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Transforming UK public procurement

The Public Procurement Bill 2022 has a second reading in the House of Lords

Since Brexit, and the subsequent pandemic when the direct award of PPE contracts was in the spotlight, the question of how public procurement will be regulated in the UK has been a subject of some debate. In December 2020, the UK Government set out its direction of travel in a Green paper (see our previous articles on this and the resulting consultation [Feb 21](#) and [Dec 21](#) articles). This is now taking shape in legislation, with the Procurement Bill being announced in the Queen's Speech and following its second reading on 25 May.

The Bill will replace the Public Contracts Regulations 2015, the Concession Contracts Regulations 2016 and the Utilities Contracts Regulations 2016, marking the biggest shift in UK public procurement regulation in years. And there is no doubt that the Bill encompasses lots of political touchpoints - and not just Brexit and the Covid legacy. The Cabinet Office's "Procurement Bill factsheet" highlights the potential for public procurement reforms to help deliver the "levelling up" agenda through requiring public sector buyers to "take account of national strategic priorities such as job creation potential, improving supplier resilience and tackling climate change" while value for money will still be the highest priority. So, it seems that an awful lot is resting on this piece of draft legislation!

Of course, the Bill may be subject to amendment as it works its way through Parliament, but we take a look now at some of the main ways this new regime will differ to the current approach and what this means for those involved in procuring public contracts or indeed bidding for them.

A simpler, more flexible approach?

Much has been made of the Government's desire to use these reforms as a way of realising the "Brexit dividend" by unshackling us from what has been seen by some as overly complex EU red tape. In presenting the Bill for its second reading, Lord True noted that "£1 in every £3 of public money—some £300 billion a year—is spent on public procurement. Imagine the power of the most efficient and effective use of that money every year. Imagine the extra small businesses that we could help to hire more workers, expand their operations and contribute to the wealth of this nation".

To this end, the new legislation will regulate public contracts from their inception up to the point at which the contract expires or is terminated. It is intended to create a "simpler, more flexible" system of procurement, which is opened up to smaller businesses and social enterprises and retains transparency. The Bill includes key principles (primarily non-discrimination and equal treatment) and objectives (namely value for

money, maximising public benefit, transparency and integrity).

In truth, it is really too early to tell whether this new regime will lead to more efficient and effective use of public money. It is certainly the case that the Bill is written in much more straightforward language than the existing Regulations which were transposed from EU Directives deriving from lengthy negotiations among EU member states. There are two schools of thought here – on the one hand the user friendly language should make public procurement more accessible, and on the other hand it might just lead to more disputes over what the words mean. Only time will tell.

As to the procedures themselves, as we explain below, they are on the face of it simpler and more flexible. For straightforward procurements, they could improve life for procurers and suppliers alike. For more complex ones, however, the extent of the flexibility could lead to a very wide range of interpretations and so over time, a significant divergence in approaches. This would not

lead to efficiencies for public bodies or suppliers, in fact, quite the opposite.

There is also quite a lot that the Bill doesn't tell us about what the Government plans for the new regime. Some important areas, such as transparency, are due to be the subject of secondary legislation so we will have to wait to see what this brings. It also means, that we won't have a single set of rules to refer to.

Some things don't change

Although we have been released from EU constraints, as an international trading nation, we will never be able to do whatever we like in the field of public procurement. As such, the Bill reflects the fact that the UK must comply with international regulations on public procurement, including the World Trade Organisation's Agreement on Government Procurement.

It should also be noted that elements of the new regime will be similar to the current one, for example, the grounds for a direct award, the circumstances in which a contract can be modified, and substantive remedies. There are clarifications and tweaks from the current regime in these areas, but they remain largely the same. However, there is no doubt that it is a fundamentally different regime, and some of the key points of divergence from the current regulations are highlighted below.

Fewer procurement procedures (on the face of it)

The Green Paper heralded three new procurement procedures which would replace the seven prescribed by the EU regulations. These were to be:

- a new competitive flexible procedure that "gives buyers freedom to negotiate and innovate to get the best from the private, charity and social enterprise sectors"
- an open procedure for simpler "off-the-shelf" competitions and
- a limited tendering procedure that can be used in certain circumstances such as extreme urgency.

The Bill delivers on the promise to reduce the number of procedures with a single stage open procedure for simple (off-the-shelf) procurements. If that isn't suitable then the Bill leaves it open to use "such other competitive tendering procedure as the contracting authority considers appropriate for the purpose of awarding the public contract". It doesn't get more flexible than that! This is though, of course, subject to the remainder of the rules, including a proportionality requirement and minimum time limits. The Bill gives this alternative to the open procedure the moniker "a competitive tendering

procedure other than an open procedure" which will probably need to be simplified for practical ease of reference, if nothing else.

What's interesting about this alternative to the open procedure is that it appears on the face of it to permit many different permutations – procedures with or without a selection stage, multiple down selections and no apparent restrictions on post tender negotiations. So you could use it to run something like a restricted procedure, competitive dialogue, competitive with negotiation or even the old negotiated procedure, for those long enough in the tooth to remember it. Detailed guidance is expected and hopefully this will provide context and structure, while still retaining the flexibility that these reforms look to achieve.

There is also still the ability to directly award contracts in situations similar to those in the current Regulations, with the addition of "direct award to protect human life" which should avoid the need to rely on urgency in prolonged public health emergencies as was the case during the pandemic.

Choosing the right supplier

The Bill sets out new framework for excluding suppliers from procurements and contract awards, including to make it easier to exclude suppliers who have underperformed on other contracts. A new "debarment register" will also be created, accessible to all public sector organisations, which will allow contracting authorities to see which suppliers have performed poorly regardless of whether the poor performance led to contract termination.

As indicated in the Green Paper, the Bill also seeks to address the practical issue that purchasers often encounter with the limited availability of independent information on poor supplier performance. Before entering into a new public contract with an estimated value of more than £2,000,000, the Bill provides that (subject to certain exceptions) a contracting authority is required to set and publish at least three key performance indicators in respect of the contract. This requirement can be avoided if the contracting authority considers that the supplier's performance under the contract could not appropriately be assessed by reference to KPIs.

Where KPIs have been set, the contracting authority must, at least once in every period of twelve months during the lifecycle of the contract and on termination of the contract:

- assess performance against the key performance indicators
- publish information to be specified in regulations in relation to that assessment.

It will be interesting to see how this plays out, particularly for more complex joint venture or public private partnership contracts, where the setting of meaningful KPIs that a supplier would be willing to have published in this way may be a challenge.

Greater transparency...and lots of notices

The Government has signalled that a single digital platform will be created for suppliers to register their details that can be used for all bids, and a single central "transparency platform" will allow suppliers to see all opportunities in one place. The Cabinet Office also sees this approach as a way of "embedding transparency throughout the commercial lifecycle so that the spending of taxpayers' money can be properly scrutinised". There are some 12 different notices identified in the Bill, some of which go beyond current requirements. The new ones include a Planning and Pipeline Notice, Pre-Market Engagement Notice, Contract Detail Notice and Contract Termination Notice.

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Further guidance will be published in due course in this area, as details of this platform and notice requirements were not specified in the Bill.

What next?

So now we keep an eye out for the promised secondary legislation and statutory guidance. The Bill and associated Regulations are not expected to come into force until March 2023. Six months' notice will be given before the implementation of the new regime. In the meantime, the current regulations will continue to apply in the same way as before. It's also worth noting that procurements which were started before the change in the law will continue to be bound by the current rules even once the Bill has come into force.