it will launch under the new regime. The Dynamic Market tool will not be limited to commonly used purchases but will be available to purchase all types of works, services and goods. The Government will issue guidance to assist contracting authorities to select the best tool for different requirements.

9. Open and closed frameworks to remain, with exceptions for utilities

The proposal in the Green Paper to introduce "open" frameworks, which suppliers will be able to join during their term, has been carried forward. Open frameworks will have a maximum duration of eight years.

The proposal to set a maximum duration of four years for standard "closed" frameworks, which suppliers cannot join mid-term, received criticism in the consultation from utilities, which typically rely on long-term relationships. In response, the Government has accepted that while the standard maximum duration of closed frameworks will be four years, an exception will be made to allow utilities specifically to establish longer closed frameworks.

10. Extensive transparency requirements retained

The Green Paper proposed to embed transparency as a principle throughout the procurement lifecycle from planning through to procurement, contract award, and completion, by imposing extensive new advertising and publication requirements. The Government Response has pared back the original proposals but only to a limited degree.

Authorities will be obliged to publish the contracts that they award, redacted for confidentiality, but this will only apply to contracts worth more than £2 million. Although having a threshold is sensible, at this level it will still capture a very large proportion of procurements. In another significant change, authorities will be obliged to share the winning bidder's evaluation documents with the unsuccessful bidders, which is a far greater level of disclosure than applies currently. This, together with providing unsuccessful bidders with their own, unredacted evaluation documents, will replace the current requirement to issue "standstill letters" to all bidders ten days before awarding a contract.

The Government has also retained plans to establish a central digital platform for suppliers' commercial data, including supplier registration information.

11. Pared-down reforms to challenges and remedies

The Government Response indicates that the more radical proposed reforms to the public procurement remedies system will not be implemented.

A significant departure from the Green Paper is the abandonment of the proposed cap on damages that can be awarded to a successful challenger. The reason given for this change is the risk of "*unintended consequences*", such as increasing the number of challenges and increasing the instances in which an automatic suspension is maintained due to the perceived inadequacy of capped damages.

The Green Paper proposal to replace the test that the Courts use to determine when to lift the automatic suspension of a contract in the event of a challenge has been retained. The Government intends to introduce a new single-limb test, which will provide for suspensions to be lifted where there are "*overriding consequences for the various interests concerned*"; including impact on public service delivery. More detail is required as to how this will work in practice but it may resemble the current "balance of convenience" test under the third limb of *American Cyanamid*, which affords wide discretion to the Court to determine such matters.

The Government has withdrawn its proposals for:

- (i) a new independent contract authority review system;
- (ii) using existing tribunals to deal with low value claims and issues relating to ongoing competitions; and (iii) creating a new procurement tribunal. Instead, reforms to High Court procedure will be introduced with a view to increasing the speed and efficiency of challenges.

12. Reforms for effective supply chain and contract management

The Green Paper proposed to legislate to tackle payment delays in public sector supply chains and give small businesses, charities and social enterprises deep in the supply chain better access to contracting authorities to expose payment delays. The Government Response confirms that these proposals will be carried forward.

The proposal to require the publication of a notice when parties agree major changes to a contract post-award will also be implemented. There will, however, be more flexibility for utilities in this area and the Government is considering whether to maintain the position under the current legislation and not include a 50% cap on contract amendments for utilities.

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