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**UK PROCUREMENT BILL PANEL  
DISCUSSION (21 SEPTEMBER 2022)**

WRAP UP

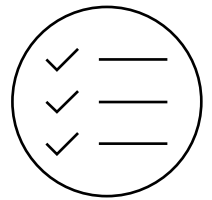


## A Panel Discussion

On Wednesday 21 September 2022 we were joined by Ed Green OBE (Cabinet Office), Lindsay Maguire (Cabinet Office), Prof. Albert Sanchez-Graells (University of Bristol), Kate Steadman (Serco) and Michael Rueter (Clifford Chance) to discuss the UK Procurement Bill. The session was moderated by Andrew Dean (Clifford Chance).

The conference is available to [watch](#) on-demand.

## BACKGROUND & OBJECTIVES

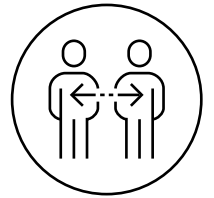


*Ed Green OBE (Deputy Director, Commercial Policy at the Cabinet Office) and Lindsay Maguire (Head of Engagement for Procurement Reform at the Cabinet Office)*

- The UK's withdrawal from the European Union has presented the opportunity to reform the UK public procurement rules. In 2019 a transformation advisory panel was established to consider reforms, supplemented by 350 workshops with stakeholders, and in 2020 a Green Paper was produced and a consultation launched, and in May 2022 a bill to reform the UK public procurement regime was introduced to the House of Lords. The bill will affect Wales and Northern Ireland (subject to certain derogations), while Scotland has opted to maintain its own legislation under the present devolution settlement.
- The Government wants the bill to be much simpler for suppliers and buyers. Some of the key objectives of these reforms are to increase transparency, improve and speed up performance, as well as conferring greater freedom on contracting authorities. The bill also aims to increase transparency in the procurement lifecycle, so that suppliers will know how to respond to demand from authorities ahead of time. Suppliers will also only have to register once, which will simplify and speed up procurement processes. The bill also makes changes to how procurement challenges will work, by speeding up and improving court processes and automatic suspensions.
- The bill is highly technical: it aims to regulate a complex area of law. However, the bill does not intend to alter the scope of a regulated procurement; this remains the same the old regime, and the parameters of the bill should match the expectations of contracting authorities accordingly. Conversations are ongoing to ensure the Government is reflecting what it wants to do in the bill, and account for all possible structures. Key changes include (broadly) moving away from EU terminology, and combining the various different regulations (utilities, defence, concession, and main procurement regulations) whilst ensuring appropriate exemptions. Considerable work has been done with defence suppliers, the Ministry of Defence, the utilities sector and others to ensure that the different sectors' needs are catered for.
- During the House of Lords reading of the bill, 37 individual amendments relating to different policy areas were tabled, and the bill continues to be a moving draft. These included incorporating certain labour standards, ensuring net zero commitments, and other issues touching broader public policy. The Government has been clear that primary legislation should not be the place for these standards. After Royal Assent, the second secondary legislation will follow and the government will also publish a national procurement policy statement; these will set the Government's strategic procurement priorities which can be used in the course of individual procurements. The bill will shortly proceed to the House of Commons for further scrutiny, with the goal of achieving Royal Assent over the coming months. Thereafter, secondary legislation will follow. These regulations will include detailed e.g. transparency notice provisions etc. This means that the period to implementation will be a long one, and the Government has committed to a sensible pace of implementation.
- There will be careful attention to the implementation process. The Cabinet Office will give suppliers and contracting authorities the time necessary to implement the new law. E-learning programmes and workshops will also take place to help them understand and implement the new bill. Supply chain integrity and compliance will be the primary new obligations of suppliers. Timeline and access to such resources will be communicated clearly in due course – the 'go live' date is expected in late 2023 (at the earliest), when the operative provisions of the new Act will be commenced.

## WHAT ARE THE HOUSE OF LORDS (NOT) TALKING ABOUT?

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*Prof. Albert Sanchez-Graells (Professor of Economic Law and Co-Director of the Centre for Global Law and Innovation at the University of Bristol Law School)*

- The politics of procurement are being rethought: procurement is now subject to critique on the basis of social and environmental standards, and open data and transparency groups are increasingly active and interested in anti-corruption in the context of procurement decisions. These groups are influencing many amendments to the bill. This means that supply chain integrity and compliance will now be the key new obligations of suppliers. Compliance costs for the private sector become expensive as procurement teams will have to start doing things they were not used to, including for example in relation to supply chain integrity.
- In the House of Lords scrutiny of the draft bill, there has been little interest in the technical side of procurement. For instance, the meaning of procurement itself has changed and has been amended many times over the course of the bill's progress in the House of Lords. Many EU law concepts, which were familiar, have now been removed. For example, the concept of proportionality has been substituted with public law concepts of reasonableness and rationality. Procurement lawyers now need to understand a new set of ideas, and every time a new concept is introduced, that raises the costs of compliance for the private sector.

## A SUPPLIER'S PERSPECTIVE

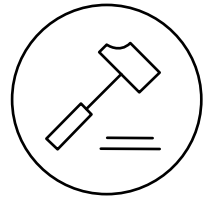


*Kate Steadman (Group Strategy and Communications Director for Serco Group plc)*

- Serco welcomes the intent and largely the content of the bill, which is considered both an evolution in part, and a revolution in part. It is a good thing that we are debating in detail how this volume of taxpayer's money is spent. Congratulations to the Cabinet Office – it is a considerable body of work. The aims of simplifying procurement and planting value for money and social value at its heart are to be applauded. This is a logical next step of years of work most recently featuring the outsourcing and sourcing playbooks. Kate set out 9 points:
  - On the specifics, in 2018 Serco published four principles for reforming public procurement. Transparency, orderly exit, the living will principle, and the fairness principle. Much of this is echoed in the bill.
  - Permitting contracting authorities to move away from the most economically advantageous tenderer to just the most advantageous tender is a good thing. It provides greater flexibility and supports accountability. This helps avoid a race to the bottom, and medium term value for money is prioritised.
  - In terms of regulation 15, which provides scope for more preliminary market engagement, this is a good thing: the earlier and the more regularly suppliers are engaged in a procurement, the better designed the procurement will be and suppliers will be able to respond to it. It does supply the suppliers will have to be excluded if they get unfair advantage from this engagement. Serco hopes that there will be a way of fairly navigating this for companies with something to offer.
  - On the debarment register, Serco is supportive of accountability. Suppliers must deliver and be held to account. However, where suppliers have been through a corporate renewal process, Serco wants to see the detail of that so that suppliers are not excluded on an unfair basis and the baby is not thrown out with the bathwater.
- KPIs – there are KPIs inherent in contracts, and they are rightly there. Serco has long published a transparency principle, but both the public and private sectors who provide services must adhere to the same principles and in house services should publish their KPIs as the private sector has to.
- On scope, Serco was pleased to see that the scope in the bill is clear.
- The obligation to publish pipelines for contracts is welcome; this assists companies with helping the government in the most effective way.
- If you look back at the playbooks from previous years, the make vs buy assessment has been recommended but not mandated. There are many services both outsourced or state delivered merely because they have always been. However, these assumptions should be questioned. Often, outsourcing services properly competed (outsourced or not) save the taxpayer average 5-15%, while increasing the quality of the services offered. Serco's independent polls show that 77% of the UK population wants the private sector to work more closely with the government if that leads to an improvement in efficiency.
- Social value is also largely missing from the bill. Serco think that social value is incredibly important, as is how this is enforced and applied. This element is crucial; however, it is necessary to pay attention to its enforcement, or small and medium-sized enterprises may struggle in delivery. It should also not detract from the core aims of the contract.

## A LAWYER'S PERSPECTIVE

*Michael Rueter (Counsel, Clifford Chance)*



- The bill is an exercise of simplification, and as a result we are all going to have to wait for the national procurement policy statement, and secondary legislation, to understand the full implications of the reforms.
- “CPOOPs” (competitive procedures other than ordinary procedures) contained in Clause 19 of the bill are not clearly explained. We will be reliant on secondary legislation on how CPOOPs will be employed, if we are to minimise the risk of challenges (or else the rules will develop incrementally through case law).
- It is still unclear how exactly the utilities and defence procurement will be structured in the future. The bill, at the moment, proposes single amendments and it is well-structured. However, unclear whether more details will given in this regard. More guidance is needed.
- It is also unclear how contract modifications will take place – the established criteria that allowed a client to change a contract with the government, although not entirely objective and often complained about by suppliers, were well understood. Now, there is room for subjectivity and legal uncertainty. Likewise, a lot of attention has been paid to exclusion and debarment, and the bill has a lot of language on the subject. However, what is less clear is the extent of the discretion granted to contracting authorities to allow for exclusion. The list of exclusions is lengthy but introduces new elements of subjectivity including for example where a supplier has in the opinion of an authority – but not on the terms of a regulatory decision – infringed competition law.



- **Q: Social Value and ESG – How will reforms change this important area of policy?**

*Ed Green:* Value for money is at the heart of the bill and is the objective listed first. This does not mean lowest price. Value for money is no longer to be considered solely from the contracting authority at award stage. The National Procurement Policy Statement will interact with the bill's provisions by signalling the types of outcomes that local authorities can hold to in their procurement exercises.

- **Q: How can government properly interrogate between price, cost and value?**

*Ed Green:* This is one of the key issues that the playbooks sought to address, after the Carillion collapse. There was a race to the bottom which impacted service deliverability. There is a legal framework, and things that overlaid that setting up the cultural change required. The legal regime and the activity carried out by the procurement function assisted by guidance will allow contracting authorities to distinguish between cost and value.

*Lindsay Maguire:* this is an opportunity to have these conversations on a wider scale. If we are legislating to say that all local authorities have to consider value on a wider scale, we will now have the opportunity to consider this.

*Prof Graells:* The difficulty we have is that procurement is diverse, and there is a capability issue. The idea of training thousands of civil servants in how to navigate new value for money provisions in a short period of time is doubtful. There may be more flexibility, but these civil servants do not take advantage of the existing flexibility so there is some scepticism about how they will go about maximising flexibility under the new rules given their capacity to do so now. People will go to what they know to be challenge free.

*Andrew Dean:* It is not necessarily the rules which hold back the proper interrogation of a bid, but cultures and nervousness around embracing innovation. This comes back to training and fostering a culture which questions.

- **Q: Certainty and good process articulated from the outset is good for the market, in particularly where there is no base of market participants. How do you ensure that the same expertise to manage processes is there across different markets?**

*Lindsay Maguire:* We want to create a community of best practice. Government is good at talking to each other, but we want to create a community of best practice so that local authorities, universities, the NHS, central government etc are all talking to each other so there is standardisation within flexibility.

- **Q: How can we protect the SME community?**

*Lindsay Maguire:* We want to create a single portal so that SMEs don't have to put their details and bid information into lots of RFPs repeatedly, Government wants to lessen the load. That is supplemented by market engagement and pipeline obligations which will help overall. A key part of this is that a lot of barriers to SMEs are not legislative, but come from the way policies are implemented, which is why the post-legislative implementation is so important.

- **Q: Do you think that the definition of a contracting authority should be extended to WTO states or sovereigns in relation to joint procurements?**

*Ed Green:* international procurement is covered separately – we should not alter the definition of a contracting authority as we would risk extraterritoriality. As is intra-UK procurement e.g. with a Scottish contracting authority, where the rules might differ.

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