SQUIRE PATTON BOGGS

UK Government Introduces Procurement Bill 2022

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The proposed text of the government's "once-in-a-generation" overhaul of public procurement was published on 11 May 2022. The Procurement Bill (Bill) sets out the government's plans to create what it intends to be a simpler and more flexible system for public procurement and follows the government's 2020 Green Paper on "Transforming Public Procurement" (Green Paper).

The Bill paves the way for significant reforms, including:

- Reducing the number of regulated procurement procedures from seven to three
- Consolidating all (or almost all) procurement rules into a single regulation
- Changing the basis on which contracts are awarded, with more emphasis on social and other considerations

There is, therefore, a lot for contracting authorities and suppliers to consider before the new legislation comes into force in 2023.

In January, we reviewed the government's response to the consultation on the Green Paper (Government Response) and identified 12 key areas of reform proposed by the government. In this update, we look again at those 12 areas and examine how they feature in the Bill.

1. Procurement Principles

The Green Paper proposed that contracting authorities would be obliged to observe six principles of public procurement: (i) the public good, (ii) value for money, (iii) transparency, (iv) integrity, (v) fair treatment of suppliers and (vi) non-discrimination. After consultation, however, the Government Response stated that only transparency, non-discrimination and fair treatment of suppliers were to remain as mandatory principles.

In contrast, the Bill does not include any mandatory principles at all. Instead, s.11(1) of the Bill requires only that contracting authorities "have regard to the importance of" four factors, described as "objectives": (i) integrity, (ii) transparency ("sharing information"), (iii) value for money and (iv) "public benefit". It is unclear what the legal effect of these objectives will be. In particular, it is unclear to what extent they will influence the interpretation of express obligations elsewhere in the Bill or, indeed, create any freestanding obligations upon contracting authorities other than to merely "consider" the objectives.

The Bill does include a requirement, at s.11(2)-(3), to observe "equal treatment" (now termed, "treating suppliers the same"). "Non-discrimination" is to apply only to "Treaty State" suppliers (i.e. those from states with whom the UK has a public procurement trade deal), under s.82, and "proportionality" is adopted only in relation to specific provisions (for example, in relation to the design of a competitive procedure, s.19(3), and selection criteria (s.21(1)).

2. Central Government Oversight

As trailed in the Government Response, part 10 of the Bill sets out details of a new procurement oversight body that will have powers to investigate, report upon and make recommendations to authorities. The body will be established by the relevant central government or devolved government department.

The oversight body will have the power to investigate compliance by contracting authorities with the Bill (or Procurement Act as it will be). The oversight body will be empowered to require contracting authorities to provide documents and assistance in relation to the investigation. Once the compliance investigation has been completed, the oversight body will have the power to publish its findings and make recommendations to the contracting authority. The recommendations will not be binding, but the contracting authority must "have regard" to any recommendation and submit progress reports to the oversight body if requested to do so.

There is little detail in the Bill of any wider role that the new oversight body may have or how the referrals system will operate, for example, in relation to how and by whom referrals can be made, when they will be investigated, whether contracting authorities can seek pre-emptive advice from the oversight body or the effect of a failure to implement recommendations.

3. A Simpler Regulatory Framework

The Bill consolidates the legal regimes for public contracts, utilities, concessions, and defence and security, all of which are currently governed by different regulations. The Bill does not, however, create a single "one-stop shop" for all public procurement laws. First, multiple public procurement rules exist under separate enactments (such as the Equality Act 2010), which will remain in force as further sources of public procurement regulation. Second, the Bill anticipates that there will be extensive secondary legislation to deal with certain important matters that are not addressed in the Bill itself – for example, the scope of light touch services (s.8(1)), the contents of notices required under the Bill (s.86), and the scope of direct award on the new "protection of life" ground (s.41(1)). Third, the procurement of health services will likely be removed from the scope of the Bill entirely and will be governed by the new Provider Selection Regime to be enacted under the Health and Care Act 2022.

4. Fewer Procurement Procedures

As proposed in the Green Paper, the Bill reduces the number of regulated procurement procedures and affords more flexibility to contracting authorities to design and conduct their own procurements. The seven procurement procedures in the current regulations will be replaced by three, as follows:

i) A new "flexible competitive procedure", which permits contracting authorities to design and implement their own procurement procedures providing they comply with the general rules in the Bill (for example, in relation to award criteria, timing, technical specifications, etc.)

ii) An "open procedure" for simpler "off-the-shelf" competitions – a single stage procedure similar to the current open procedure

iii) A "direct award procedure" (which was referred to as "limited tendering" in the Green Paper), which can be used only in certain limited circumstances, such as extreme urgency

5. Retaining the "Light Touch" Regime

Section 8 of the Bill provides for the continuation of a separate regime for "light touch" services. However, the precise scope of services that will benefit from the "light touch" regime will be determined by a separate regulation. There will be some cross-over between current light touch health and social care services and the new NHS Provider Selection Regime, though the delineation of each applicable regime is yet to be decided.

6. Rewarding the Most Advantageous Tender

The Bill confirms that contracts should be awarded to the "Most Advantageous Tender" rather than, as currently, to the "Most Economically Advantageous Tender". The implication of this change is that procuring entities will have more scope to consider wider policy objectives when they award contracts (such as environmental and social objectives) rather than purely economic considerations. However, the extent to which this is anything other than a cosmetic change is unclear. Contracting authorities are already required to include wider social value award criteria in procurement (under PPN 06/20), providing those criteria are proportionate and linked to the subject matter of the contract. Section 22(2)(a) of the Bill makes a similar provision: award criteria must be "related to" (as opposed to "linked to") the subject matter of the contract. Similarly, under the Bill, selection criteria must be limited to proportionate means of ascertaining capability and capacity (s.21); again, this seems roughly equivalent to the current regime.

The government's original proposal (in the Response) allowing authorities to deviate from the requirement that award criteria be linked to the subject matter of the contract does not appear to be included in the Bill. This may be covered by the new requirement that contracting authorities must have regard to the National Procurement Policy Statement (under s.12(9) of the Bill). However, this is not expressly stated.

7. Major Reform of Rules on Exclusion

As expected, the Bill establishes a new framework for the exclusion of suppliers from procurement processes. These include:

i) A five-year time limit to apply in cases of discretionary, as well as mandatory, exclusion (whereas currently a three-year limit applies to discretionary exclusions).

ii) The introduction of a new "past poor performance" exclusion criterion, which is to be available where a supplier has breached a prior public contract resulting in termination, damages or settlement or where a contracting authority is dissatisfied with a supplier's performance and the supplier fails to improve despite being given the opportunity to do so (Sch 7(13) to the Bill). There will also be a national register of past poor performers, which can be used as a basis to exclude on the "past poor performance" ground. This will have serious implications for suppliers and risks unintended consequences, such as stifling settlement of legitimate disputes and inhibiting competition for onerous contracts.

iii) The introduction of a new debarment list. The procedures for the operation of and appeals in relation to the list are set out in ss.56-61 and are roughly in accordance with the Response proposals. Again, inclusion on this list will have very serious consequences for suppliers.

8. Dynamic Purchasing to Become a "Dynamic Market" Tool

The government has adopted the term "Dynamic Market" to describe a new, more flexible dynamic purchasing system. The Bill allows contracting authorities to establish arrangements (a "dynamic market") for the purpose of awarding public contracts by reference to suppliers' membership of the market. In effect, the dynamic market will operate as an open "supplier list" – that is, participation in a procurement competition can be limited to those suppliers who are members of the relevant dynamic market.

Dynamic markets will, in principle, be available for all purchases (as opposed to off-the-shelf purchases where the current DPS system is used).

Admission to the market must be open at any time during the operation of the market and the number of suppliers to be admitted cannot be limited. The admission process will operate as a selection and exclusion process, with a separate contract award procedure being conducted for any purchases made from the market.

The dynamic market could be a useful new procurement tool to facilitate faster, more efficient purchasing for contracting authorities and suppliers alike.

9. Frameworks

The Bill introduces the proposal for "open frameworks", i.e., frameworks that new suppliers can join after they have been set up. Open frameworks will have a maximum duration of eight years and must be reopened at least once in that time. There is a real risk that this will create uncertainty and an increased administrative burden on suppliers under those frameworks.

Closed frameworks can still be used but must be limited to four years (eight for utilities) except where a longer period is justified.

10. Extensive Transparency Requirements Retained

In an effort to ensure that transparency is observed throughout the procurement life cycle, the Bill implements proposals to require contracting authorities to publish a range of new notices and other documents. New mandatory notices include a "contract change notice" where certain variations have been made to an existing public contract and a "preliminary market engagement notice" where a contracting authority intends to engage with suppliers in relation to certain procurement planning activities. While these measures will improve transparency for suppliers, there will inevitably be an increased administrative burden on contracting authorities to comply with these requirements.

11. Limited Reforms to Challenges and Remedies

The reforms to the current remedies system are relatively limited. There will be a new test for the courts to apply in applications to lift an automatic suspension of a contract award when a challenge is brought. This moves away from the three-part *American Cyanamid* test to a more general test balancing the interests of all involved. It remains to be seen whether this will have any impact on the approach of the courts in practice, as often the current "balance of convenience" part of the *American Cyanamid* test is approached in a similar manner.

The standstill period that applies after an authority awards a contract and before they can sign has been changed from 10 days to eight working days (s.49(2) of the Bill). This is intended to ensure consistency, for instance to avoid time constraints when the standstill period falls over a bank holiday.

The remedy of "ineffectiveness" will become "set aside", which aligns with the nomenclature of public law remedies in England and Wales. The remedy itself appears largely similar.

12. Reforms for Effective Supply Chain and Contract Management

The Bill implements the Response proposal to require prompt payment of suppliers and subcontractors and to require authorities to report on their compliance with the maximum 30-day payment (ss.63-65 and 68 of the Bill).

What Next?

Both contracting authorities and suppliers will need to consider the implications of the new Bill carefully. These include, most notably, understanding and adapting to the three new procurement procedures. The Bill is likely to take a number of months to pass through Parliament and may be amended further on the way. To help authorities and suppliers prepare for the new rules, the government has pledged that a six-month "go live" period will apply once the Bill has been enacted before it enters into force.

Contacts

Will Sparks
Partner, Brussels
T +322 627 7610
E william.sparks@squirepb.com

Martin H. Rees
Partner, London
T +44 207 655 1137
E martin.rees@squirepb.com

Jenny Broderick
Senior Associate, Leeds
T +44 113 284 7035
E jenny.broderick@squirepb.com

Sam Hare
Senior Associate, London
T +44 207 655 1154
E sam.hare@squirepb.com

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