Client briefing

Mills & Reeve Summary:

Government's response to consultation on transforming public procurement

A major reform of the public procurement law regime in the UK is on the way.

Following publication of its Green Paper on Transforming Public Procurement in December 2020, the Government has recently published its response to that consultation. The response gives us a clear steer on the shape of the new regime and well as a rough timetable for its implementation.

This briefing note first sets out the likely timetable for change and then provides a chapter-by-chapter analysis of the response, highlighting what changes we can expect to see from the current position, and providing commentary where appropriate.

The new regime will apply in England and Wales. Subject to the outcome of current discussions, it may also be extended to cover Northern Ireland. Scotland will as currently continue to have a separate regime, but, as now, this is likely to be closely aligned to the position in England and Wales.

Next steps

Spring 2022
Earliest date Bill introduced to Parliament

Later in 2022
Royal Assent to Act of Parliament

Earlier part of 2023
Secondary legislation drafted and enacted

Six-month notice period prior to new regime coming into force

CCS to provide learning and development training programme and events - to support implementation

Later in 2023
New regime "goes live"

Analysis of proposals

	Position under current regime	Proposed changes in the new regime
Chapter 1 – Procurement that better meets the UK's needs		
Principles	EC Treaty Principles as set out in our procurement regulations: • transparency • equal treatment • non-discrimination • proportionality At present there is little guidance in the regulations as to how to apply these. Strategic procurement policy and guidance is currently communicated via ad hoc Procurement Policy Notes.	The procurement principles will be expanded: • the public good • value for money • transparency • integrity • fair treatment of suppliers • non-discrimination Interestingly, there is no reference to proportionality in the new list of principles but the Cabinet Office has stated that the obligation to act proportionately will be referenced in the appropriate places, e.g. authorities must act proportionately when setting time limits. These principles are to be embedded alongside clear objectives, so it is clear to authorities when they are to consider the principles with reference to the procurement lifecycle. The National Procurement Policy Statement (NPPS) was published in June 2021 in PPN 05/21. This is a statutory statement summarising the government's strategic procurement policy objectives (local objectives may also be considered). The NPPS will be set out separately but incorporated into the new legislation by reference. It will be interesting to see how far authorities will be required to have regard to the NPPS.
Creation of a Procurement Review Unit (PRU)	The Public Procurement Review Service (PPRS) can currently deal with informal complaints by tenderers, publish findings and issue guidance to authorities, but has no formal enforcement powers.	The new PRU will sit above the PPRS. It will focus on non-compliance and systemic and institutional challenges, building on work done by PPRS (which will continue to exist as a subset of the PRU). It will have a power to make recommendations and an authority will have a duty to implement these. The PRU will have an independent panel of procurement experts empowered to investigate potential procurement challenges and provide advice. The government will also use the PRU to monitor how the new legislation is working in practice. The PRU is likely to be helpful as a source of expertise and guidance. There will be limitations on its impact, particularly around resourcing and lack of enforcement powers – it will **not** be analogous to, say, the Employment Tribunal. While the PRU may make recommendations that an authority will have a duty to implement, it will not be able to adjudicate on the lawfulness of a particular procurement – this will require, as now, a High Court challenge.

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Chapter 2 – A simpler regulatory framework		
One set of rules	There are currently four sets of regulations covering procurement: • Public Contracts Regulations 2015 • Utilities Contracts Regulations 2016 • Concession Contracts Regulations 2016 • Defence and Security Public Contracts Regulations 2011 Plus, there are additional, related laws that impose procurement-related obligations e.g. The Public Services (Social Value) Act 2012, The Local Government Act 1988.	The new regime will consist of one set of regulations only, but with sector-specific elements. It will be interesting to see what status Procurement Policy Notes are intended have going forward - and if previously issued PPNs will be incorporated into the legislation. We also wait to see the extent to which the new draft legislation attempts to cover wider legislation that has an impact on public procurement.
Sector specific exemptions	Currently there are separate regimes for defence, concessions and utilities, as well as a "light touch regime" for health and social services.	Given the need for many sector-specific features, it remains to be seen how simple the new legislative regime will be. Utilities will be exempt from the procurement regime where they are directly exposed to competition and may be permitted to enter into framework agreements of longer duration. The current flexibility around qualifications systems will be retained. The new regulations will integrate concession-specific rules around calculation of value and duration of a concession. Following feedback in the consultation, the light touch regime will now be retained in a developed form. Those health/social services where service user choice is important (e.g., choice of care home) will be made exempt. Clinical healthcare services, such as hospital and community services, will of course be affected by the new Health and Social Care Bill due to come into force later this year. It is proposed that the Bill will remove clinical healthcare services entirely from the remit of the procurement rules.
Chapter 3 – Using the right procurement procedures		
Procedures	Currently, there are six procedures: • open • restricted • competitive with negotiation • competitive dialogue • innovation partnership • negotiated without notice	The new regime will have three procedures: • open • limited tender • competitive flexible Non-prescriptive guidance and template documents will be issued around the competitive flexible procedure which is intended to be flexible enough to cater for a wide range of requirements. This represents a significant change to current procurement procedures and will allow greater flexibility to design more bespoke procedures within a broad framework. This may lead to some uncertainty amongst authorities and suppliers - which may in turn lead to legal uncertainty – but the training and guidance promised should help deal with these concerns.

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Limited Tendering	Regulation 32 PCR 2015 sets out scenarios where a direct award without notice may be made, including where only one supplier is in fact capable of providing the requirement, and in situations of extreme urgency not attributable to the authority.	The limited tender procedure will be for use in emergency situations – and will be based on (although will expand upon) the current "urgency" ground in regulation 32(2)(c) PCR 2015. There is a proposal to allow the government to issue secondary legislation which states that the emergency ground is satisfied and permit limited tendering to take place (contrast with Regulation 32(2)(c), where the authority must make the assessment as to whether the ground is available and bear the risk of relying on the exemption). The response makes no mention of the "other" regulation 32 scenarios – e.g., the single supplier exemption. It is possible that these will be dealt with in a general list of exemptions. It will be interesting to see whether use of the limited tender process will always require a prior statutory instrument to be issued, and whether, once issued, will it cover ALL procurement or only those procurements related to the emergency.
Innovation	Regulation 14 PCR 2015 provides an exemption from the regime for R&D services where conditions are met. The Innovation Partnership procedure is a mechanism by which a competitive process may be run for both the R&D and production phase – thus introducing competition into the innovation element. The Innovation Partnership procedure has been little used. Introducing a competitive element into R&D remains challenging in practice.	The Innovation Partnership procedure will no longer exist. Innovation will be encouraged via promotion of greater use of the pre-market engagement phase and the use of the competitive flexible procedure (which could be designed to be broad enough, particularly in term of time limits, to support innovative solutions). Respondents highlighted some of the challenges in this area – in particular, how public contracts tend to be restrictive contractually, and issues around protection/share of intellectual property rights. The new regime will not legislate for this but encourage pre-market engagement as the space in which dialogue may be had around these difficulties.
Light Touch Regime	Certain health, social and other services enjoy a higher threshold under the PCR 2015 and, even where the threshold is exceeded and the rules apply, the ability to create a more flexible procurement process (the "light touch regime").	Following feedback in the consultation the "light touch regime" will now be retained, with the higher financial threshold, in a developed form. In particular, health/social services where service user choice is important (e.g., choice of care home) will be made exempt. The Cabinet Office is working with the Department of Health and Social Care to ensure a coherent procurement regime given proposed reforms through the new Health and Social Care Bill (due to come into force later this year). That Bill will remove may clinical healthcare services, such as hospital and community services, from the remit of the procurement rules.
Chapter 4 – Awarding the right contract to the right supplier		
MEAT to MAT	Currently, the contract must be awarded to the Most Economically Advantageous Tender (MEAT). The authority can apply quality/price weightings and may award on the basis of price alone, if desired/appropriate. Quality may be assessed and weighted heavily if desired. However, the overall emphasis is economic – to award the contract to the tender that represents the best value for money to the authority.	The new regime will allow contracts to be awarded to the Most Advantageous Tender, widening the possibility of award to contracts that best further general procurement policies, including social value. There will be an emphasis on proportionality in using non-commercial criteria – it will be interesting to see how the government determines which non-commercial criteria are considered acceptable and whether authorities will avail themselves of this flexibility.

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Link to subject matter of the contract	Award criteria must be "linked to the subject matter of the contract" - which limits their suitability for use to promote general procurement policy, for example.	The requirement that the award criteria be linked to the subject matter of the contract will be retained generally, although the government will have the power by statutory instrument to allow this link to be "broken" in certain key policy areas (for example, the "net zero" climate change target). Section 17 Local Government Act 1988 will be amended to ensure local government can take advantage of the derogation from the requirement for award criteria to be linked to the subject matter of the contract.
MAT from whose point of view?	At present, the evaluation is to be conducted to establish the most economically advantageous tender from the point of view of the authority.	This requirement will be removed, allowing (albeit within a clear framework) the authority to conduct the evaluation from the perspective of others e.g., service users. There are concerns about potential unintended consequences of this approach but hopefully these will be mitigated by the proposal to publish guidance around how and when the government considers it appropriate for authorities to exercise this new flexibility.
Mandatory and Discretionary Grounds	Regulation 57 sets out a list of mandatory and discretionary exclusion grounds, with a self-cleaning mechanism available. Regulation 57 does not address the scenario where a body closely connected to the supplier (rather than the supplier itself) is convicted of the offence.	The proposals here go beyond what was proposed in the Green Paper and will refresh the whole area and provide guidance. A new list of mandatory and discretion exclusion grounds will be created – similar to but building on the current list. The aim will be to exclude suppliers who pose an unacceptable risk to UK confidence in procurement, public protection/national security/ service delivery. A self-cleaning mechanism will be retained. There will be a new five-year exclusion period for both mandatory and discretionary grounds for exclusion. It will be irrelevant where the "offensive" conduct took place (whether aboard or in this jurisdiction). Suppliers may be excluded where persons other than the supplier who have close connections with it have committed the offence (including beneficial owners, directors, and so on). A separate assessment will be made in relation to sub-contractors (as now). It would be helpful for the new legislation to clarify the overriding public interest exception (i.e., which allows an authority NOT to exclude a supplier who might otherwise be excluded).
Central debarment list	At present, although central government bodies are under guidance around addressing poor past performance in references for large government contracts, there is no centrally managed debarment list with statutory force.	The government is currently undertaking a feasibility study for a central debarment list – allowing authorities to share information and leverage spending power. The response notes that this may be implemented through secondary legislation. There is a proposal that a Minister may direct a supplier be added to a debarment list where it has been excluded on a mandatory ground (where a discretionary ground applies, addition to the list will likewise be discretionary). The new Procurement Review Unit will have responsibility for considering these cases, and suppliers added to the list will have the right to appeal to court. There remain questions around how the proposal will this work in practice, particularly around which body will have ownership of the management of the list and the outcome of any appeals. It also

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		remains to be seen whether an exclusion of a supplier will trigger, for example, a mandatory referral to the PRU for consideration for debarment.
Past performance	Regulation 57(8)(g) provides a discretionary ground to exclude for serious poor performance where this has led to early termination/payment of damages or similar.	This ground will be expanded to also include a situation where a supplier has "failed to remedy" a breach following the authority having exercised a contractual right to require it to do so. There is an intention to create and publish a Contract Performance Register to make transparent supplier performance against key KPIs. This represents a widening of the ground – poor performance is rarely dealt with via termination/a court order, but rather, contractually as between the parties. These latter measures may now come within scope of this ground. The new legislation and/or guidance could usefully address the issue of how serious the conduct/breach must be to trigger the ground. Responses to the consultation noted concerns that in some cases poor performance may be due to reasons the supplier could not control, or where the supplier has taken on a particularly risky contract, for example, and that exclusion here could be unfair. There are also questions around how the Contract Performance Register will be administered and which contracts will come within its scope.
Supplier Registration System – simplified selection stage	There is no central registration system currently for the collation of data around selection criteria.	The system will be a single point, electronic data storage system, owned by the Cabinet Office. Suppliers will register on the system and be responsible for the accuracy of the data they input. When a supplier enters a competition, their self-declaration (that none of the exclusion grounds apply and that they meet the conditions for participation) will be submitted to the contracting authority via the system. There are questions around who bears the liability for the accuracy of the system and to what extent may reliance be placed on it. It will also be interesting to see whether there is any scope for the system to cover more bespoke selection information.
Chapter 5 – Using the best commercial purchasing tools		
Dynamic market	Currently, Dynamic Purchasing Systems (DPS) are suitable only for more common commodity-type contracts.	The new proposals will expand DPS into a "Dynamic Market" – sophisticated enough to able to procure more complex requirements. Suppliers who pass the selection criteria will continue to be able to join the Dynamic Market at any point, although Contract Notices will still be required for each contract procured under it. This will be a new regime, but guidance will be issued around how Dynamic Market is to work and when it may be suitable, which will assist authorities and suppliers. Utilities will welcome the decision to continue to allow utilities to make use of qualification systems.

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Open and closed frameworks	Currently, frameworks may last for a maximum of four years (unless exceptional circumstances justify a longer term). New suppliers may not join an established framework.	There will continue to be "closed" frameworks of a 4-year duration. However, the new regime introduces a new concept of an "open" framework to which new providers may be admitted after a certain period has elapsed. The idea here is reinvigorate the framework during its lifespan – i.e., to fix prices but without necessarily fixing competition. (Utilities will be able to continue to award longer term "closed" frameworks, as currently.) The new open frameworks will add welcome flexibility. They bring the potential to combine the advantages of framework agreements (fewer tenders to assess) with those of DPS (ability to contract with new suppliers and keep the framework up to date with the market in a more dynamic way).
Charges for use of frameworks/DPS	Currently, authorities may not charge suppliers who are awarded a contract under a DPS.	Charges for use of framework agreements will permitted but will need to be proportionate and funds reinvested into the public sector.
Central register of DPS/frameworks	There is no central register currently, meaning that opportunities can often be duplicated across resources.	A central register of all available DPS and framework agreements will be created, which should reduce duplication. It may usefully disclose charges imposed for use of certain frameworks, improving transparency and value for money.
Chapter 6 – Ensuring transparent and open contracting		
Embedding of transparency	Transparency is a key principle in both the PCR 2015 and in various procurement policy notes, (e.g.PPN 09/21) . There are regulatory requirements to publish various notices in Find a Tender Service and Contracts Finder, but these are more limited currently than what is being proposed .	Although considered, a decision has been made not to require authorities to publish tenders received (due to the fear that this could prejudice future competition). To address concerns about resourcing, full publication of contracts (redacted as appropriate) will be required only for contracts valued at **over £2m**, subject to review. The new regime will feature some new notices, and some current notices will be renamed. Notices required will be: **Planning and Pipeline Notice** – to contain advance information on planned procurements for contracts valued over £2 million **Pre-Market Engagement Notice –** to be used by contracting authorities if they choose to carry out pre-market engagement **Appropriate Tender Notice** – to commence a procurement **Award Notice** – to confirm the contracting authority's intention to award a contract and notify the market of the outcome of the procurement process, and to start the standstill period **Contract Detail Notice** - once a contract has been awarded, this notice provides information on the contract including details of the supplier (if the total value of the awarded contract is over £2m, a redacted version of the contract will need to be published) **Contract Implementation Notice** - this notice is for contracting authorities to update a Register of Contract Performance with the key performance indicators on contracts above a value threshold

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		Contract Change Notice - a notice to confirm any amendments to the scope or value of the contract where there is change of 10% of the value for a goods or services contract or 15% for works contracts or an increase in the duration of any contract of 10%. Additionally, this notice commences standstill where one is required or applied voluntarily (rather like a current "VEAT" notice) **Contract Termination Notice -** this notice is to confirm when a contract has ended, either through natural expiry or other means The range of notices required has been expanded requiring consideration and resourcing by authorities. Further guidance will be welcome on the content of each of the notices. Authorities will also need to ensure that their e-tendering portals are ready to effect changes to the number and format of the notices in good time.
Open Data Contracting Standard (ODCS)	The ODCS enables disclosure of data and documents at all stages of the contracting process by defining a common data model. It is not yet a regulatory requirement for authorities to adopt it.	Adoption of the ODCS will be mandatory, so that data across the public sector can be shared and analysed at contract and category level. A single digital platform for supplier registration will be adopted to ensure businesses only have to submit their data once to qualify for any public sector procurement (see above). Authorities will need to conduct due diligence to assess the interoperability impact of the move to ODCS.
Disclosure of evaluation documents	At present, there is no express requirement to share evaluation documentation with the other tenderers/the market.	A requirement will be introduced that tenderers be provided with selected evaluation documents for the winning bidder (redacted for commercial sensitivity). Also, all bidders will be provided with their own, unredacted, evaluation document(s) to enable them to compare the relative advantages of the winning bid against their own. Disclosure of evaluation documents will now be required prior to or as part of the Award Notice and standstill period. Suppliers will potentially have more material to review and more time to scrutinize the evaluation and assess the merits of any potential challenge. However, as under the current regime, suppliers will need to ensure that they act promptly should they wish to formally challenge a contract award decision. There are some obvious and foreseeable problems with the proposal - for example how the government will ensure that authorities take a similar approach when deciding what is commercially sensitive and should be redacted.
Chapter 7 – Fair and fast challenges to procurement decisions		
Review system	At present a claim must be made in the High Court, which can be burdensome for both suppliers and authorities.	The government continues to seek routes to improve and speed up the system, perhaps via amendments to the Civil Procedure Rules or the Technology and Construction Court Guidance. One proposal is to appoint a specialist procurement law judge – working alongside court reform proposals. The difficulty will continue to be the high cost of litigation and the inability to access an effective review scheme without spending substantial sums in instructing lawyers and issuing proceedings.
Automatic suspension	At present the court will apply the long-standing "American Cyanamid" test - used in all cases where injunctive relief is sought - to assess whether the	The new regulations will set out expressly a bespoke test for the lifting of automatic suspensions that is suited to the procurement law context. The details of this are still being worked out, but it is likely to be a simpler, single limb test which provides for suspensions to be lifted where there are

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	suspension should be maintained or lifted. The test is not procurement specific.	overriding consequences for the various interests concerned (including the impact on public service delivery). The reason why American Cyanamid was adopted was because it was 'ready-made' in English law. The way courts considered automatic suspension was nearly always reduced to the 'balance of convenience' which appears to be what is now being suggested as a 'single limb test'. It seems unlikely therefore that there will be much substantive change to the practice in this area. The new regime will also provide for the automatic suspension remedy to be made unavailable in cases of extreme urgency/crisis.
Debrief letters	All tenderers receive a debrief letter (formally called an Award Decision Notice), which commences the standstill period and provides information on the contract award and the relative advantages and characteristics of the winning tender.	Debrief letters will no longer be required in their current form. Authorities may choose, if appropriate/desired, to provide individual covering debrief letters to bidders (which may include feedback on improving performance), but this will not be mandated. Instead, authorities will be required to send an Award Notice, and to provide participants with certain evaluation documents for the winning bidder (redacted for commercial sensitivity). Further all bidders will be provided with their own, unredacted, evaluation document(s) to enable them to compare the relative advantages of the winning bid against their own. This change might make it harder for unsuccessful bidders to determine how they were evaluated since it might require a much more wide-ranging review of information which is often contained in a number of different spreadsheets kept in different places rather than being pulled together into the award notice as currently. Authorities will have to consider how the outputs from various electronic portals can be rendered to bidders in a readable format.
Chapter 8 – Effective contract management		
Prompt payment	Regulation 113 requires authorities to pay contractor invoices within 30 days. It also requires contractors to pay its sub-contractors within the same period. PPN 07/20 requires in-scope authorities to take account of bidders' approach to prompt payment when procuring high value contracts.	Under the new rules, suppliers will be able to approach authorities directly to escalate payment delays, provided they can show they have taken reasonable steps to obtain payment. Authorities will be empowered to look at supplier payment performance down the supply chain. There will be a unified reporting systems for both authorities and suppliers. It remains to be seen how enforcement of these rights/obligations will fit within the newly structured Procurement Review Unit/Public Procurement Review Service.
Contract modification – safe harbours	Public contracts may be modified in one of the six "safe harbour" situations set out in Regulation 72 PCR 2015.	The current safe harbours of Regulation 72 will be retained, with the definition of "substantial modification" being made clearer. A new safe harbour will be introduced permitting the amendment of complex contracts. Also, the current "extreme urgency" safe harbour will be amplified, to maximise flexibility in a crisis.
Contract Amendment Notices	Currently the PCR 2015 require publication of contract modification notices in two cases only. There is no mandated time period within which such notices must be published.	Contract Amendment Notices will be required for all contract amendments, except where the amendment does **not change the scope of the contract** and • increases or decreases the value by less than 10% (goods and services)/15%(works), or

Position under current regime	Proposed changes in the new regime
	• increases or decreases the initial contract term by less than 10% of the original contract term. The proposal implements greater transparency around contract modifications required than at present. A standstill period will be required following publication of a Contract Amendment Notice to enable greater scrutiny of proposed modifications before they are implemented, except in the case of urgency. Authorities will need to factor this period into their timescales. The standstill period will also serve to provide third parties with knowledge of the circumstances surrounding the proposed amendment, thereby potentially commencing the limitation period for any claim.

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