

## UK GOVERNMENT RELEASES PLANS TO REFORM PUBLIC PROCUREMENT LAW IN THE UK

On 15 December 2020, the UK government published its eagerly anticipated Green Paper on "Transforming Public Procurement".<sup>1</sup> The Green Paper sets out the government's plans to reform UK public procurement law, now that the UK is no longer subject to EU law.

As a Member of the EU (and for the duration of the transition period), the rules governing public procurement in the UK were largely set by the EU. The current UK government, led by Prime Minister Boris Johnson, has long made clear its dissatisfaction with the current regime and intention to use the UK's departure from the EU as an opportunity to rethink UK public procurement.<sup>2</sup> As expressed in the Green Paper, the government's view is that "[t]he current regimes for awarding public contracts are too restrictive with too much red tape for buyers and suppliers alike, which results in attention being focused on the wrong activities rather than value and transparency."

The government's proposed alternative is intended "to speed up and simplify our procurement processes, place value for money at their heart, and unleash opportunities for small businesses, charities and social enterprises to innovate in public service delivery."

Interested parties can participate in the process through the consultation, which is open until 10 March 2021.

### BACKGROUND TO THE GREEN PAPER

#### The current UK public procurement regime

As an EU Member State, the UK was required to implement, through domestic legislation, the EU procurement directives which comprise detailed procedural rules and obligations on designing and administering the public procurement process. Currently, there are four key EU procurement directives which have been implemented by the UK into

#### Key takeaway proposals from the Green Paper:

- consolidating the various sets of procurement regulations (on public contracts, utilities, concessions and defence and security public contracts), into one single set of regulations;
- requiring contracting authorities to have regard to a new National Procurement Policy Statement;
- broadening the range of instances in which past poor performance can be taken into account;
- formalising participation in Deferred Prosecution Agreements (DPAs) as a discretionary ground for exclusion from procurement processes;
- reducing the number of possible procurement procedures in favour of a new "competitive flexible" procedure which will increase the scope for bidders to negotiate with contracting authorities; and
- fundamental reforms to the procurement challenge process including caps on damages, expedited court proceedings, a tribunal system for low value claims and a new government oversight unit.

<sup>1</sup> Available online at <https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement>.

<sup>2</sup> See Clifford Chance briefing dated October 2019, "Public procurement, Brexit and Boris Johnson's 'buy British' pledge", available online at [https://www.cliffordchance.com/briefings/2019/10/public\\_procurementbrexitandborisjohnson.html](https://www.cliffordchance.com/briefings/2019/10/public_procurementbrexitandborisjohnson.html).

domestic regulations and remain on the UK statute book until the reforms come into effect.<sup>3</sup>

The UK public procurement regime also comprises additional domestic legislation that includes procurement obligations, such as the Public Services (Social Value) Act 2012, and a range of other procurement policies. The overall picture, as articulated by the Green Paper, which refers to over 350 operative regulations, is that public procurement regulation in the UK has become overly complex. It is against this backdrop that the government is proposing reforms to "*speed up and simplify*" procurement processes

#### The EU-UK trade agreement and the UK's accession to the GPA

The Green Paper was published shortly before the 24 December 2020 announcement of the terms of the EU-UK post-Brexit "Trade and Cooperation Agreement" (TCA).<sup>4</sup>

The TCA covers public procurement, both in the public procurement chapter as well as in the sub-chapter on "Subsidy control" – part of the heavily negotiated chapter on the so-called "level playing field". In effect, the TCA adopts and builds on the parties' commitments under the WTO Government Procurement Agreement (GPA). The UK acceded to the GPA in its own right on 1 January 2021, replacing its previous membership as an EU Member State.

The GPA is a lighter touch version of the EU public procurement rules. It follows the same basic framework insofar as it requires participants to open public procurements to companies from across the membership base, imposes restrictions on favouring domestic companies, and provides aggrieved bidders with remedies. However, the GPA's procedural rules are less prescriptive and its remedies are less stringent (e.g. no standstill provisions, automatic suspension, ineffectiveness/contract cancellation, and damages can be limited to bid costs only). Furthermore, the GPA does not automatically apply in full to each member. Instead, each WTO member accedes to the GPA by proposing a 'coverage offer' – which specifies the extent to which the GPA covers its domestic public procurements – for discussion and approval by other GPA members.

In addition to the procurements covered by the parties' GPA schedules, the UK and EU have also agreed to extend the scope of markets covered by procurement rules to include the gas and heat distribution sector, certain private utilities that act as a monopoly, and certain services including hospitality, telecoms, real estate and education.

## **KEY PROPOSALS IN THE GREEN PAPER?**

Although UK public procurement will, as a result of the UK's accession to the GPA, retain the core principles underlying the EU approach, the Green Paper goes to some lengths to portray its proposed reforms as a reward for the UK's decision to leave the EU. In the ministerial foreword, Lord Agnew, Minister of State of the Cabinet Office, describes the regime based on EU law as "*outdated*" and "*bogged down in bureaucratic, process-driven procedures*", and tries to emphasise as much as possible the sense of departure from the EU rules. While the political incentive to differentiate the new regime is manifest, its

<sup>3</sup> The key EU procurement directives and their corresponding UK procurement regulations are as follows: (i) Directive 2014/24: the award of contracts by public bodies, implemented in the UK through the Public Contracts Regulations 2015 (ii) Directive 2014/25: the award of contracts by certain public utilities, implemented in the UK through the Utilities Contracts Regulations 2016; (iii) Directive 2014/23: the award of concession contracts both public bodies and certain public utilities (the Concessions Directive) implemented in the UK through the Concession Contracts Regulations 2016; and (iv) Directive 2009/81: award of contracts in the fields of defence and security, implemented in the UK through the Defence and Security Public Contracts Regulations 2011.

<sup>4</sup> The full text of the TCA is available online at

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/948104/EU-UK\\_Trade\\_and\\_Cooperation\\_Agreement\\_24.12.2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948104/EU-UK_Trade_and_Cooperation_Agreement_24.12.2020.pdf). This is the draft version of the agreement dated 24 December 2020. At the time of publication, the text had not yet been fully ratified.

proposals arguably amount more to a 'toning-down' than a clean break from the EU law-based regime.

### Reforming the legal framework

The Green Paper proposes two notable reforms to the legal framework for public procurement.

First, a consolidation of the four UK procurement regulations, which are based on the EU procurement directives, into one single set of regulations in order to "*reduce complexity and give greater clarity to contracting authorities on which processes and behaviours are or are not permitted during contract awards.*"

Second, a proposal that the government legislate to require contracting authorities to have regard to a new National Procurement Policy Statement which will set out "*national priorities of strategic importance in public procurement*" to which contracting authorities should have regard when procuring goods or services. The list of priorities will include:

- "*delivering social value including economic, social and environmental outcomes;*
- "*commercial delivery including publishing pipelines of future procurement;* and
- "*commercial capability including benchmarking performance.*"

The proposal to oblige contracting authorities to deliver social value in public procurement builds on, and would give legislative footing to, current and existing UK government policy. Since the Public Services (Social Value) Act 2012, contracting authorities have been required to 'consider' how their procurement processes might secure social value. In September 2020, the UK government announced a new policy requiring that central government departments, their executive agencies and non-departmental public bodies adopt a 'social value model' in public procurement, requiring them to "*explicitly evaluate*" social value when procuring new public contracts, from 1 January 2021, and apply a minimum weight of 10% to social value in determining the total overall score of a bid when procuring contracts covered by the Public Contracts Regulations 2015.<sup>5</sup>

### Selection/exclusion

The Green Paper proposes amending the grounds for mandatory and discretionary exclusions from procurements to:

**Broaden the range of instances in which past poor performance can be taken into account.** Under the EU procurement directives, a supplier can only be excluded if their past poor performance led to termination, damages or other comparable sanctions. The Green Paper proposes that a supplier can be excluded for "*significant or persistent deficiencies*" in the performance of previous public contracts – whether or not these contracts were of a similar subject matter to the contract being considered; and

**Establish participation in Deferred Prosecution Agreements (DPAs) as a ground for exclusion from procurement processes.** DPAs are agreements to suspend prosecutions, typically by regulatory authorities for alleged offenses such as fraud, bribery and other 'economic crimes'. DPAs are not caught by any of the current procurement rules' mandatory or discretionary exclusions because the party to the DPA is not subject of a criminal conviction, although they can in theory be considered as 'grave professional

<sup>5</sup> The relevant Procurement Policy Note (PPN 06/20) is available online at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/921437/PPN-06\\_20-Taking-Account-of-Social-Value-in-the-Award-of-Central-Government-Contracts.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/921437/PPN-06_20-Taking-Account-of-Social-Value-in-the-Award-of-Central-Government-Contracts.pdf). See also Clifford Chance's briefing, "UK central government bodies required to take account of 'social value' when awarding contracts", dated 29 September 2020, available online at <https://www.cliffordchance.com/briefings/2020/09/uk-central-government-bodies-required-to-take-account-of--social.html>.

misconduct' – a discretionary ground for exclusion. The Green Paper proposes to clarify the situation regarding DPAs by introducing legislation so that "*DPAs (and their equivalents in other jurisdictions) explicitly fall within a discretionary exclusion ground*".

#### Procedure

**Reducing the number of possible procurement procedures in favour of a new 'competitive flexible' procedure.** The Green Paper proposes adopting a new 'competitive flexible' procedure, based on current "light touch" procedural rules, in order to give buyers "*maximum flexibility to design a procurement process that meets their needs and the needs of the market*". Under the current regime "light touch" procedural rules, which are more principles-based than the standard prescriptive rules, apply in only a limited set of circumstances. The UK government envisages that the competitive, flexible approach would replace five of the existing procedures: restricted, competitive dialogue, competitive procedure with negotiation, innovation partnerships and design contests. It would also be used for the award of all concession contracts.

Importantly, the proposed procedure will allow contracting authorities to negotiate with bidders at various stages throughout the tendering process. Negotiation is currently strictly limited under most standard procurement procedures due to concerns that it makes the process less objective, but arguably can help both contracting authorities and bidders better understand contract requirements and result in better value for money. Allowing for more negotiation in procurements, along with other Green Paper proposals such as the "DPS+", updating and expanding of the scope of Dynamic Purchasing Systems, is in line with proposals that have been championed for some time by the private sector and academic community, and forms part of a broader drive running through the Green Paper to bring public procurement law and practice more in line with commercial procurement practice.

#### Challenging and reviewing decisions

The Green Paper contains wide-ranging proposals to reform the process by which procurement challenges are heard and managed, the overall objective being to "*develop a new remedies system that can make faster decisions on procurement challenges on all types of procurements, relying more on pre-contractual measures, so that fewer challenges proceed to court for post-contractual remedies.*"

The proposed reforms include:

- Removing the requirement to provide losing bidders with a debrief letter explaining why they lost the bid and the relative strengths of other bidders, on the basis that bidders will be able to access the information on the evaluation of each bid pursuant to new transparency provisions that will be introduced;
- Capping the post-contractual damages that can be awarded for breaches of procurement rules to legal fees and 1.5x bid costs in most cases, to discourage speculative challenge;
- Reform of the existing procedures to hear procurement challenges, most of which are heard within the Technology and Construction Court (TCC), including the introduction of a tailored fast track-system, a presumption that certain types of claims could be reviewed on the basis of written proceedings, improved transparency to save time and cost on disclosure and cutting the procedural timetable for proceedings; and
- In the alternative, hearing procurement challenges through a tribunal system, rather than through the courts. The Green Paper does not recommend this outright, but rather proposes the potential transfer of "*a subset of procurement*

*challenges to a tribunal-based system – while retaining the flexibility to hear more cases in this way in the future should the anticipated benefits of Court reform not be realised".*

The Green Paper also proposes the introduction of a new oversight body focused specifically on "*improving the commercial capability of contracting authorities*". The body would have powers to review and, if necessary, to intervene – by issuing improvement notices with recommendations to individual contracting authorities. The new body would be situated within the Cabinet Office and would be supplementary and separate to the Public Procurement Review Service (PPRS), which provides more general oversight of contracting authorities by allowing suppliers or potential suppliers to anonymously raise concerns about poor public procurement practice.

Unlike procurement challenges, which arise when bidders suffer economic harm, these 'ex officio' reviews may result in action being taken over breaches that the private sector wouldn't usually litigate.

#### Changes to existing contracts

In an attempt to lessen legal uncertainty regarding whether amendments to existing public contracts will require a new procurement process, the Green Paper proposes broadening the scope of mandatory contract amendment notices. The proposals would require publishing of contract amendment notices for:

- all amendments to the scope of a contract;
- amendments that increase or decrease the initial contract value by 10% or more for goods or services, or by 15% or more for works; and
- amendments that increase or decrease the contract term by 10% or more.

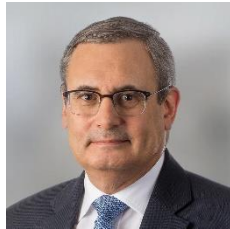
With the exception of amendments where there is a crisis or extreme urgency, a standstill period of ten days would apply to all contract amendments which require the publication of a contract amendment notice to allow for challenges to the amendment to be brought. This essentially amounts to a formalisation of the current process of issuing voluntary ex-ante transparency notices (VEAT), and it is not certain whether it will indeed decrease legal uncertainty regarding contract amendments.

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