

UPDATE ON UK PUBLIC PROCUREMENT REFORMS (SEPTEMBER 2022)

This briefing provides an update on the Procurement Bill (the "Bill") as it continues its passage through Parliament, the support our procurement specialists are providing throughout the process and an outline of the key changes proposed by the Bill.

The Bill codifies the UK government's plans, as foreshadowed in its Green Paper on 'Transforming Public Procurement'¹.

Progress to date and next steps

While the draft legislation aims to make the UK's current EU law-based public procurement simple and streamlined, its passage through Parliament has been anything but that.

- On 11 May 2022, the UK government introduced the Bill in the House of Lords, and second reading took place later that month.
- On 27 June 2022, the UK government tabled 320 amendments².
- The House of Lords has since carried out a detailed line-by-line review of the Bill which has, thus far, gathered more than 500 amendments before adjourning for the summer recess.
- The House of Lords is expected to resume its detailed review, and undertake a third and final reading, once Parliament resumes in September, after which the Bill will pass to the House of Commons.

There is therefore still time for the public to influence the drafting of the Bill through dialogue with local Members of Parliament.

Following its passage through Parliament and entry into law, the UK government will give a minimum of six months' notice before the new regime enters into force.

How we can help

We are available to assist clients seeking to get ahead in preparing for the reforms or engaging in the parliamentary process. Please contact [Andrew Dean](#) (Director of Public Law) for further information.

On 21 September, we are hosting a panel of experts who will discuss how these reforms will ultimately affect how businesses work with the UK government. We will be joined by [Edward Green OBE](#) (Cabinet

Key takeaways:

- The Bill introduced in May 2022 has been heavily scrutinised and amended
- The still ongoing parliamentary process is likely to be the final opportunity for members of the public to influence reform proposals
- Clifford Chance's procurement specialists are available to assist clients seeking to get ahead in preparing for the reforms and seeking to engage in the parliamentary process
- The Bill's simplification and flexibilities are welcomed, but are likely to result in uncertainty and challenge risk, at least in the short to medium term

¹ 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>, and January 2022 update: <https://www.cliffordchance.com/briefings/2022/01/update-on-uk-public-procurement-reform-plans.html>.

² <https://bills.parliament.uk/publications/47059/documents/2067> and <https://bills.parliament.uk/publications/47060/documents/2066>.

Office), [Lindsay Maguire](#) (Cabinet Office), [Prof Albert Sanchez-Graells](#) (University of Bristol), [Kate Steadman](#) (Serco) and [Michael Rueter](#) (Clifford Chance), moderated by [Andrew Dean](#) (Clifford Chance). Register your interest here to join us in person in our London office or online: <http://ow.ly/V6T650KjJnw>.

Key changes under the Procurement Bill

Simplification, or uncertainty?

The key focus of the Bill is on simplification and flexibility:

- the UK's separate procurement regimes (the Public Contracts Regulations 2015, Utilities Contracts Regulations 2016, Concession Contracts Regulations 2016 and Defence and Security Public Contracts Regulations 2011) will be consolidated under a single rule book; and
- the Bill is drafted as a move towards "soft law" (i.e. being guidance-based), and away from detailed and prescriptive regulations.

It remains to be seen whether the approach will result in an improved regime. In the short to medium term, the loss of precedent and precision in the Bill may lead to uncertainty and legal challenges.

Jurisdictional coverage

The Bill generally applies to authorities in England, Wales and Northern Ireland.

Utilities and defence contracts

Existing sector-specific rules for utilities and defence contracts will be (broadly) maintained within the Bill's single rulebook.

Healthcare contracts

Certain healthcare services and goods contracts are expected to be regulated through a separate healthcare-specific regime.

Sharp focus on supplier (poor) performance

Subject to exceptions, authorities will be obliged to publish:

- details of the supplier's performance annually; and
- any breaches of contract, termination or poor performance (which has not been rectified following performance management) within 30 days.

Authorities will also enjoy broader rights to exclude bidders for previous poor performance. Under the UK's current procurement regimes, authorities can only exclude bidders when the poor performance (1) relates to a "substantive requirement" in a public contract and (2) has led to termination, damages or other comparable sanction. The Bill significantly lowers this threshold by enabling authorities to exclude a bidder when it has not performed a public contract to the "authority's satisfaction", and was given proper opportunity to improve performance, but failed to do so.

Augmented exclusion and debarment provisions

The Bill expands the grounds upon which authorities can currently exclude tenderers (including their proposed subcontractors). In addition to

broadening the exclusion rights for poor performers as mentioned above, authorities will gain the right to exclude a bid from a supplier (or a connected person) that poses a threat to the national security of the UK.

The Bill also provides the UK government with a power to establish a national "debarment list".

Procurement remedies

The Bill broadly maintains the existing procurement remedies regime.

The Bill replaces the common *American Cyanamid* law test for determining interim remedies, and the lifting of automatic suspensions. A court will now be required to consider:

- the public interest: including both the public interest in ensuring that the contract is awarded in accordance with the law and avoiding adverse consequences caused by delay in performing the contract in question (e.g. to defence or security interests); and
- the interests of suppliers: including the winning bidder and claimant and specifically require consideration of whether damages are an adequate remedy for the claimant.

The Bill also shortens the time period for 'automatic suspensions', which prevent authorities from entering into proposed new contracts or modifications following a legal challenge. Claimants must commence legal challenges before the expiry of the mandatory standstill period (10 calendar days under the current regime and 8 working days under the Bill) for automatic suspensions to take effect, even if, as is often the case, the contract or modification remains unsigned thereafter.

A number of the fundamental changes proposed in the Green Paper (e.g. capping damages to 1.5x of the claimant's bid costs and the use of tribunals for low-value disputes) have been abandoned. The UK government intends to achieve its objective of a faster remedies regime instead through a combination of court procedural reform outside the Bill and greater up-front transparency as provided for under the Bill.

Adieu to EU procurement principles?

The Bill introduces some changes to the 'foundational' procurement principles which underpin the existing regime (e.g. equal treatment, proportionality, transparency and non-discrimination):

- authorities must have regard for the National Procurement Policy³ and new procurement "Objectives" (delivering value for money; maximising public benefit; sharing information; and acting with integrity);
- equal treatment and non-discrimination principles still apply (broadly speaking); and
- no freestanding principles of transparency or competition. Specific procedural rules regarding the conduct of procurements and management of contracts as set out in the Bill are deemed sufficient.

³ <https://www.gov.uk/government/publications/procurement-policy-note-0521-national-procurement-policy-statement>

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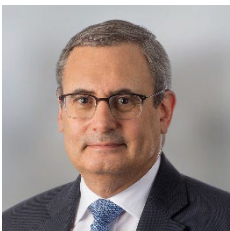
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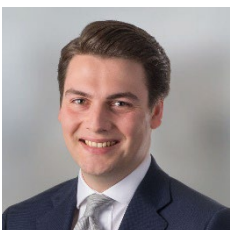
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