Cabinet Office

Transforming Public Procurement

Part 1 Consultation on draft regulations to implement the Procurement Bill

June 2023

CP 862

Transforming Public Procurement

Part 1 Consultation on draft regulations to implement the Procurement Bill

Presented to Parliament by the Parliamentary Secretary at the Cabinet Office by Command of His Majesty

June 2023

CP 862

This publication is available at www.gov.uk/official-documents

Alternative format versions of this report are available on request; please contact https://www.gov.uk/guidance/contact-the-cabinet-office.

Any enquiries regarding this publication should be sent to us at procurement.reform@cabinetoffice.gov.uk.

ISBN 978-1-5286-4176-0
E02921918 06/23

Printed on paper containing 40% recycled fibre content minimum

Printed in the UK by HH Associates Ltd. on behalf of the Controller of His Majesty's Stationery Office

Contents

Introduction

This is a consultation on the secondary legislation required to implement the new public procurement regime established by the Procurement Bill. This is a technical consultation, split into two parts. This first part of the consultation refers predominantly to areas of the Bill which require lists, calculations or further definitions to be used in practice and covers the following subjects:

- Scope of Light Touch Regime Contracts and Reservable Light Touch Services;
- Exempt Contracts: Vertical and Horizontal Activities Calculations;
- Exempt Contracts: Utilities Intra-group Turnover Calculations;
- Utility Turnover and Supply Tests;
- Intra-UK Procurement;
- Definitions of ‘Central Government Authority’ and ‘Works’ for Thresholds;
- Disapplication of section 17 of the Local Government Act 1988; and
- Disapplication in regard to NHS procurement.

Questions seek to understand to what extent the draft secondary legislation provisions implement the policy intent as established in the Bill and will be scored on a scale from ‘Strongly Agree’ to ‘Strongly Disagree’.

The consultation opens on 19 June and closes on 28 July.

Background to the legislation

One in every three pounds of public money, over £300 billion a year, is spent on public procurement. By improving the way public procurement is regulated, the Government can save the taxpayer money and drive benefits across every region of the country.

Following the UK's exit from the EU, we now have an opportunity to develop and implement a new procurement regime. The Procurement Bill helps deliver the Prime Minister's promise to grow the economy by creating a simpler and more transparent system that will deliver better value for money, reducing costs for business and the public sector.

The Government wants to make it easier for small businesses to work with the public sector by ripping up unnecessary rules and tackling late payment in the supply chain. We will ensure all public bodies consider Small and Medium Enterprises (SMEs) when designing their procurements.

Following wide-ranging public consultation and stakeholder engagement, we have brought forward legislative proposals to establish the new regime. These measures and the training we will roll out to

support them will deliver greater value for the public purse, from huge infrastructure projects to services by local councils.

The new regime will replace the current bureaucratic and process-driven EU rules for public procurement by:

- Creating a simpler and more flexible commercial system that better meets our country's needs while remaining compliant with our international obligations.
- Opening up public procurement to new entrants such as small businesses and social enterprises so that they can compete for and win more public contracts.
- Taking tougher action on underperforming suppliers and excluding suppliers who pose unacceptable risks.
- Embedding transparency throughout the commercial lifecycle so that the spending of taxpayers' money can be properly scrutinised.

The main benefits of the new regime are:

- **Delivering better value for money** – Supported by greater transparency and a bespoke approach to procurement, the new regime will provide greater

flexibility for buyers to design their procurement processes and create more opportunities to negotiate with suppliers.

- **Slashing red tape and driving innovation** – More than 350 complicated and bureaucratic rules govern public procurement in the EU. Removing these and creating more sensible rules will not only reduce costs for businesses and the public sector, but also drive innovation by allowing buyers to tailor procurement to their exact needs, building in stages such as demonstrations and testing prototypes.
- **Making it easier to do business with the public sector** – The new regime will accelerate spending with small businesses. A new duty will require contracting authorities to consider SMEs and we will ensure 30 day payment terms on a broader range of contracts. A single digital platform will be created for suppliers to register their details once so that they can be used for multiple bids. In turn, encouraging more suppliers to bid increases competition, which supports growth.
- **Levelling up the UK** – While value for money will remain the highest priority in procurement, contracting authorities will be required to take account of national strategic priorities such as job creation, improving supplier resilience, and driving innovation. Contracting Authorities will be able to

reserve competitions for contracts below certain thresholds for suppliers located in the UK, SMEs and social enterprises.

- **Taking tougher action on underperforming suppliers** – The Procurement Act will introduce an exclusions framework that will make it easier to exclude suppliers who have underperformed on other contracts. It will also create a new 'debarment list', accessible to all public sector organisations, which will create a register of suppliers who must or may be excluded from contracts.
- **Creating an open and transparent system** – Everyone will have access to public procurement data. Citizens will be able to scrutinise spending decisions. Suppliers will be able to identify new opportunities to bid and collaborate sooner in the process, and this will improve competition because suppliers will find it easier to plan and gear up. Contracting Authorities will be able to analyse the market and benchmark their performance against others, for example on their spend with SMEs.
- **Effective emergency procurement** – The new regime will allow faster competition processes for emergency buying, reducing the reliance on direct awards while retaining (and improving) the ability to act at pace in situations similar to the COVID pandemic.

- **Protecting national security** – The Procurement Act will include specific rules for defence and security procurements, as well as provisions to exclude suppliers from procurements if they present a threat to national security. It also provides flexibility for contracts to be upgraded to refresh technology and avoid gaps in capability.
- **Strengthening exclusion grounds** – The Procurement Act will toughen rules to combat modern slavery by allowing suppliers to be excluded where there is evidence of modern slavery, accepting that in some jurisdictions it is unlikely that a supplier would ever face conviction.
- **International Trade** – The new regime will ensure that UK businesses can continue to be successful in competing for public contracts in other countries around the world by protecting reciprocal arrangements and guaranteeing market access.

The Bill's progress

The Government published a Green Paper consultation in December 2020 on 'Transforming Public Procurement' which detailed the proposed measures to be included in the then upcoming Procurement Bill. The Government's response to the consultation was published in December 2021 after analysing over 600 responses from central and local government, industry, academia, trade bodies and interest groups, and the legal profession.

The Procurement Bill was introduced in the House of Lords in May 2022, moving to the House of Commons in December. During the parliamentary process, amendments were made in a number of areas including to facilitate SME participation in public procurement; the National Procurement Policy Statement (NPPS) and social value; transparency thresholds; and national security.

These regulations will apply to all reserved procurement in the UK, and procurement by transferred Northern Ireland authorities. We have worked closely with the Devolved Authorities in developing and drafting the provisions in the Bill and the draft Statutory Instrument (SI). In the Autumn the UK Government will follow the formal process to seek consent from the relevant NI Department to

make Regulations on their behalf. The draft SI will be updated as appropriate before being made. The Welsh Government intends to consult and legislate separately in respect of regulations for devolved Welsh procurement.

How to respond

In this next stage we invite you to respond to the questions in this consultation by 28th July 2023. Where possible, please respond by completing the survey at the following link https://www.smartsurvey.co.uk/s/TPPSI1/. Where this is not possible, you may alternatively respond by email to procurement.reform@cabinetoffice.gov.uk.

This consultation seeks feedback on the secondary legislation that sits under the Procurement Bill and brings many of its provisions to life. The consultation is split into two parts with this first part of the process focusing on policy areas which require specific detail in secondary legislation, and the second on the transparency provisions and notices that will be used by Contracting Authorities to fulfil their legal requirements under the Act. The second part will also include information on the proposed approach to transitional arrangements for procurements already underway at the time that the new regime enters into force and the position on other legislation that will need to be amended in order for the full provisions of the Act to take effect.

The nature of this consultation is detailed and technical. Views are not sought on the policy intent itself which has already been subject to consultation

and has been established by the Bill, but on whether the policy intent has been reflected in the drafting of the regulations.

Questions will ask respondents to state to what extent they agree or disagree with the question posed under each section. There are 9 questions of this nature. Where respondents disagree or strongly disagree that the policy intent as stated is delivered through the drafting, they have the opportunity to explain why they believe this to be the case. Comments should be limited to whether this policy intent has been translated into the draft SI and on whether the drafting causes any inconsistencies, gaps or overlaps with provisions elsewhere in the Bill or the draft SI.

For information on how the Cabinet Office will use and manage your data, please see the Cabinet Office's corporate Privacy Notice for public consultations here: https://www.gov.uk/government/publications/privacy-notice-for-cabinet-office-consultations.

Next steps

Following this and the forthcoming second part of the consultation, the final version of the secondary legislation will be laid in Parliament, combining the provisions contained within the two consultations into one single statutory instrument. Before laying the SI we will determine whether its provisions warrant a review and update of the impact assessment on the new regime undertaken when the Bill was drafted and laid.

The Government has committed to providing a minimum of 6 months' advance notice of go-live of the new regime and the laying of the secondary legislation would be the earliest point that this notice would be given. We expect that the regime will come into force in October 2024.

Subjects for Consultation and Associated Questions

Light Touch – scope of light touch contracts and reservable light touch services

Light touch contracts reflect that certain services require different treatment, particularly those that are individual, locally or community-focused. Clause 9 of the Bill sets out the considerations that must be taken into account when specifying the services; this includes the extent to which:

- suppliers from outside the United Kingdom are likely to want to compete for contracts for the supply of the services;
- the services are supplied for the benefit of individuals (for example, health or social care services) or the community generally;
- proximity between the supplier and the recipient of the services is necessary or expedient for the effective and efficient supply of the services.

The draft SI uses Common Procurement Vocabulary (CPV) codes to specify the services that can be procured as a light touch contract for the purposes of the Bill. The CPV codes are the same as those

referred to in the existing Public Contracts Regulations 2015 but they also incorporate certain Defence-specific codes which were Part B services under the Defence and Security Contracts Regulations 2011 (these will continue to only be applicable for defence and security contracts).

This reflects the previous consultation response which confirmed that we would retain a light touch approach for certain services in line with those afforded the same treatment under the PCR.

The draft SI also makes clear which services are 'reservable light touch services' under the Bill. These are services which under clause 33 may be awarded via a competitive flexible procedure, where the field of suppliers is limited to public service mutuals. To continue to recognise the benefits brought by these organisations, the full scope of reservable services (identified by CPV codes) in line with PCR regulation 77 has been maintained.

QUESTION 1: To what extent do you agree or disagree that CPV codes set out in the draft SI accurately capture those services which can be supplied via a light touch contract under the new regime?

QUESTION 2: If you disagree or strongly disagree, please indicate which services should be included or excluded, or clarify any other perceived issues with the list such as inconsistencies with other areas of the Bill or draft SI.

QUESTION 3: To what extent do you agree or disagree that the draft SI accurately captures those services which should be 'reservable' to public service mutuals under the new regime?

QUESTION 4: If you disagree or strongly disagree, please indicate which services should be included or excluded, or clarify any other perceived issues with the list such as inconsistencies with other areas of the Bill or draft SI.

Exempt Contracts: Vertical and horizontal activities calculations

The 'vertical exemption' at paragraph 2 of Schedule 2 to the Bill replicates the exemption at regulation 12(1) - 12(6) of the PCR (often referred to as the "Teckal" exemption). This exemption allows a contracting authority that is a public authority to award a contract within its 'corporate family' and vice versa, e.g. between 'parent(s)' contracting authority and its 'child(ren)' subsidiary and vice versa (or between any other 'family' permutations such as 'grandparent'-'grandchild' and vice versa, 'sibling'-'sibling' and

‘cousin’-‘cousin’), provided various tests are met. Guidance will be provided to assist contracting authorities in the application of these provisions.

The primary test to be met as set out in Schedule 2 is that there is a relationship of ‘control’ between the parties to the contract. Schedule 2 paragraphs 2(2) and 2(3) set out what this ‘control’ means.

The test includes an ‘activity threshold’. This requires that the controlled entity carries out more than 80% of its activities for the contracting authority (or authorities) or other persons also controlled by the contracting authority (or authorities).

The ‘horizontal exemption’ at paragraph 3 of Schedule 2 to the Bill replicates the exemption at regulation 12(7) of the PCR (often referred to as the ‘Hamburg’ exemption). This exemption allows a contracting authority to award a contract to another contracting authority provided various tests are met.

The first test is that the parties are ‘cooperating’ to achieve common objectives in carrying out their public functions and the arrangement is solely in the public interest.

The second test is an ‘activity threshold’. This requires that no more than 20% of the activities are intended to be carried out for other (non-public function) purposes.

The draft SI establishes how the 'activity threshold' for both the horizontal and vertical exemptions is calculated, which should replicate the effect of regulation 12(8) and (9) of the PCR. This is key as contracting authorities will benefit from continuity in this technical aspect of the procurement regime.

QUESTION 5: To what extent do you agree or disagree that the methodology of calculating the percentages of the activity thresholds set out in the draft SI is clear and meets the policy intent to exempt horizontal and vertical procurement from the requirements of the Bill?

QUESTION 6: If you disagree or strongly disagree, please explain why you believe the calculation is not clear or does not otherwise meet the policy intent.

Exempt Contracts: Utilities intra-group turnover calculations

Utilities, like many organisations, sometimes rely on separate entities within their group to carry out certain activities when delivering a contract. This may be within a 'traditional' group arrangement or within a joint venture arrangement and can cover a variety of activities, such as 'back office' services or specialist technical services. This arrangement may be for tax or management reasons. This is referred to as

an arrangement between 'affiliated' persons and an exemption from the procurement regime is available where a utilities contract is awarded by a relevant utility to a relevant affiliated person provided the 'turnover test' is met. The exemption is available where a utility awards a contract to an affiliate or, where the utility is a joint venture, to a person affiliated with any member of the joint venture, and reflects the exemption that exists currently in regulation 29 of the UCR.

The turnover test requires that the affiliate awarded the contract receives more than 80% of its relevant turnover from supplying the utility awarding it the contract.

The draft SI sets out the steps to be taken to calculate the affiliate's percentage turnover from the supply to the utility and its total turnover for the purposes of determining whether it meets the turnover test. The conditions to be met for the exemption to apply are that:

- in respect of service contracts, the affiliate's average turnover over the preceding 3 years, taking into account all services provided by that affiliate and other affiliates of the utility to the utility, derived from the provision of services to the utility or one or more of its affiliates exceeds 80% of its total turnover for the provision of services;

- in respect of goods contracts, the affiliate's total turnover over the preceding 3 years, taking into account all supplies provided by that affiliate and other affiliates of the utility to the utility, derived from the provision of goods to the utility or one or more of its affiliates exceeds 80% of its total turnover for the provision of goods;
- in respect of works contracts, the affiliate's average turnover over the preceding 3 years, taking into account all works provided by that affiliate and other affiliates of the utility to the utility, derived from the provision of works to the utility or one or more of its affiliates exceeds 80% of its total turnover for the provision of works.

QUESTION 7: To what extent do you agree that the methodology of calculating the percentages of the affiliated turnover test as set out in the draft SI is clear and meets the policy intent to exempt contracts to affiliates as described in Schedule 2, paragraph 6?

QUESTION 8: If you disagree or strongly disagree, please explain why you do not believe that the calculation will deliver the policy intent.

Utility Turnover and Supply Tests

Sale of gas or heat to a network where the gas or heat sold is a by-product of some other activity

Schedule 4, paragraph 1(2) of the Bill exempts from the provisions of the Bill the supply to a network by a private utility or public undertaking (the operator) of gas or heat which is an unavoidable by-product of carrying out an activity that is not a specified activity in paragraph 7 of the Schedule. For example, steam or hot water generated by a waste incinerator may be supplied to a district heating network to heat homes. The exemption is available only provided the amount of gas or heat supplied by the operator to the network is no more than 20% of its turnover amount.

The purpose of the draft SI is to set out how to calculate 20% of the operator's turnover amount in order to determine whether the supply of the gas or heat amounts to a utility activity and therefore whether procurements for contracts relating to that activity should be subject to the new procurement regime or are exempt.

In providing how to calculate the operator's turnover amount, the draft SI specifies that the amount is to be calculated by reference to an average amount over a

specified period. The period specified in the draft SI is the preceding three full financial years, including the current year.

Sale of electricity to a network where the electricity sold is the excess that has not been consumed

Schedule 4, paragraph 2(2) of the Bill exempts the supply to a network of electricity by a private utility or public undertaking (the operator) where the supply is only the excess electricity that it has produced in order to do something that is not a specified activity in paragraph 7 of the Schedule but not used. For example, a port may generate its own electricity using wind turbines for use in carrying out various port activities, such as the operation of certain machinery and supply the surplus to the national grid network. The exemption is available only provided the amount of electricity supplied is no more than 30% of the amount of energy produced by the operator.

The purpose of the draft SI is to set out how to calculate the amount of electricity supplied in order to determine whether the supply of the electricity amounts to a utility activity and therefore whether procurements for contracts relating to that activity should be subject to the new procurement regime or are exempt.

In providing how to calculate the amount of electricity supplied, the draft SI specifies that the amount is to be calculated by reference to an average amount over a specified period. The period specified in the draft SI is the preceding three full financial years, including the current year.

The draft SI sets out that the assessment will have regard to the average of:

1. energy produced; and
2. electricity produced and supplied to the public network,

for the preceding three years from the point of assessment in the current year. If all or part of the figures for energy and/or electricity are not available for the required three years, the utility is required only to show that it is reasonable to expect that electricity supply to the public network has not exceeded 30% of the entity's total production of energy. This could draw on what metering information exists and/or business projections of activities in current and future years.

Sale of drinking water to a network where the water sold is the excess that has not been consumed

Schedule 4, paragraph 3(4) exempts the supply to a network (as described in sub-paragraph 3(1)(b) of the Schedule) of drinking water by a private utility or public undertaking (the operator) where the supply is only the excess drinking water that it has produced in order to do something that is not a specified activity in paragraph 7 of the Schedule but not used. The exemption is only available provided the amount of drinking water supplied is no more than 30% of the amount of drinking water produced by the operator.

The purpose of the draft SI is to set out how to calculate the amount of drinking water supplied in order to determine whether the supply of the drinking water amounts to a utility activity and therefore whether procurements for contracts relating to that activity should be subject to the new procurement regime or are exempt.

In providing how to calculate the amount of drinking water supplied, the draft SI specifies that the amount is to be calculated by reference to an average amount over a specified period. The period specified in the draft SI is the preceding three full financial years, including the current year.

At the point of assessment we would expect the utility to look back from that point over the last three years, determine in each of those three years how much drinking water it supplied to the public network, then add those three totals together and divide by three to create an average. This average supply figure is then to be compared against the average of how much drinking water the utility produced based on the last three years.

QUESTION 9: To what extent do you agree or disagree that the methodology to make the appropriate calculations for the relevant exemptions in paragraphs 1(2), 2(2) and 3(4) of Schedule 4 is clear and meets the policy intent to exempt the supply of gas, heat, electricity and drinking water where the relevant conditions apply?

QUESTION 10: If you disagree or strongly disagree, please explain you believe the calculation is not clear or does not otherwise meet the policy intent.

Intra-UK Procurement

Under the current procurement regulations it is possible for contracting authorities across the UK to procure jointly to ensure we achieve value for money for the taxpayer. As Scotland has chosen to retain

their present procurement rules we need to ensure we can continue to jointly procure goods, works and services where UK authorities are governed by different regimes.

The Bill contains a power (clause 114) to make regulations to allow for intra-UK access to commercial tools such as frameworks, and to manage joint procurements undertaken by authorities subject to the Scotland and UK legislation. The intention of this power is to ensure that bodies subject to the Scottish regulations can continue to take advantage of commercial arrangements put in place by – and with – bodies subject to the legislation in operation throughout the rest of the UK, and vice versa.

This will, for example, ensure that Scottish contracting authorities will continue to have access to frameworks and dynamic markets established under the new regime. There is a shared interest in ensuring that such collaboration can continue for the purposes of cooperation and achieving value for money; and that access to such commercial tools is not restricted by which regime the contracting authority is subject to.

The regulation presented here is to allow Scottish devolved authorities to carry out a joint procurement under the Bill and/or make use of a commercial tool established under its provisions.

The Scottish Government will also be tabling its own SI to disapply, where appropriate, Scottish legislation where procurement by devolved authorities is regulated under these regulations. It will also legislate to ensure that reserved authorities, devolved Welsh, and transferred Northern Ireland bodies can access tools and procurements established under the Scottish regulations.

QUESTION 11: To what extent do you agree or disagree that the regulation meets the policy intent of permitting Scottish devolved authorities to undertake joint procurement or collaborate with other authorities across the UK under the auspices of the Procurement Bill?

QUESTION 12: If you disagree or strongly disagree, please explain why you do not think that the regulation will provide Scottish devolved authorities with this opportunity.

'Central Government Authority' and 'Works' for thresholds

The Procurement Bill establishes that certain obligations are triggered at set financial thresholds. There are many thresholds in the Bill, some of which are derived from international trade commitments, whereas others are domestically-driven policies in support of current government priorities such as

improving transparency and facilitating SME access to public procurement opportunities. The threshold for a certain obligation, such as publication of a specified notice, or, indeed, to determine whether a procurement is a covered procurement bound by the main provisions of the Bill, may vary according to the scope of the intended contract and the categorisation of the contracting authority undertaking the procurement.

The 'main' financial thresholds (i.e. those that are derived from the World Trade Organisation's Agreement on Government Procurement (GPA) and determine whether or not a procurement is a covered procurement bound by the main provisions of the Bill) have one threshold that applies to 'Central Government Authorities' for the procurement of goods and services (currently £138,760) and another for the procurement of goods and services by local government and wider public sector bodies (currently £213,477). Goods and services procurements resulting in contracts over these thresholds are required to comply with the full provisions of the Bill unless any exceptions/ exemptions apply. This includes the authority being required to advertise the contract opportunity publicly to the marketplace using the UK's online platform, Find-A-Tender. Similarly, a specific threshold applies to procurements for 'Works' (currently £5,336,937) which reflects the generally high monetary values involved

with procuring construction. The works threshold is the same regardless of whether the body is a Central Government or sub-central authority.

Schedule 1 to the Procurement Bill provides that the definitions of 'Central Government Authority' and 'Works' shall be set out in regulations. Setting these (often lengthy) lists in regulations rather than in the Bill itself means that they are more easily updated; updates are required periodically as bodies are created, disbanded and re-named.

The concepts themselves are not changing from those which apply under the existing regime, although there have been some adjustments in language where appropriate e.g. to adapt the wording in line with UK legal drafting practice (as opposed to EU-derived wording) and to change references to 'His' rather than 'Her Majesty'. It is important that the list reflect the commitments we have made under the GPA as to which bodies are covered; as such, the list includes departments which no longer exist (such as the Department for International Trade), but ensures that the functions of those departments, wherever they now sit, are covered for GPA purposes. We will update our GPA schedules in due course, and amend this SI at the same time to reflect the update.

Essentially this means, as is the case in preceding regulatory schemes, that there will be:

- a general definition of 'Central Government Authorities' supported by a list of bodies that will be updated from time to time; and
- a general definition of works/works contracts, supported by a list of relevant CPV codes representing the actual activities that constitute works.

QUESTION 13: To what extent do you agree or disagree that this approach achieves the policy objective of ensuring a clear, consistent and familiar approach to defining Central Government Authorities and Works?

QUESTION 14: If you disagree or strongly disagree, please explain why you do not believe that the definitions are clear, consistent and/or familiar.

Disapplication of Section 17 of Local Government Act

Under the current regime, central government departments (including their executive agencies and non-departmental public bodies) are able to take advantage of government policy (as set out in Procurement Policy Note 11/20) that permits below-threshold contracts to be reserved for suppliers that are UK-based or located in a specific county or borough and (if the contracting authority chooses) are

SMEs or Voluntary, Community and Social Enterprises (VCSEs). However, local government and other authorities that are subject to the Local Government Act 1988 (LGA 1988) are currently unable to implement this policy as section 17 of that legislation precludes them from awarding procurement contracts on the basis of 'non-commercial considerations', including that of supplier location.

The Procurement Bill has been designed to improve SMEs' ability to bid for government contracts and contains a power (at clause 115) for Ministers to make regulations to disapply section 17 of the LGA 1988 when required.

The purpose of this regulation is to use this power so that local government and other authorities subject to the LGA 1988 can take advantage of the policy for below-threshold contracts and boost UK or local suppliers and SME/VCSE participation in public procurement. The provisions are drafted to disapply section 17(5)(e) of the LGA 1988 in particular, which is the part that prevents contracting authorities from taking into account a supplier's location when awarding contracts. This will only apply to below-threshold contracts that are procured under Part 6 of the Procurement Bill or entered into after the new regime takes effect.

PPN 11/20 will be updated when the regulations come into effect.

QUESTION 15: To what extent do you agree or disagree that the regulations permit local authorities and other bodies subject to the Local Government Act 1998 to take advantage of policy on reserving below-threshold contracts for suppliers that are UK-based or located in a specific county or borough and (if the contracting authority chooses) are SMEs or VCSEs?

QUESTION 16: If you disagree or strongly disagree please explain why you do not think the regulations will allow the below-threshold policy to be applied by authorities subject to the LGA 1988.

Disapplication in regard to NHS procurement

The policy objective is to disapply the Procurement Act in relation to the procurement of health care services procured by bodies that are in scope of the forthcoming NHS health care procurement regulations (the Provider Selection Regime (PSR) regulations). This disapplication is necessary to enable the PSR regulations to achieve their intended purpose to deliver a bespoke procurement regime for healthcare services which helps unlock integration and collaboration in line with the idiosyncrasies of the health and care system. Clause 119 of the Procurement Bill provides that a

Minister of the Crown may make regulations for the purpose of disapplying the Procurement Act in relation to “regulated health procurement”.

Currently, health care procurement forms part of the existing ‘light-touch’ rules regime in the PCR that also applies to services such as education and social services. The Procurement, Patient Choice, and Competition Regulations (PPCCR) 2013 No.2 also apply to the procurement of healthcare services.

The Health and Care Act 2022 received Royal Assent in April 2022. It includes various features to modernise health care service provision. This includes, at section 79, an amendment to the National Health Service Act 2006, which provides a power at section 12ZB of that Act to make procurement regulations for the procurement of certain ‘health care services’ when procured by ‘relevant authorities’ (both ‘health care services’ and ‘relevant authorities’ are defined in section 12ZB). Effectively this means the NHS will have a separate, bespoke scheme of procurement regulations for these health care services that is independent from the wider procurement rules for general goods, services and works as set out under the Procurement Bill. The remainder of NHS procurement will continue to be regulated by the Procurement Bill.

The scope of the PSR regulations is strictly limited to a tightly defined subset of health care services provided to individual patients and service users. The services in scope of the PSR regulations are defined in those regulations by reference to a list of Common Procurement Vocabulary codes.

The scope is further limited in its application to England only and only the following bodies are in scope of the PSR: a combined authority, an integrated care board, a local authority in England, NHS England, an NHS foundation trust and an NHS trust established under section 25 of the National Health Service Act 2006.

This draft SI includes necessary provisions using the power in Clause 119 that permits the disapplication of the Procurement Bill in relation to those contracts that are in scope of the PSR Regulations, so that procurements regulated by the PSR are not 'double-regulated' by the Procurement Bill as well.

QUESTION 17: To what extent do you agree or disagree that these regulations effectively disapply the Bill in respect of health care services procured by bodies that are in scope of the forthcoming DHSC/NHSE Provider Selection Regime (PSR) regulations.

QUESTION 18: If you disagree or strongly disagree, please explain why you do not believe that these regulations effectively disapply those services.

E02921918
978-1-5286-4176-0