

Green Paper

Transforming Public Procurement:
Government Response to Consultation.
CPL Group Guidance for Members and Clients



**Our mission is to provide
outstanding procurement services
to members and clients**

CPL GROUP

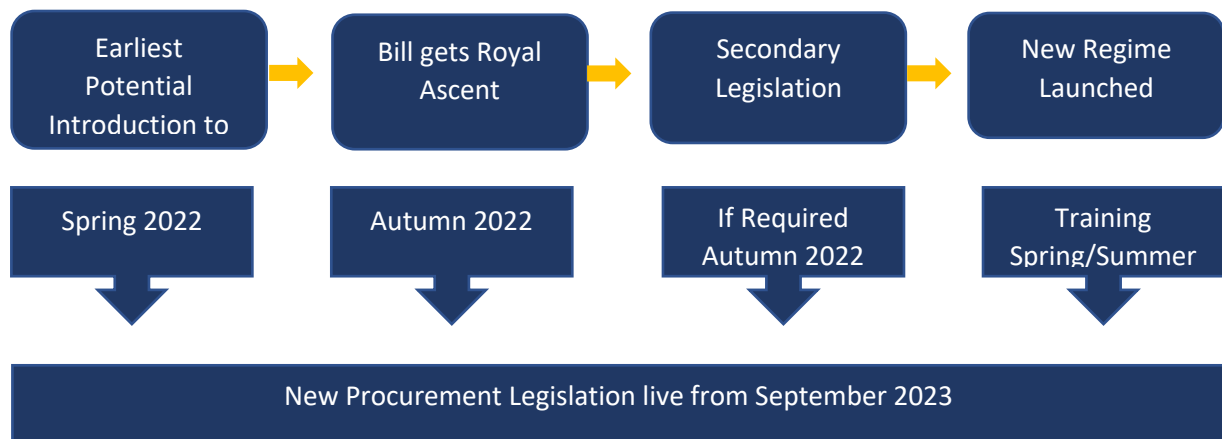
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Introduction

In December 2021, The Government published its long-awaited response to the consultation on their proposals for transforming public procurement in the UK. There have been some changes made to the original proposals. However, many questions remain unanswered in consideration of the application of the proposed regulations once they become public procurement law. The CPL Group Team have analysed the Government responses and this report provides an overview of how we believe both CPC Members and Tenet Education Services Clients will be impacted by the new legislation. As always, things can change, but nevertheless, this is how we see the changes currently working in education. Be assured, that the CPL Group will continue to appraise guidance and documentation as it becomes available from Cabinet Office and that once published, we will be providing pertinent training, advice, and guidance for all our Members and Clients, specifically in line with the timescales outlined below.

Timescales for Introduction



Chapter Analysis

The report will examine each chapter and highlight key points that Members & Clients will need to consider. At the end of the chapter analysis, some broad-brush tips are provided covering additional areas of your operations that may need consideration where the new legislation may be of additional impact.

Chapter 1: Procurement that better meets the UK's needs

The Key fundamental principles proposed for public procurement are shown in the diagram below. Governments have also proposed legislating to require contracting authorities to have regard to their strategic priorities for public procurement in a new **National Procurement Policy Statement** for England and the new **Welsh Procurement Policy Statement**. The English Government further proposed establishing a new unit to oversee public procurement in England with powers to review and, if necessary, intervene to improve contracting authorities' compliance with the procurement regulations.



The **National Procurement Policy Statement** for England was published in June 2021 with the **Welsh Procurement Policy Statement** published earlier in March 2021 with both requiring that Contracting Authorities should already be taking account of the priorities outlined within them. The English Government as outlined above, is proposing to set up a **Procurement Review Unit (PRU)** with powers to review and recommend change, however, it is unknown at this point how far into the public sector this unit will reach and whether they would (if necessary) liaise directly with DfE on education or engage at consortium or institution level. We will advise once we have more information. The Welsh Government will retain their existing **Supplier Feedback Service (SFS)** but with enhanced powers once finalised. Advice pertaining to Scotland and Northern Ireland will be issued once published.

Proposed Member & Client Actions

National Procurement Policy Statement

- Examine the National Procurement Policy Statement and Welsh Procurement Policy Statement to make changes as required to existing procurement procedures within your institution and plan for the future

Fundamental Principles of Public Sector Procurement

- Take note of the new principles and start to plan what changes may be required within your institution in meeting these for future procurement activity

Chapter 2: A simpler regulatory framework & Chapter 3 Using the right procedures

We have combined the responses to Chapters 2 & 3 together as they naturally complement each other. The Government are proposing a consolidation of procurement legislation, aligning the existing Public Contracts Regulations 2015, The Utilities Regulations 2016, Concession Contracts Regulations 2016 and the Defence and Security Contract Regulations 2016 into a single uniform framework. There will also be a consolidation of procurement procedures as shown in the diagram below.

EXISTING PROCUREMENT PROCEDURES	NEW PROCEDURES
Open Procedure	Open Procedure
Restricted Procedure	Flexible Competitive Procedure
Competitive Dialogue	Light Touch Regime (under review)
Competitive Procedure with Negotiation	Limited Tender
Negotiated Procedure	
Design Contests	
The Light Touch Regime	

The Light Touch Regime was originally marked for removal; however, it seems that the Government are likely to retain this procedure with enhanced flexibility and amended thresholds which is excellent news given that it underpins several categories of educational procurement activity above threshold.

The new Flexible Competitive Procedure will (as the name suggests) allow Contracting Authorities significant flexibility in designing procurement both in light of the requirements of the [***National Procurement Policy Statement***](#) and the [***Welsh Procurement Policy Statement***](#) as well as being able to introduce specific requirements that are local and pertinent to your institution and environs. There

is currently no information available as to how procurement activity will be compliant under this regime and it's therefore very much a case of "watch this space" for further updates and guidance. It is also worth noting that as this is a new procedure with no legal case law precedents to underpin it, the view of the CPL Group Procurement Team is that this procedure potentially presents the most risk for Contracting Authorities in the future for a challenge to a procurement award by an aggrieved bidder.

Proposed Member & Client Actions

Procurement Procedures

- Whilst the Open Procedure and the Light Touch Regime will be available and operationally are known, the new Flexible Competitive Procedure will bring significant training requirements that the CPL Group will undertake with Members & Clients once more detail is provided by Cabinet Office.
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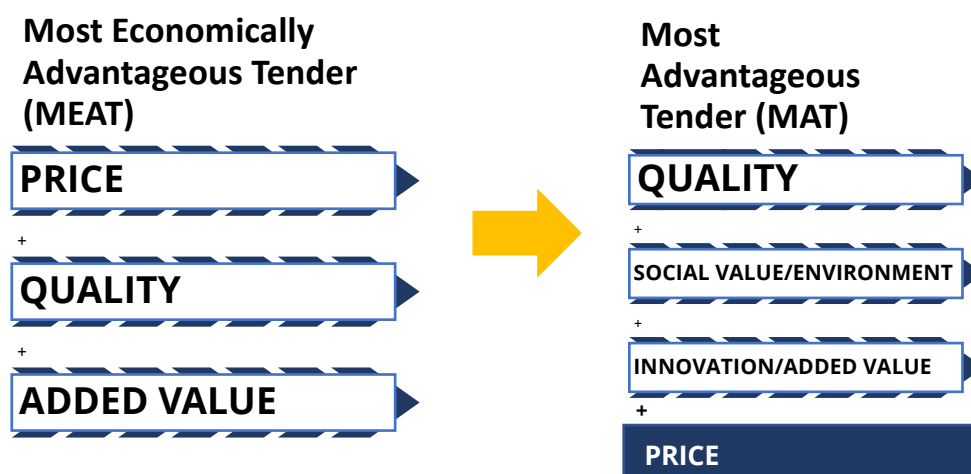
Chapter 4: Awarding the right contract to the right supplier

The Green Paper proposed retaining the current requirement that award criteria must be linked to the 'subject matter of the contract' but amending it to allow specific exceptions to set by the Government. It proposed retaining the requirement for the evaluation of tenders to be made solely from the point of view of the contracting authority, but amending it so that, exceptionally, a wider point of view can be taken. The Government are also recommending a move away from awarding contracts based on the Most Economically Advantageous Tender (**MEAT**) to the Most Advantageous Tender (**MAT**) as **MAT** can more readily achieve the aims of the [National Procurement Policy Statement](#) and [Welsh Procurement Policy Statement](#) as pure cost is not as important in the evaluation as it potentially carries less weighting.

Government also proposed using revised exclusion measures to tackle unacceptable behaviour in public procurement such as fraud and is exploring the introduction of a centrally managed debarment list. It also proposed reforming the procurement regime to allow past performance to be more easily considered in the evaluation.

Proposed member & Client Actions

MEAT V MAT Key Differences



The publication of the [National Procurement Policy Statement](#) and [Welsh Procurement Policy Statement](#) together with the move to **MAT** Principles and the utilisation of the Flexible Competitive Procedure will mean that price may carry a lower weighting for future procurements which may in turn cause budgetary concerns for institutions. It is therefore worth contemplating appropriate weighting criteria for above threshold procurements considering these new policy drivers and regulations and beginning to plan for project budgets accordingly.

There will also be new regulations to assist with supplier exclusions from procurement activities. These will be laid out within the new Regulations covering the pertinent mandatory and discretionary exclusion criteria within the Supplier Questionnaire as well as the utilisation of a proposed Supplier Registration Database. CPL Group will provide training opportunities for both the use of the Flexible Competitive Procedure and the completion of the Supplier Questionnaire post regulatory update in due course.

Finally, the Government are proposing to widen the scope of award criteria to take account of additional stakeholder requirements outside of the Contracting Authority, e.g., if you collaborate with a local authority on a procurement, different priorities can be considered. Once again, CPL Group will provide training opportunities in consideration of this update, but if you are collaborating now, then begin to have those conversations with collaboration partners for future procurement projects.



START PLANNING FOR CHANGE NOW

Chapter 5: Using the best commercial purchasing tools

In the Green Paper, Government proposed legislating for:

- a new Dynamic Purchasing System (“DPS+”) that could be used for all types of procurement (not just common goods and services). The name will change to become the “Dynamic Market”
- They proposed legislating for new options in framework agreements including an option for an ‘open framework’ with multiple joining points and a maximum term of 8 years.

In consideration of utilising a DPS, the scope will be extended beyond common goods and services, and it will be a requirement that an Award Notice is published to the Find a Tender and Contracts Finder portals for all awards that exceed published procurement thresholds. The new Flexible Competitive procedure can be utilised to call off from a DPS giving Contracting Authorities flexibility and innovation with their procurement design where required.



There will be 2 types of Frameworks, "Standard" and "Open" for which the key differences and commonalities are now detailed:

Standard Framework

- Must include clear estimate of potential contract value in Contract Notice
 - Maximum Period 4 years
- No new suppliers can be added to the framework once awarded
 - Can be single supplier award
- Details will need to be entered on central database

Open Framework

- Must include clear estimate of potential contract value in Contract Notice
 - Must include details of "Open" periods in the Contract Notice
- Maximum Period 8 years with no open period exceeding 3 years
- New suppliers can be added to the framework once awarded in line with declared "Open" periods
 - Cannot be single supplier award
- Details will need to be entered on central database

If you design your own frameworks, you will need a framework strategy to reflect the requirements for your institution

Proposed member & Client Actions

At this juncture, simply understanding the revisions to existing practices is sufficient. However, where institutions utilise their own frameworks, they should begin to consider the option for utilisation of the new Open framework for future procurement activity. CPL Group will be considering our own strategy as to the approach that we will be taking with new and recurring frameworks over the coming months to ensure that future iterations meet both the requirements of our members & clients as well as underpinning strategic business objectives.

Chapter 6: Ensuring open and transparent contracting

This proposed requiring all contracting authorities to implement the Open Contracting Data Standard so that all data across the public sector can be shared and analysed at contract and category level, including establishing a single digital platform for supplier registration that ensures businesses only must submit their data once to qualify for any public sector procurement. There are several Contract Notices that will be required at various potential points of procurement activity to enable ALL procurement activity across the public sector to be monitored in one place. These notices are now shown in the table below:

Notice	Content / Application
Planning and Pipeline Notice (and Notice of Planned Procurement)	This notice will contain advance information on planned procurements for contracts valued over £2 million. This requirement will only cover contracting authorities and entities that reasonably expect to have more than £100m third party spend in any financial year. Where the contracting authority wishes to do so, they can choose to also complete the part of the notice (called Notice of Planned Procurement in GPA texts) that allows contracting authorities to reduce the tendering period
Pre-Market Engagement Notice	This notice is to be used by contracting authorities if they choose to carry out pre-market engagement (unless there is a valid reason not to publish such a notice).
Appropriate Tender Notice	This notice is to be used to commence a competitive procurement. This notice will perform a number of functions including: <ul style="list-style-type: none"> • alerting the market to an upcoming opportunity - enabling the authority to reduce the timescales of the subsequent procurement; • advertising an opportunity; or • ensuring transparency of limited tendering depending on the procedure used.
Award Notice	This notice is to confirm the contracting authority's intention to award a contract and: <ul style="list-style-type: none"> • notifies the market of the outcome of the procurement process, anticipated contract value and description and identities of all bidders; • alerts the market to the fact that a contract is about to be signed and in conjunction with a private release of information to any bidders, where required or commenced voluntarily, starts the standstill period.
Contract Detail Notice	Once a contract has been awarded, this notice provides information on the contract including details of the supplier. Separately, 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 to be confirmed.
Contract Change Notice	This notice is 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
Contract Termination Notice	This notice is to confirm when a contract has ended, either through natural expiry or other means

Proposed member & Client Actions

In addition to the revised notices required as outlined, it will be imperative that all public sector bodies and their tendering platform partners implement the Open Contracting Data Standard to enable the reporting required. Members and Clients should ensure that their tendering platform partners are working to this standard or indeed have already achieved it. With the introduction of new notices required CPL Group will provide training solutions in this regard.

Chapter 7: Fair and fast challenges to procurement decisions

In the Green Paper, the Government proposed reforms to certain Court processes that apply to the determination of procurement disputes, including through the introduction of expedition measures aimed at speeding up the resolution of challenges and making it more accessible. They proposed to investigate the use of a tribunal system to determine low value claims and issues in ongoing procurements (and potentially for wider use should the proposed Court reforms not deliver the required benefits). Additional proposals sought to refocus redress for suppliers onto pre-contractual remedies which preserve their opportunity to participate in the procurement. A cap was proposed for the level of damages available to aggrieved bidders, reducing the attractiveness of speculative claims. Further proposals include removing the automatic suspension for award of contracts let competitively in crisis or extreme urgency situations and finally removing the mandated requirement to provide an individual debrief letter to each bidder at the end of a procurement process.

Many of the proposals outlined in the Green Paper will not be taken forward because of information submitted during the consultation period. The key area of development though is the introduction of changes to the Standstill letter as detailed below:

The Award Notice will confirm the authority's intention to award a contract and notify the market of the outcome of the procurement, anticipated contract value/description and identity of all bidders. It will also detail the standstill period;

When the contracting authority releases the Award Notice signalling their intention to award a contract, they will additionally provide participants with certain evaluation documents for the winning bidder (redacted for commercial sensitivity);

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;

Contracting Authorities may, if they choose, provide individual covering debrief letters to bidders (which may include feedback on improving performance) but this may not be appropriate or possible in all circumstances.

In consideration of call off contracts from frameworks and DPS Systems, no decision has as yet been made as to what information would have to be released, but this will include similar levels of transparency in the Award Letter once finalised.

Proposed member & Client Actions

No action is presently required other than to be aware that changes will be made in line with the detail presented above.

Chapter 8: Effective contract management

The Government proposed legislating to further tackle payment delays in public sector supply chains and give small businesses, charities, and social enterprises deep in the supply chain better access to contracting authorities to expose payment delays including:

Businesses in public sector supply chains should have direct access to Contracting Authorities to escalate payment delays


There should be a specific right for public sector bodies to look at the payment performance of any supplier in a public sector contract supply chain

Private and public sector reporting requirements should be aligned and published in one place

There are likely to be set matrices and reporting mechanisms that public sector bodies will need to address which may go beyond existing measures and analysis of payments made as a % of total payments made within 30 days in line with public sector expectations.

Government also proposed introducing a new requirement to publish contract amendment notices so that amendments are transparent and to give commercial teams greater certainty over the risk of legal challenge. They also proposed capping the profit paid on contract extensions where the incumbent raises a legal challenge. These changes allow:





Currently, Regulation 72 carries risk in that it is not entirely transparent in how all the clauses (particularly 72.8) are structured / interpreted and therefore can lead to uncertainty when being used by a Contracting Authority. Government proposes to consolidate and simplify the requirements around contract changes during the contract term including making special provisions for complex contract changes which would include such contracts as outsourced services affected by a pandemic or other such catastrophic event.

Where a contract is amended, a notice of that amendment will be required as detailed in **Chapter 6**. Any new notice carries a Standstill Period and runs a risk of challenge in line with current directives and the 30-day timescales.

Proposed member & Client Actions

No action is presently required other than to be aware that changes will be made in line with the detail presented above.

Conclusions

The Government have taken forward a significant proportion of the changes outlined within the Green Paper published in December 2020 with the main changes and retractions occurring in Chapter 7 as most proposals in this chapter have been deemed unworkable. The passing of legislation through Parliament is still scheduled for Autumn 2022 with the legislation being enacted with a live launch in September 2023.

The overall scope of the proposals will necessitate changes in the way our Clients and Members undertake procurement activities once the Regulations have been published and as such, this presents both opportunities and risks as detailed within this summary.

Recommendations

The Public Sector is entering a time of change in consideration of procurement and the levels of consolidation, flexibility, transparency and reporting that the new Regulations are seeking to bring.

The impacts as outlined in this report are considerable in their scope bringing the changes that the new Regulations will require. Members & Clients should start planning for changes to key procurement systems and processes that will need updating once the Regulations are in place. An overview of some of the likely potential additional impacts are presented in the table below:

Business Area	Impact / Requirement
Procurement Activities	<ul style="list-style-type: none">• New template ITT documentation will be required to utilise the Flexible Competitive Procedure• Updated Terms and Conditions of Contract will be required to reflect the new Regulations• New contract management protocols to reflect the new reporting standards will be required• Internal training on the new regulations and their usage will be required• Checks should be undertaken with procurement business partners to align systems and practices where required.
Budgets	<ul style="list-style-type: none">• Consideration should be given to the strategic direction outlined in the <u>National Procurement Policy Statement</u> and <u>Welsh Procurement Policy Statement</u> together with the potential impacts on future project budgets as Price is eroded as a key element of the move away from MEAT to MAT

As always, the CPL Group will keep Members and Clients informed of developments and we will also provide appropriate and timely training solutions in consideration of the new Public Contracts Regulations. Keep an eye on our monthly newsletters for developments.

