



# Reforming Public Procurement in the UK - Latest Update

Professor Sue Arrowsmith QC (hon), Professor Emerita at the University of Nottingham

Katie Ferrier, Senior Vice President Customer Engagement & Quality Assurance at Achilles



# Background: timetable





# Background

- Green Paper is from the Westminster jurisdiction
- Wales: will be covered in the new Bill
  - With supplementary rules
- Northern Ireland – discussions ongoing
- Scotland?
- Particular problems for utilities?

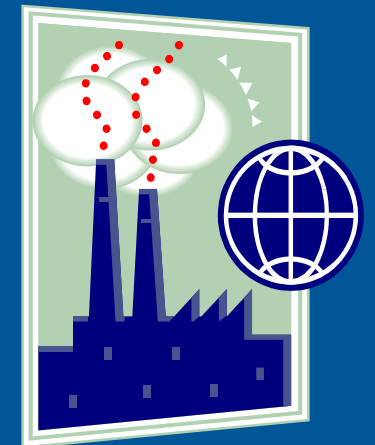




# Objectives of the new procurement legislation

## Objectives

- Not *just* to open markets but e.g. value for money, “the public good”, integrity





# (Objectives and) principles

“STATUTORY OBJECTIVES” - Interpretation and/or obligation?	PRINCIPLES (RULES CREATING SPECIFIC OBLIGATIONS)
Value for money	Non-discrimination
Public good	Fair treatment of suppliers – equal treatment and fair procedure
Integrity	
Competition [a means to achieve objectives, rather than an objective]	
[Should also include: - efficiency of the procedure; compliance with international obligations]	[No reference to a <i>general</i> principle of transparency or proportionality]



# Simplification

## Current regime

Public Contracts  
Regulations 2015

Defence and Security  
Public Contracts  
Regulations 2011

Utilities Contracts  
Regulations 2016

Concessions  
Contracts Regulations  
2016

Light regime

Other rules e.g. Local  
Government Act 1988;  
Public Services  
(Social Value) Act  
2012

## Green Paper proposal

*Single instrument*  
*Largely uniform*  
set of rules

Not to apply to  
“other rules”



# Simplification

**Response: will implement this reform (single instrument and uniform rules)  
- *but* significant qualifications to the uniform rules principles**

Light regime: will be retained  
higher thresholds and more  
flexible procedure

Concessions: higher  
threshold ; specific rules on  
valuation and duration;  
others e.g. no frameworks  
etc?

Utilities: different thresholds;  
more exemptions (e.g.  
affiliated undertakings);  
some more flexible rules  
(e.g. qualification systems;  
modifications; length of  
frameworks)

Defence: thresholds?  
special exemptions; lots of  
special rules e.g. urgent  
procurement, very flexible  
modifications

“Other rules”



## Critique

- Some differences are justified, including because of GPA constraints
  - Qualification systems for utilities (and defence?)
- Most differences not justified
  - Often general rules e.g. on modifications, can be extended to the general public sector
- No differences are justified for concessions
  - No definition needed of concessions
- Need to avoid current complex definition of defence and security contracts





# Terminology

Most  
Advantageous  
Tender

Fair Treatment

Limited  
Tendering

Dynamic  
Markets



# Terminology

- Sometimes no change of meaning intended
- But will changes in terminology produce *unnecessary* uncertainty?

Example:  
correction of  
errors in  
tenders



# Available award procedures

Procedures with a public solicitation – Green Paper	Procedures with a public solicitation – current
Open procedure	Open procedure
Competitive flexible procedure (available without limitation)	Restricted procedure
	Competitive procedure w. negotiation
	Competitive dialogue
	Negotiated procedure w. call for comp
	Innovation partnership
	Light regime procedure
	Concessions procedure
Procedure without public solicitation - Green Paper	Procedure without public solicitation - current
Limited tendering	Negotiated procedure without prior publication/call for competition



# Available award procedures

## Response

- Government will implement this proposal
  - Except that will keep separate light regime procedure
- No “restricted procedure” – despite concerns over:
  - Effort needed to design procedures each time
  - Variation creating uncertainty for suppliers
  - Legal uncertainty



# Available award procedures

- To be addressed by guidance, including template options and case studies
- Will this be sufficient to deal with concerns?





# Conduct of award procedures

## Award criteria – to be implemented

- Change in *language only*:
  - From MEAT to MAT – to clarify that non-economic factors relating to the subject matter can be considered
  - To remove reference to “from the point of view of the contracting authority” – (where otherwise within the authority’s legal powers)
  - Guidance; emphasis on proportionality in using non-commercial criteria
- Still must be linked to the subject matter of the contract
  - But limited exceptions will be allowed *when centrally authorised*
  - Emphasises exceptions will be limited
  - Local Government Act 1988 s.17 to be amended to ensure local government can use



# Exclusions

- Response addresses in detail
  - Goes beyond Green Paper
- Will “refresh” whole area and provide guidance





# Exclusions

## Mandatory exclusion grounds

- Proposals in Response include:
  - Bribery, blackmail and fraud
  - Modern slavery and certain other labour market offences
  - Corporate manslaughter
  - Tax offences or adverse HMRC decisions
  - Serious breaches of competition law
  - Failure to provide complete and accurate list of associated individuals
- Convictions or formal decisions (e.g. of HMRC) will be required for all mandatory exclusions





# Exclusions

## Discretionary exclusion grounds

- Key changes to current law proposed in Response:
  - Additional ground: risk to national security
    - Why not mandatory?
  - Exclusion easier for poor past performance (see later slide)
- Key changes to current law proposed in Response:
  - Rationalisation of exclusions for supplying incorrect information
    - Is this an exclusion just from the immediate procurement? (Exclusion list should clearly separate the two types)



# Exclusions

## Discretionary exclusion grounds

- Inconsistency over whether regulatory decision e.g. conviction, is required
  - Not where breach of competition law
  - But is required for environmental offences
- Does there even need to be violation of some external standard?
  - Misconduct bringing professional integrity into question



# Exclusions

## Discretionary exclusion grounds

- Inconsistency/lack of clarity over whether conduct needs to be serious
  - Not mentioned with breaches of competition law or poor performance, but mentioned with professional integrity and environmental offences
  - Care needed in drafting domestic legislation





# Exclusions

## General proposals in Response

- 5 year time limit for all exclusions, running from:
  - For mandatory exclusions: time of conviction/decision
  - For discretionary exclusions: time authority knew/should have known of conduct or, if later, time of conviction/decision
- Clarification that it is irrelevant where the conduct took place
- Clarification of the “overriding public interest” exception (mandatory exclusions)



# Exclusions

## General proposals in Response

- Precise definition of associated persons, applicable to all exclusions
  - By reference to Companies Act 2006, where definitions exist
- Power for Minister to add new exclusion grounds



# Exclusions

## General proposals in Response

- Deferred Prosecution Agreements (DPAs) NOT to be separate ground for exclusion but evidence of whether discretionary exclusion grounds met (and whether self-cleaning exists)
- DPAs not relevant for mandatory exclusions as conviction required
  - Exclusions can discourage convictions - an example of regulatory backfiring.....

# Exclusions



## **Problems for procuring entities with exclusions operated solely by contracting authorities**

- Finding out about convictions, especially of directors
- Applying self-cleaning defence etc
- Risk of challenge from excluded party or competitors
- Duplication of work and inconsistency with entity-based approach
- Ineffective as deterrent



## **Also issues of procedural protection for suppliers**



# Exclusions

## General proposals in Response

- New legislation will include provision for list of excluded suppliers (debarment list) for all exclusions
  - Will study international best practice
- To be managed by new Procurement Review Unit in Cabinet Office
- Will list excluded suppliers, and deal with self-cleaning of listed suppliers
- Will consider exclusion when:
  - A contracting authority has excluded
  - A supplier is referred (probably by central authorities only)





# Poor past performance

## Discretionary exclusion

- Response proposes to allow where, in relation to previous public contract:
  - Damages or termination for breach or settlement for breach/poor performance OR
  - Supplier has failed to remedy a breach or poor performance under contractual measures (such as improvement plans)





# Poor past performance

## Discretionary exclusion

- Will be Central Performance Register, recording performance against KPIs
  - Separate from the central debarment list
- Is rejection still possible if exclusion test is not met, on grounds of absence of technical capability?
  - Needs clarifying



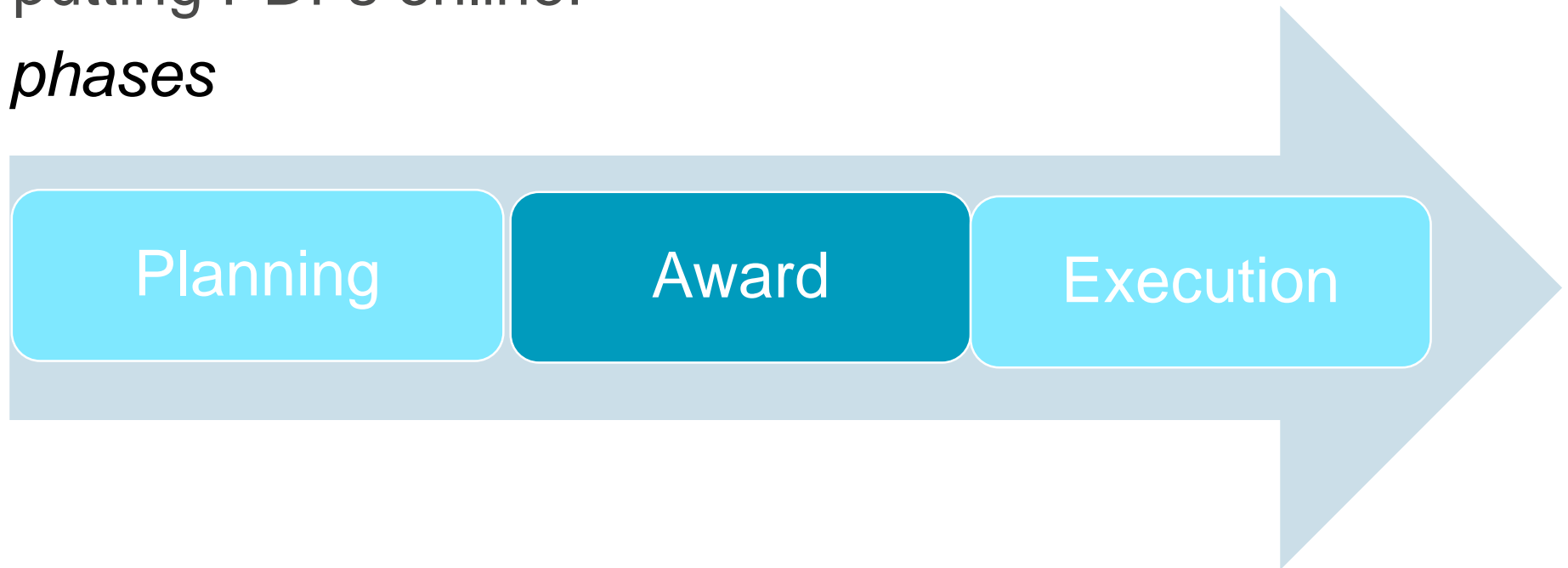
# Selection: centralised supplier information system

- Response: Government will introduce this system proposed in the Green Paper
  - One place for suppliers to submit information for all contracting authorities
  - Owned by the Cabinet office
- Crucial clarification: procuring entities may request *more* information if required
  - Any information for exclusions
  - Information that is proportionate to the contract for selection
- Suppliers' *rights* to provide alternative information unclear



## Open contracting approach

- *Systematic gathering* and publication of all information/documents in *usable* form
  - not just putting PDFs online!
- Covers *all phases*





## An open contracting approach

Allows analysis and monitoring by Government *and* other stakeholders e.g.

- Indicators of collusion
- Assess value through price data
- Know and manage contractors
- SME access
- Better planning and drafting
- Relating planning to performance
- Market can develop tools to improve procurement



# Transparency

## An open contracting approach

- For more information see:

<https://www.open-contracting.org/>





## An open contracting approach

- Green Paper Chapter 6
- Commitment to “transparency by default”  
= pro-active publication of contract information *through whole cycle*
  - E.g. Includes information on amendments and performance
  - Exceptions e.g. commercially confidential information to be determined by Freedom of Information Act exemptions; guidance to be issued
- Data to be published using Open Contracting Data Standard
  - Ensures is accessible and usable



# Transparency

- Response proposes to implement this
- But some qualifications since Green Paper
  - Some key documents require publication only for contracts of £2 million plus
    - Planning documents (where total contracts £100 million plus pa) and redacted contracts
  - Evaluations will not be made public, to avoid prejudice to competition (e.g. if rerun); bidders will receive their own evaluation and a redacted version of winner's evaluation
    - Logic?





# Transparency

- Response sets out full list of publication requirements
- Is not really transparency by default – but an excellent (and realistic) start



## Response also indicates Government will implement:

- Proposal for *mandatory* public notice when intend to use limited tendering (MEAT rather than VEAT?!), giving justification
- A 10-day standstill requirement will apply
  - *except* in cases of urgency
- Will facilitate challenge to unjustified use
  - e.g. where claim only possible supplier for technical reasons



# Modifications to concluded contracts

- Green Paper
  - Current rules to be retained largely as now
    - Based on Public Contracts Regulations 2015
    - Slight reordering to make easier to understand
  - Plus new ground for modification in case of crisis or extreme urgency
    - To parallel the rules on limited tendering





# Modifications to concluded contracts

- Response proposes to implement this BUT
  - With “as much freedom as possible” to amend defence and security contracts
  - Possibly with more flexibility to utilities
    - No 50% cap?
    - 50% cap currently applies under public sector rules for additional purchases for reasons of interchangeability etc; and where necessary because of unforeseeable events



# Modifications to concluded contracts

- Is even more flexibility needed?
- My response to the Green Paper proposed:
  - A specific provision on adjusting long-term complex contracts, possibly with an approval process
- Government Response states that is “considering” including a “safe harbour” provision to assist in transparent and effective amendment of complex contracts, including where needed to ensure delivery



# Modifications to concluded contracts

- Response will also take forward new requirement to publish a notice of contract amendments, plus standstill period
- Plus publication of amendment itself generally required under the transparency reforms



# “Commercial Tools”



DYNAMIC PURCHASING  
SYSTEMS (DPS)



FRAMEWORK  
AGREEMENTS



QUALIFICATION  
SYSTEMS



# “Commercial tools”

## Green Paper

- Not an adequate basis for consultation as many aspects of proposals on all three were insufficiently clear







# Dynamic Purchasing Systems

## Green Paper

- To be called “DPS-plus”
- Proposal to extend to *all* type of purchases (not just standard purchases)
- Call offs will be by competitive flexible procedure
  - But need to invite all suppliers, as now?

## Government Response

- To be called Dynamic Markets
- Government proposes to implement this



# Qualification systems

## Qualification systems

- Are lists of interested (or qualified) suppliers
- Utilities (but not general public sector) can use the lists to:
  - Make a call for competition (no further call needed)
  - Identify and choose which suppliers to invite
    - In fact currently *must* limit to those on the list



# Qualification systems

## Green Paper

- Was unclear on whether utilities could continue to use qualification systems in this way

## Response

- Proposes that this *will* be possible for utilities
- No apparent intention to extend to public sector generally
  - GPA would require modifications
  - But will this be extended to defence and security contracts not covered by the GPA?



# Qualification systems

## Questions and issues

Will utilities also be allowed to invite entities from outside the qualification system?

Cabinet Office needs to make sure legislation is carefully adapted to these systems (current Directives and Green Paper Response do not do that)

Utilities (including private utilities?) will need to obtain basic information from the Cabinet Office central supplier registration system – but qualification systems can include supplementary information for specific categories of contracts?



# Framework agreements

## Green Paper

- “Closed framework agreement” – up to 3/4 years *only*
- “Open framework agreement” – up to 8 years
  - Open to new suppliers at various points
  - *But existing suppliers must recompete* (with old or new tenders) on frameworks where supplier numbers are limited – so is just a series of short framework agreements, *which is already possible*



# Framework agreements

## Response

- Proposes to implement this approach

BUT

To allow closed frameworks longer than the usual minimum for public sector, if justification given

To give even more flexibility on length to utilities



# Framework agreements

## Green Paper

- Was there also an intention to allow framework agreements with unlimited numbers of suppliers (where all qualified suppliers are admitted)? And to allow them to retender prices in mini-competition?
  - Not the intention of the current rules, although this is often how they are operated
- Response does not answer that question
  - If yes to both, then framework agreements should be open continuously



## Supplier remedies

- Green Paper acknowledges problems, including time and cost
- Seeks “fundamental change”
- But proposes to do this *mainly by improving the court process*
- However Green Paper says:
  - Will “continue to investigate” different system for certain claims
    - e.g. low value or challenges to ongoing procurements
  - May look at more widely if court reforms do not produce results
- Response maintains this approach





# Enforcement

## Supplier remedies

- Reforms to court process mooted in Green Paper:
  - New court rules on procedure
  - “Fast-track” system (tailored to urgency of the procurement)
  - Written pleadings in certain cases
  - More cost-effective approach to disclosure
  - More use of courts outside London





## Supplier remedies

- Reforms to remedies
  - Statement of explicit preference for pre-contractual remedy
    - Rejected in Response
  - New procurement-specific legal test for suspension
    - Accepted in Response

To promote greater use of suspension







# Enforcement

## Supplier remedies

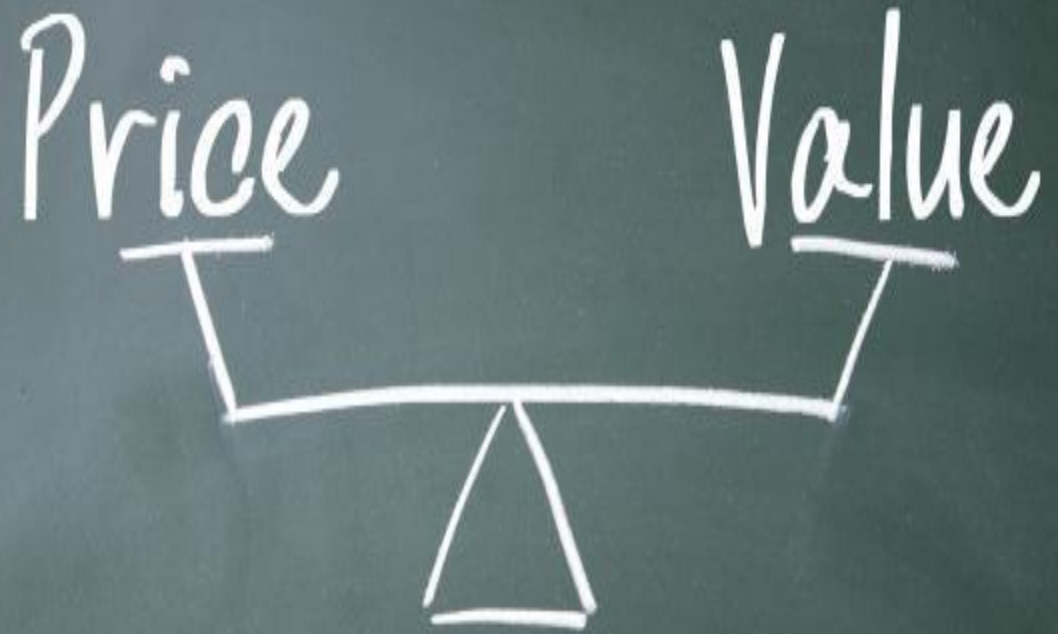
- Green Paper
  - Damages generally to be limited to legal costs plus 1½ times bid costs (no lost profits)
  - More acceptable with better pre-contract remedies
- Response
  - Rejects this proposal





## Supplier remedies

- Green Paper:
  - Prices paid under contract extension during challenge to be capped
    - To deter unfounded challenges by incumbent suppliers
- Response
  - Rejects as disproportionate





## Supplier remedies

- Green Paper: proposal to remove pre-standstill notification letter
  - Not needed as access to more information
  - Guidance to *encourage* debrief letter focused on tenderer's own tender





## Supplier remedies

- Response: will implement this (even though not generally supported)
  - Call-offs from frameworks and dynamic markets still under consideration
- Recall that bidders will receive their own evaluation and a redacted version of the winner's evaluation





## Supplier remedies

- Review within the procuring entity
  - Some countries have a formal internal process with time limits etc
  - Green Paper mooted looking at this
- Response to Green Paper indicates this will not now be taken forward
  - Procuring entities will be encouraged to review complaints internally



# Enforcement

- Green Paper: proposal for new “unit” within the Cabinet Office to “improve commercial capability”
  - To go beyond legal compliance?
- Composed of civil servants supported by expert panellists
  - From suppliers, government, legal profession etc
- To monitor to address gaps in capability and understanding with new rules
  - Based on general information and supplier complaints
- Then report based on the monitoring, to be submitted to the panels for recommendations to Minister
  - Possible action e.g. spending controls





# Enforcement



- Response takes this forward with more detail and a slightly different focus



# Enforcement

- To be called the Procurement Review Unit
- To encompass current Public Procurement Review Service, looking at policy and practice, including live procurements, based on complaints, and making recommendations
- *Main* focus will be systematic *legal* violations
- Information will come from referrals from Departments, and data from the new systems
- Will not apply to private utilities
- Defence?



## Further reading/information

Sue Arrowsmith, *Transforming public procurement law after Brexit: early reflections on the Government's Green Paper*, Working Paper, SSRN:

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3749359](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3749359)

Sue Arrowsmith, *Constructing rules on exclusions (debarment) under a post-Brexit regime on public procurement: a preliminary analysis*, Working Paper, SSRN:

<http://ssrn.com/abstract=3659909>

Sue Arrowsmith, *Reimagining public procurement law after Brexit: seven core principles for reform and their practical implementation*, Working Paper, SSRN:

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3523172](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3523172) (Part 1) and  
<http://ssrn.com/abstract=3672421> (Part 2)



# Executive postgraduate programme in public procurement law (LLM/Diploma/Cert), University of Nottingham

- Designed for those with and without a legal background
- Part time
  - Fits with professional commitments
- Distance learning (with optional intensive teaching days)

Email:

[law.execcpp@nottingham.ac.uk](mailto:law.execcpp@nottingham.ac.uk)



“Register your interest to learn  
more about the Reform of Public  
Procurement Law training course”



# THANK YOU

BECAUSE INSIGHT BEATS HINDSIGHT  
[www.achilles.com](http://www.achilles.com)