

UPDATE ON UK PUBLIC PROCUREMENT REFORM PLANS

The UK Government has published a Response to the consultation process on its Green Paper on 'Transforming Public Procurement', which is designed to simplify the UK's current EU law-based public procurement regime following its departure from the EU.¹ The Response updates the UK Government's reform plans following feedback.

Whilst the initial Green Paper and updated proposals set out in the Response promise significant procedural and structural changes, the new regime will likely closely resemble its predecessor in practice and some of the notable proposals in the Green Paper have been dropped or watered down in light of the consultation process.

Changes to the rules are some way off. The UK Government foresees that the new regime will come into force in 2023 "*at the earliest*", suggesting that the changes may well not take effect until 2024 or beyond.

The Response confirms that the new legislation will cover England and, potentially, Wales and Northern Ireland. Scotland is expected to continue with a separate regime.

Key takeaways from the Response:

- The current rules will remain in force for some time, with the new regime set to come into force in 2023 "*at the earliest*".
- The UK Government confirms plan to harmonise current regulation into a single piece of legislation, but differential treatment of utilities and defence and security contracts will remain.
- Expanded grounds for excluding bidders and introduction of a central 'debarment list'.
- Previous proposal to cap damages to discourage procurement challenges has been dropped.
- New legislation will cover England and Wales and, potentially, Northern Ireland, but not Scotland.

SIMPLIFICATION OF THE UK PROCUREMENT REGIME?

The UK Government's Green Paper, released in December 2020, set out to "*comprehensively streamline and simplify the complex framework of regulations*". The centrepiece of the plan is the consolidation of the four UK procurement regulations (the Public Contracts Regulations 2015, Utilities Contracts Regulations 2016, Concession Contracts Regulations 2016 and Defence and Security Public Contracts Regulations 2011) into a single set of regulations. Sector-specific rules for utilities and defence contracts will continue but within the same set of regulations, which are expected to contain less black and white law within in it given the move to a guidance-based system.

The proposal received broad support in the public consultation (from 81% of respondents) and the UK Government's Response confirms its intention to carry it through.

It remains to be seen whether the approach will result in a more simplified regime in practice. Referring to one set of regulations will help. But the simplicity of the new regime will be determined ultimately by the number and nature of the procedural rules adopted. The Green Paper and Response serve only to provide an overview of the changes on the

¹ The Response is accessible online

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1038516/Transforming_Public_Procurement-Government_response_to_consultation.v3_.pdf. For more information about the Green Paper, see Clifford Chance's January 2021 briefing: <https://www.cliffordchance.com/briefings/2021/01/uk-government-releases-plans-to-reform-public-procurement-law-in.html>.

horizon, which say very little about simplified rules above and beyond consolidation, and the finer details will not be known until the UK Government publishes the proposed legislation and accompanying guidance which are not expected any time soon.

However, based on the proposals, we anticipate that contracting authorities and bidders from across the UK will continue to face a fragmented regime and complexity in interpreting and applying the rules:

- a move to a guidance-based system under which contracting authorities will be afforded greater discretion may result in a proliferation of government procurement guidance and reduce the clarity and consistency on how the rules are applied. Recent court rulings have reaffirmed that failing to follow government procurement guidance, absent good reason for departing from it, is a breach of law and can result in a successful procurement challenge in the same way as a breach of statute.²
- the challenges of consolidating differing legislation whilst retaining differential treatment for different types of contracts could result in certain aspects of the law being less clearly spelt-out than they are now. There is a risk that any legal confusion under the new regime will be resolved by referring to the EU-based regulations under the previous regime, thus calling into question the purpose of the reform exercise.
- a separate statutory regime in at least one of the devolved administrations (see "Implementation" below)
- not all procurement obligations will be consolidated. For example, obligations in other legislation will still exist, such as the requirement for certain public bodies to have regard to economic, social and environmental well-being in connection with public services contracts as set out in the Public Sector (Social Value) Act 2012. There may even be an entirely separate regime for the procurement of healthcare services in England, which is expressly carved out of the Green Paper.

EXCLUDING BIDDERS FROM PUBLIC TENDERS

The Green Paper identified fraud, theft, corruption and collusion in bidding as a "*major risk to the effectiveness and integrity of public procurement*" and proposed changes to 'toughen' the procurement regime by expanding the grounds of mandatory and discretionary grounds of exclusion from government tenders, and introducing a central debarring list. These measures were generally supported by respondents to the consultation, although respondents stressed the need for clear guidance around the application of the exclusionary grounds and highlighted potential practical difficulties for contracting authorities assessing exclusionary grounds in specialised areas such as tax law.

A full list of the refreshed grounds for exclusion is set out in Annex A below. The key points are:

- **Mandatory grounds:** The mandatory exclusion grounds remain largely limited to conviction for criminal offences such as fraud, but now also include decisions from the CMA or other regulators relating to the most serious breaches of competition law
- **Past poor performance:** Under the existing regime, a bidder can only be excluded from participation in public tenders for poor performance if its previous performance under a public contract led to termination, damages or other

² *Good Law Project v DHSC* [2021] EWHC 346 (Admin).

comparable sanctions. Under the proposed new regime, contracting authorities will also have discretion to exclude bidders (i) where a settlement agreement has been entered into in relation to poor performance or breach under a public contract and (ii) where the supplier has failed to remedy poor performance or breach in accordance with contractual measures invoked under a public contract (e.g. rectification or improvement plans)

- **Deferred Prosecution Agreements:** The UK Government has dropped its proposal to establish participation in Deferred Prosecution Agreements (DPAs) as a ground for exclusion from procurement processes, thus avoiding a potentially significant broadening of the grounds for exclusion
- **National security:** The Response includes a new discretionary ground of exclusion where the "*the supplier poses a risk to national security*". It is not clear whether this is aimed at particular bidders or jurisdictions, but it appears likely that it could apply to both
- **Centrally managed debarment list:** The Response confirms the UK Government's intention to carry through its proposal to maintain a central debarment list of both UK and overseas suppliers that meet either a mandatory or discretionary ground for exclusion and present insufficient evidence of "self-cleaning" (e.g. changing compliance policies and removing law-breaking employees). Contracting authorities must exclude suppliers that have been listed on mandatory grounds but will retain a discretion where a discretionary ground (such as professional misconduct) applies

Despite the proposed amendments, excluding bidders is likely to remain a thorny area for contracting authorities. The onus will continue to be placed on contracting authorities to assess exclusionary criteria and also to take account of exculpatory self-cleaning measures taken by bidders (except where the bidder is listed as excluded on mandatory grounds on the new central debarment list). The paucity of case law around the application of the exclusionary criteria suggests that contracting authorities tend to avoid applying this aspect of the current regulations, preferring instead to eliminate bidders at the award stage. Whilst the proposed central debarment list should help prevent bidders falling foul of mandatory exclusion grounds from slipping through the net and participating in public tenders, it remains to be seen whether the UK Government's proposals will lead to a meaningful increase in procurement exclusions.

PROPOSAL TO CAP DAMAGES DROPPED

Among the more far-reaching proposals in the Green Paper – stemming from recent loosening of aspects of EU and UK procurement law in response to the Covid pandemic – was a plan to cap post-contractual damages as part of a wider review of the mechanism for challenging and reviewing decisions. The damages cap was intended to discourage speculative challenges "*especially from incumbent suppliers who can also secure valuable extensions to existing contracts while the challenge is being considered, often over a significant period of time*", and reduce the risk of contracting authorities becoming overly risk averse in their practices. Support for the proposal appears to have been lukewarm – the Response describes "*mixed*" views among the consultation respondents – with respondents highlighting the risk of unintended consequences and the fact that very few challenges have resulted in contracting authorities having to pay substantial damages. The UK Government has confirmed in the Response that it will no longer be introducing a damages cap.

'CRISIS' PROCUREMENT WATERED DOWN

The Green Paper included proposals to allow contracting authorities to effectively avoid the requirement to carry out competitive tendering in 'crisis' situations. Under the proposal, the Cabinet Office would be granted new powers to declare a crisis for the purposes of public procurement. The proposal did not achieve a majority of support in the consultation, and the UK Government is now instead proposing a "*limited tendering ground*" for urgent requirements, along the lines of the WTO Agreement on Government Procurement, to which the UK is a party, which permits the UK Government to take necessary steps to protect public health, among other things.

IMPLEMENTATION

The UK Government foresees that the new regime will come into force in 2023 "*at the earliest*".

The new regime will apply to public bodies in England. The Welsh Government has confirmed in a written statement that "*provision for Welsh contracting authorities*" will be made in the new legislation, whilst insisting on safeguards to ensure that it can pursue its own procurement policies.³ Discussions are ongoing with the Northern Ireland Executive about extending some parts of the new legislation to Northern Ireland. The Scottish Government, meanwhile, will continue to set its own procurement regime.

³ <https://gov.wales/written-statement-way-forward-procurement-reform-wales>.

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Annex A

Mandatory grounds for exclusion	Discretionary grounds for exclusion
Conviction of offences relating to participation in an organised crime group or involvement in serious organised crime	Regulatory enforcement for serious labour misconduct by way of a labour market enforcement order, a slavery and trafficking prevention order or slavery and trafficking risk order or evidence of modern slavery in the absence of a conviction
Conviction of offences of bribery and blackmail	Conviction of offences relating to incidents causing potential or actual environmental impact which is major or significant
Conviction of offences related to fraud and fraudulent trading	Bankruptcy, insolvency or equivalent situations
Conviction of offences related to theft, robbery, burglary and stolen goods	Professional misconduct which brings into question the supplier's professional integrity, such as dishonesty, impropriety, or serious violation of ethical standards applicable to the supplier's profession
Conviction of offences related to terrorism	Poor performance, comprising either: (i) where a previous public contract has been terminated due to breach of contract, where damages were paid for breach or where a settlement agreement has been entered into in relation to poor performance or breach; or (ii) where the supplier has failed to remedy poor performance or breach in accordance with contractual measures invoked under a previous public contract (such as rectification or improvement plans, breach notices or other mechanisms)
Conviction of offences related to money laundering	Conflict of interest which cannot be appropriately mitigated by other means, which does or could cause unfair advantage
Conviction of modern slavery offences and labour market offences (including offences relating to carrying out of an employment agency or employment business, offence of refusing or wilfully neglecting to pay the national minimum wage, offences relating to gangmasters and failure to comply with a labour market enforcement order)	Conduct which constitutes a breach of competition law, including in the absence of a regulatory decision
Conviction of the offence of corporate manslaughter/corporate homicide	Where the supplier may be at an unfair advantage due to prior involvement in preparing or planning the procurement which cannot be effectively remedied without exclusion
Conviction of offences related to tax evasion, civil penalties or HMRC decisions relating to tax evasion, fraud or avoidance	Where the supplier has made a serious misrepresentation in supplying the information required for the assessment of the exclusion grounds or the conditions for participation or has provided incomplete, inaccurate or misleading information that may have a material influence on decisions concerning the procurement
Decision by the Competition and Markets Authority or another regulator relating to the most serious breaches of competition law	Unduly influencing a contracting authority or obtaining confidential information that may affect the fairness of the procurement
Failure to provide a complete and accurate list of individuals and entities in respect of which the exclusion grounds are to be considered (where requested by an authority on a particular procurement)	Where the supplier poses a risk to national security