



The Public Procurement Bill – delegated powers – 'to delegate, or not to delegate: that is the question'

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In previous blogs (see here), we provided an overview of the Procurement Bill (the "Bill") and the extent to which it will change the public procurement regime in England, Wales and Northern Ireland. In this blog, we consider the provisions of the Bill relating to delegated powers. This may seem like an esoteric subject of interest only to lawyers. However, these powers, if enacted, will be of significance and, for the reasons given below, merit attention now by procurement professionals.

Background

By way of a brief reminder, the Bill was introduced in the House of Lords on 11 May 2022, had its second reading on 25 May 2022, and started its committee stage on 4 July 2022.

According to its Explanatory Notes:

"The purpose of the Procurement Bill is to reform the United Kingdom's public procurement regime following its exit from the European Union (EU), to create a simpler and more transparent system not based on transposed EU Directives".

To this end, the Bill deals with:

- public contracts: i.e. the award and subsequent management of contracts by most central government departments, their arms-length bodies and the wider public sector including local government, health authorities and schools;
- utilities contracts: i.e. the award and subsequent management of contracts by utilities operating in the water, energy and transport sectors;
- concession contracts: i.e. contracts for the supply of works or services where at least part of the consideration for that supply is a right for the supplier to exploit the works or services; and
- defence and security contracts.

The Bill proposes to regulate public procurements from the point at which a contracting authority is considering whether and what to procure, through the process of procurement and contract award, up to the point at which the resulting contract ends.

The Government would like to enact the Bill by the end of 2022.

The Procurement Bill – Delegated powers

The Bill contains 53 delegated powers, each allowing UK Government Ministers to make secondary legislation in the form of statutory instruments. Of these:

- 28 of the powers are subject to the negative procedure; and
- 25 of the powers allow for the affirmative procedure.

The affirmative procedure is a type of parliamentary procedure that applies to certain statutory instruments. A statutory instrument laid under the affirmative procedure must be actively approved by both Houses of Parliament. In contrast, a statutory instrument laid under the negative procedure becomes law on the day the Minister signs it and automatically remains law unless a motion – or ‘prayer’ – to reject it is agreed by either House within 40 sitting days. In practice, very few statutory instruments are ever ‘negated’ or ‘prayed’ against since, in most instances, the Government of the day is able to rely on its working majority to secure the passage of its legislation.

Returning to the Bill and the delegated powers provided under the Bill, a key point to note (and one made very forcefully by the House of Lords Delegated Powers and Regulatory Reform Committee in a recent report (see here)) is that regulations issued in connection with the current (and soon to be former public procurement regime) were made under a unique delegated power in the form of section 2(2) of the European Communities Act 1972. Although this power was in some respects of considerable breadth, the section 2(2) power was subject to a critical constraint: it gave Ministers power to make laws to give effect to EU law. In contrast, the Bill creates new delegated powers that, on its face, are subject to no such constraints. Some would give Ministers new and significant scope to determine important aspects of the regulatory regime. Key examples (highlighted in the Lords committee’s report) are listed below.

Financial thresholds

In general, the regulatory regime in the Bill applies only in relation to procurements the estimated value of which equals or exceeds financial thresholds that are specified in the Bill.

The Bill confers on the Government a number of so-called ‘Henry VIII’ powers to increase or decrease these financial thresholds by way of regulations. The powers are named after King Henry VIII because they enable Ministers to amend or repeal provisions in an Act of Parliament using secondary legislation in a manner similar to King Henry VIII’s preferred way of legislating, i.e. by (in effect) executive decree. By way of limited example, the Government may by regulation amend:

- the value of a public contract to which the requirement in clause 51(3) to publish a copy of the contract applies.
- the value of a “regulated below-threshold” works contract above which the bar in clause 78(1) does not apply. That bar prevents a contracting authority from restricting the submission of tenders below the threshold amount by reference to an assessment of a supplier’s suitability to perform the contract.
- the level of annual spend on procurement to which the requirement in clause 84 applies (the requirement to publish a “pipeline notice” setting out information about high-value contracts in respect of which a contracting authority intends to publish a tender notice or a transparency notice).
- the value of a “high-value contract” for the purposes of the requirement in clause 84.
- the level of modification to a contract below which the requirement in clause 70(1) does not apply (the requirement to publish a “contract change notice” relating to that modification); and

As noted, the scope of these powers is, on the face of the Bill, untrammelled. Accordingly, the Government could, for example, increase the thresholds well above the rate of inflation. Self-evidently, this would amount to a significant change to the public procurement regime and would have a practical effect on procurement practitioners working in this area.

The Government argues that its ability to set these thresholds is in fact limited by international agreements made by the UK including in particular the thresholds set by virtue of the UK’s membership of the WTO Agreement on Government Procurement (the “GPA”).

Under the GPA, the UK is required to review and update the thresholds that apply to the UK every two years. The GPA sets the process and methodology for calculating the thresholds applicable. The review is required to be undertaken each autumn, following which the UK informs the GPA of the new thresholds. The updated thresholds must take effect from 1 January immediately following the review.

The Government says that it would be “impractical” to use primary legislation to update the thresholds in this manner.

However, the Government concedes that these thresholds may change if there were “a wider renegotiation of the GPA”. Therefore, to the extent that one accepts that there are some restrictions on the scope of these delegated powers, those limits are in practice quite narrow and could be further prescribed by the Government depending on its success (or otherwise) in securing changes to the GPA etc.

Transparency requirements

The Bill seeks “to bring greater transparency to procurement”. Accordingly, the Bill imposes obligations on contracting authorities to publish specified documentation relating to procurement exercises.

Clause 86 of the Bill contains a broad power to prescribe in regulations the information that must be set out in 16 different types of notices. These include notices:

- inviting suppliers to submit tenders;
- about contracts awarded without a competitive tender process;
- about contracts that an authority intends to enter into or has entered into;
- about suppliers excluded from participating in a procurement exercise;
- about the performance of a contractor; and
- about modifications to, or termination of, contracts.

At present, no draft statutory instrument has been provided by the Government to illustrate what information will be mandated by regulations issued under clause 86. The Government argues that the “obligations around the content of notices... are detailed and technical matters”. However, as procurement practitioners will know, such ‘detailed and technical matters’ are fundamental and will determine the relative ease of conducting (or engaging with) a procurement exercise. The lack of clarity regarding the intended use of this provision, and the open-ended nature of the delegated power, is at present highly problematic.

Exemption from full regime

Clauses 8, 33 and 109, and paragraphs 17 and 34 of Schedule 2 and paragraph 7 of Schedule 4, of the Bill provide Ministers with powers, by regulations, to exempt particular types of public contract from the full regulatory regime under the Bill. For example, clause 8 gives Ministers the power to specify certain contracted services, to be subject to the less onerous “light touch contract” regulatory regime.

Whilst this power (and the other powers referred to above) are subject to the affirmative procedure there is nothing of substance on the face of the Bill to limit the discretion afforded to Ministers to allow less rigorous regulation for contracts of a kind that they choose to specify in regulations. The Bill does not impose any criteria to limit the exercise of Ministerial discretion. Therefore, Ministers could, with limited parliamentary oversight, make wholesale changes to core parts of the procurement regime, i.e. which contracts are subject to the light touch procedure.

Conclusion

At present, the Bill would afford UK Government Ministers with significant delegated powers to amend integral aspects of the new public procurement regime. The scope of many of these delegated powers is exceptionally broad. Accordingly, Ministers could, with limited parliamentary oversight, change fundamental aspects of public procurement. Unless the scope of these powers is changed by Parliament during the Bill’s legislative passage, procurement professionals should be alert to this issue now.

Forthcoming webinar

We are hosting a webinar on 4 October 2022 during which we will be considering the planning and commencement of a procurement under the regime envisaged by the Procurement Bill.

The webinar will cover the following:

- Planning a public procurement process including the approach to market engagements, notice requirements and choice of procedure
- Grounds for the direct award of public contracts

- Use of commercial purchasing tools – frameworks and dynamic markets
- Application of the Procurement Bill in Scotland

Who should attend?

- Individuals in a contracting authority responsible for running a procurement process
- Individuals in organisations bidding for public sector contracts

You can register here.

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