Client briefing

Mills & Reeve Summary:

A review of the first draft of the Procurement Bill (dated 11 May 2022)

A major reform of the public procurement law regime in the UK is making its way through the legislative process.

Following publication of its Green Paper on Transforming Public Procurement in December 2020, the Government published its Response to that consultation in December 2021. The response gave us a clear steer on the shape of the new regime and well as a rough timetable for its implementation.

The reform of procurement law has now moved in the next phase, with the **first draft of the Procurement Bill** introduced into Parliament on 11 May 2022 and having its first reading on 25 May 2022. This is the legislation that will eventually become the law that regulates procurement in England, Wales and Northern Ireland. Scotland will as currently continue to have a separate regime, but, as now, this is likely to be closely aligned to the position in England and Wales.

This briefing note analyses the key points to note in the new Bill and traces how the high-level reforms discussed in the Response to the consultation have been translated into draft legislation. Readers should note that the Procurement Bill is likely to go through several drafts before it is finalised, so the analysis below does not represent the final position, nor does it cover every clause in the Bill exhaustively.

One of the immediately noticeable features of the Bill is the new terminology is used in it. Click here to read our **Procurement Phrasebook** - our guide to navigating the new language.

Progress of reform

11 May 2022
Procurement Bill introduced to Parliament

Later in 2022 or early 2023
Royal Assent to Act of Parliament

Earlier part of 2023
Secondary legislation drafted and enacted

Six-month notice period prior to new regime coming into force

CCS to provide learning and development training programme and events - to support implementation

Later in 2023
New regime "goes live" -
it will be known as the "Procurement Act 2022"

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Analysis of proposals

	Position under current regime	Current position in the Procurement Bill (n.b. subject to change as the Bill evolves)
Part 1: Key Definitions (sections 1 to 9)		
Definition of "Contracting Authority"	A list of central government authorities is set out in Schedule 1 of the PCR 2015. A "body governed by public law" is also contracting authority to which the PCR 2015 apply. The PCR 2015 contains a test that considers the purpose of the entity concerned as well as its finance, management supervision and board composition. The PCR 2015 contains a definition of "central purchasing bodies" that can arguably include private sector entities.	We understand from the Cabinet Office's webinars on the Bill that there was no intention to make any core conceptual changes to the definition of "contracting authority" or "public contract", even though the language has been changed. In other words, there was no intention to extend the reach of the procurement rules to organisations or contracts which are not currently in scope under the PCR 2015. The wording of the new definition has been tweaked. A contracting authority is defined as a "public authority", and the definition goes on to considers whether the entity has "functions of a public nature" and is either wholly or mainly funded from public funds or subject to oversight by another contracting authority. Schedule 1 makes it clear that the definition of "central government authority" is to be set from time to time via secondary legislation (rather than listed in the new Act). Section 1(3) clarifies that funds received from a public body in return for provision of services/works/goods do not constitute public funds for the purposes of the "funded wholly or mainly from public funds" test. The Bill currently does not clarify whether entities such as universities, registered providers and commercial trading arms of contracting authorities are all covered by the definition of a contracting authority and any further guidance will be welcomed. It is confirmed at section 10(5) that only contracting authorities may act as centralised procurement authorities.
Exempted contracts	Regulations 10 to 17 cover various contract types which are wholly or partially exempt from the application of the PCR 2015. Regulation 12 exempts in-house (*Teckal*) arrangements and joint collaboration (*Hamburg*) arrangements.	Exempted contracts are now listed out in Schedule 2 to the Bill. The exemptions have largely carried over from the PCR 2015 with a small number of changes in scope as to which contract types are excluded. For example, contracts awarded to not-for-profit organisations for defined emergency services are no longer defined by CPV code. Therefore, there may be a possibly unintended divergence between the current exemptions and those proposed by the Bill. The currently drafting of the new exemption for *Teckal* companies - now referred to as "vertical arrangements" – appears to have removed the possibility of joint ownership by two or more contracting authorities of the in-house company. We expect this is a drafting oversight that will be addressed in further iterations of the Bill.

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One set of rules	There are currently four sets of regulations covering procurement: • Public Contracts Regulations 2015 • Utilities Contracts Regulations 2016 • Concession Contracts Regulations 2016 • Defence and Security Public Contracts Regulations 2011 Plus, there are related laws that impose procurement-related obligations e.g. The Public Services (Social Value) Act 2012, The Local Government Act 1988.	Section 9(6) creates a concept of "special regime contracts" for the purpose of referring to (a) concession contracts; (b) defence and security contracts; (c) light touch contracts; and (d) utilities contracts. Each type of special regime contract has its own dedicated section within the Act, containing bespoke provisions in addition to the general provisions. The Bill does not clarify the status of Procurement Policy Notes. It is not clear whether previously issued PPNs will be incorporated into the legislation or otherwise updated. In some areas, the Bill addresses its relationship with other legislation that touches on public procurement – for example, section 104 of the Bill creates a power to disapply section 17 of the Local Government Act 1988. As yet, the Bill does not address its relationship with other legislation, such as the Public Services (Social Value) Act 2012, but this could change going forward.
Special regime contracts	Currently there are separate regimes for defence, concessions and utilities, as well as a "light touch regime" for health and social services.	The Bill covers concessions, utilities, defence, and light touch regime contracts via sections 5 to 9. Generally, the rules in the new Bill apply to concessions, utilities, and defence contracts, with some limited exceptions. At first sight this looks to have achieved the goal of simplification by making all contracts, including "special regime" contracts, subject to the same overall set of rules. Limited differences are provided for. For example, for utilities and defence contracts, greater flexibility is offered around the duration of "closed frameworks". Utilities will also have some limited differences in how dynamic markets are to work and defence contracts will enjoy a greater flexibility to amend contracts as required by the sector. Concession contracts are broadly subject to the standard new regime, albeit that the sector specific features are provided for via the definition of "concession contract" and the specific rules around the valuation of concession contracts. Section 9 deals with the situation where a contract could be regarded as "mixed" – i.e., part "ordinary" public contract and part "special regime" contract and sets out the factors that

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		should be considered when assessing whether a special regime contract should be treated as an "ordinary" public contract.
Part 2: Principles and Objectives (sections 10-13)		
Principles	EC Treaty Principles as set out in our procurement regulations: • transparency • equal treatment • non-discrimination • proportionality At present there is little guidance in the PCR 2015 as to how to apply these and interpretation is guided by case law. Strategic procurement policy is currently communicated via ad hoc Procurement Policy Notes.	Section 11 sets out the "Procurement Objectives" • delivering value for money • maximising public benefit • sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions • acting, and being seen to act, with integrity There remains no reference to "proportionality" as an objective, although many individual sections of the Bill do require an authority to ensure discretion and flexibility are exercised in a manner proportionate to the nature, cost and complexity of the contract. The section sets out an express requirement to treat suppliers the same unless a difference between them justifies different treatment (which must not put one supplier at an unfair advantage). It also confirms that when applying the principles to a procurement, the phrase "a procurement" refers to ALL steps involved in both procuring *and managing* the contract – thus covering all steps through to contract exit.
National Procurement Policy Statement	The National Procurement Policy Statement (NPPS) was published in June 2021 in PPN 05/21 but not incorporated into PCR 2015. This is a statutory statement summarising the government's strategic procurement policy objectives (local objectives may also be considered).	Section 12 covers the National Procurement Policy Statement (NPPS) and states that a contracting authority must "have regard" to the NPPS that is current from time to time. This duty to have regard to the NPPS does not apply where awarding contracts under a framework or dynamic market. Private utilities are not required to have regard to the NPPS. The Bill does not expand on what "have regard to" means in this context, although "have regard" duties will of course be familiar to public bodies in other areas of law (e.g., the public sector equality duty). The Bill puts the NPPS onto a statutory footing, which raises the question around whether this may mean we start to see procurement challenges based on a breach of a statutory duty to have regard to the NPPS.

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Part 3 – Award of public contracts and procedures (sections 14-61)		
Chapter 1 – Preliminary Steps (sections 14-17)		
Pre-market engagement	Pre-market engagement is permitted by Regulation 40 PCR 2015 although no express notice exists to cover this.	Sections 14 to 16 introduce a couple of new notices - (1) Planned Procurement Notices and (2) Preliminary Market Engagement Notices. A planned procurement notice will operate much as a Prior Information Notice does currently – to alert the market to procurement coming up and to potentially commence a procurement in "qualifying" circumstances. A preliminary market engagement notice is published to communicate to suppliers that the authority intends to carry out a market engagement exercise. We have not yet seen the standard forms for these notices and therefore it is not yet known how much detail they will require; we note that section 86 of the Bill states that further regulations will be issued around the content of notices. Note that there appears to be no *mandatory* requirement to publish these notices – the phrase "may publish" is used.
Chapter 2 – Competitive Award (sections 18-39)		
MEAT to MAT	Currently, the contract must be awarded to the Most Economically Advantageous Tender (MEAT). The authority can apply quality/price weightings and may award on the basis of price alone, if desired/appropriate. Quality may be assessed and weighted heavily if desired. However, the overall emphasis is economic – to award the contract to the tender that represents the best value for money to the authority.	Section 18(1) sets out the core obligation to award a contract to the supplier that submits the Most Advantageous Tender and confirms that this is the tender that best satisfies the award criteria in accordance with the published assessment methodology and weightings. The new regime thus will allow contracts to be awarded to the Most Advantageous Tender, widening the possibility of award to contracts that best further general procurement policies, including social value. This flexibility is set within a general requirement to set criteria in a way which is proportionate to the contract, as mentioned above.

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Competitive Tendering Procedures	Currently, there are six procedures: • open • restricted • competitive with negotiation • competitive dialogue • innovation partnership • negotiated without notice	Section 19 creates one concept of a "competitive tendering procedure" which may be either: • a single-stage open procedure; or • any other competitive procedure that the authority considers appropriate (introducing freedom to design a procedure). This may contain deselection phases and in, a new flexibility, may provide for the refinement of award criteria in accordance with the Bill. These non-open procedures are referred to as "multi-staged" procedures. This represents a significant change to current procurement procedures and will allow greater flexibility to design more bespoke procedures within a broad framework. Whatever procedure is adopted, it must **be proportionate to the nature, complexity, and cost of the contract** (section 19(3)). The government intends to issue guidance and template documents which are intended to be flexible enough to cater for a wide range of requirements.
Conditions of Participation (Selection Criteria)	At present selection criteria are set out in the CCS SQ, to assess economic and financial standing and technical and professional ability. There is some discretion to choose project-specific questions, but these must fall within Regulation 60(9) on means of proof.	Section 21 deals with what we currently refer to as "selection criteria" – and what are referred to in the Bill as "conditions of participation". These conditions are aimed at ensuring suppliers have the legal and financial capacity and the technical ability to perform the contract. Section 21(4) gives the authority to discretion to set thee conditions, but these must be proportionate to the cost, nature and complexity of the contract. Note that "economic and financial standing" becomes "legal and financial capacity", while "technical and professional ability" becomes "technical ability". Section 21(3) prohibits any condition of participation that requires a supplier to have been awarded a particular contract previously, or to have particular qualifications without accepting equivalents, or that breaks the rules on technical specifications in section 24. It is not yet clear whether there is an intention to continue with the CCS standard form selection questionnaire – this is not mentioned in this draft of the Bill nor the explanatory notes.
Award criteria – link to subject matter of the contract	Award criteria must be "linked to the subject matter of the contract" - which limits their suitability for use to promote general procurement policy, for example.	The requirement that the award criteria be linked to the subject matter of the contract is retained generally. Section 22(5) makes it clear that, as now, staff experience and qualifications are linked to the subject matter where this makes a material difference to the quality of provision under the contract.

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		The Response to the Green Paper trailed the idea that the government could be given the power by statutory instrument to allow this link to be "broken" in certain key policy areas (for example, the "net zero" climate change target). It is not clear that this draft of the Bill expressly takes any powers to "break the link" in certain key policy areas e.g., Net Zero, but we may see this in a later draft.
Award Criteria – most advantageous tender from whose point of view?	At present, the evaluation is to be conducted to establish the most economically advantageous tender from the point of view of the authority.	The Response to the Green Paper suggested that this requirement could be removed, allowing (albeit within a clear framework) the authority to conduct the evaluation from the perspective of others e.g., service users. Section 22(6) makes it clear that, for light touch contracts, the views and potentially different needs of service end-users may be taken as being a proper part of the "subject matter of the contract". However, at present, this seems to be the maximum extent of change in this area, and at present the Bill does not appear to provide for this flexibility to apply outside of the light touch context.
Refinement of award criteria	Once published in the contract notice and procurement documents, the award criteria may not be amended without attracting risk.	Section 23 introduces a useful flexibility to refine award criteria and relative weightings during a procurement - provided that: • it is not an open procedure; • the ITT document has not yet been issued; and • there are no suppliers who have been excluded from the process who would have been able to progress had the refinement been in place at the time of their exclusion. The procurement documents must have reserved the right to make this refinement, and the making of the refinement triggers an obligation to republish the tender notice/documents. A refinement is not permitted if, had it been made earlier, it would have allowed one or more suppliers (that did not progress beyond an earlier round or selection process) to have done so.
Excluding suppliers	Regulation 57 (and the CCS SQ) set out the mandatory and discretionary exclusion grounds.	New terminology is introduced - "excluded" suppliers (excluded on a mandatory ground) and "excludable" suppliers (excludable on a discretionary ground). The mandatory grounds are set out in full in Schedule 6 and the discretionary grounds in Schedule 7. A supplier can also be excluded/excludable if an **associated supplier** is itself excluded/excludable (although the supplier must be given the opportunity to replace the

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		offending supplier) – see section 26(3). A similar regime applies in relation to sub-contractors (see section 28). In addition to the mandatory and discretionary grounds set out in schedules 6 and 7 there are extra sections permitting exclusions for "improper behaviour" (section 30) or where the supplier is a threat to national security (section 29).
Modifying a procurement	The PCR 2015 are silent on making modifications to the terms of a procurement process that is ongoing.	Section 31 contains a helpful flexibility allowing a contracting authority to modify the terms of a procurement provided the tender deadline has not passed and consideration is given to amending timelines. Any modification of this sort triggers an obligation to re-publish the Tender Notice.
Dynamic market	Currently, Dynamic Purchasing Systems (DPS) are suitable only for more common commodity-type contracts.	The new regime will expand DPS into a "dynamic market" – advertised via a "dynamic market notice" with the intention that dynamic markets could be used for more sophisticated requirements than presently. Sections 34-39 set out the basics for how a dynamic market is to be procured and operate and confirms that a fee may be charged (as a % of the value of an awarded contract). Until guidance is published it is difficult to comment on how it is intended to operate in practice. The Green Paper trailed the idea of a central register of dynamic markets although this does not appear to be mentioned in this draft of the Bill.
Chapter 3 – Direct Award (sections 40-43)		
Direct Award	Regulation 32 PCR 2015 sets out scenarios where a direct award without notice may be made, including where only one supplier is in fact capable of providing the requirement, and in situations of extreme urgency not attributable to the authority.	The concept of "limited tender" mentioned in the Green Paper has been dropped in the Bill and instead the concept "direct award" has been used. Section 40 covers "direct award in special cases" and requires publication of a transparency notice. Schedule 5 to the Act sets out a list of situations where a direct award may be made. Some of these are new and others are based on Regulation 32 PCR 2015: • the contract is for production of a prototype or otherwise novel goods/services (NEW) • only a single supplier can supply the requirement • the procurement is for additional/repeated goods, services or works • the contract is for a commodity (NEW) • in the context of insolvency proceedings, the direct award to a particular supplier will obtain advantageous terms to the authority (NEW)

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		• the contract is for strictly necessary goods, services or works and cannot be awarded following a competitive tendering procedure for reasons of extreme and unavoidable urgency • the contract is for a light touch service which is a user choice service – intended to allow direct awards for e.g., personal social care (note no transparency notice is required under this ground) Section 41 also allows direct awards where regulations are made by the government permitting this in order to protect life. This takes the decision about whether to direct award in these cases out of the hands of contracting authorities. No transparency notices are required here. Section 42 allows a procurement to "switch to direct award" where no suitable tenders have been received and helpful sets out a definition of "suitable". This mirrors Regulation 32(2)(a) (although a new element under the Bill is that a transparency notice must be published in this situation).
Chapter 4 – Award under frameworks (sections 44-47)		
Open and closed frameworks	Currently, frameworks may last for a maximum of four years (unless exceptional circumstances justify a longer term). New suppliers may not join an established framework.	There will continue to be "closed" frameworks of a 4-year duration which operate as frameworks do currently. In addition, there is a new concept of an "Open" framework which will be of potentially longer duration and allow suppliers to join during the lifetime of the framework. Interestingly, it appears that open frameworks will work differently to how originally implied in the Green Paper. Section 47(1) defines an open framework as one that provides for the award of successive frameworks on essentially the same terms. There will be no four-year time limit for each framework that forms part of a series of open frameworks (see section 45(5), and explanatory note 282). However, section 47(2)(c) imposes a maximum time limit for the open period of 8 years from the day the first framework under the scheme is awarded to the day the final framework under the scheme expires. If the terms and conditions are to change, a new competitive tendering process must be held. This new flexibility is helpful as will make it easier to renew frameworks where there is no material change to the scope or terms/conditions, without having to run a full new tender process.

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Charges for use of frameworks	There is no express right to charge for using a framework in Regulation 33 PCR 2015	Section 44(7) states any fees are to be charged as a % of contract value **each time** a contract is awarded to the supplier (see explanatory note 276). No other conditions e.g., reinvestment in the public sector appear to be stipulated (as was trailed in the consultation), but of course the general procurement principles are in operation.
Central register of DPS/FW agreements	There is no central register currently, meaning that opportunities can often be duplicated across resources.	The Response to the consultation trailed the idea that a central register of all available DPS and FW agreements will be created, which should reduce duplication. It may usefully disclose charges imposed for use of certain frameworks, improving transparency and value for money. However, we can find no mention of this as yet in either the Bill nor the explanatory notes. The Cabinet Office has a workstream around systems and platforms and it is likely that we will find out more about how a central register might work in due course.
Chapter 5 – After award, standstill periods, and notices (sections 48-51)		
Debrief letters	All tenderers receive a debrief letter (formally called an Award Decision Notice), which commences the standstill period and provides information on the contract award and the relative advantages and characteristics of the winning tender.	The Response to the Green Paper suggested that authorities would be required to send an Award Notice, and to provide participants with certain evaluation documents for the winning bidder (redacted for commercial sensitivity). It also suggested that all bidders be provided with their own, unredacted, evaluation document(s) to enable them to compare the relative advantages of the winning bid against their own. The Bill seems to have taken a slightly different approach and is very broad brush on the detail of what information must be supplied. Section 48 requires contracting authorities to send a Contract Award Notice (note this is separate from the Award Notice) and include with this an "assessment summary". This means, in relation to an assessed tender, "information" about the contracting authority's assessment of the tender, and the most advantageous tender submitted (if different). This looks to be a little closer to the content of what we currently know as a standstill letter than the consultation response perhaps initially contemplated. However, the language around "relative advantages and characteristics" has of course now disappeared.
Chapter 6 – General provision about award and procedures (sections 52-61)		
Time limits	The current minimum time limits under the PCR 2015 are set out in our timescale tracker here.	Although there is flexibility on how procurement processes can be designed, section 52 states certain minimum time limits for the participation period (i.e., the selection stage) and the tendering period (i.e., the award stage). Broadly speaking these time limits look to be five days shorter than their current equivalents.

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		The minimum timescales for what we currently refer to as an accelerated restricted process appear to remain unchanged. There are no minimum timescales for light touch contracts but in setting time limits regard must be had to the general principles set out in section 52(1).
Abandoning a procurement	An authority may abandon a procurement without needing to publish an official notice about this. Regulation 55 sets out requirements to inform candidates and tenderers of the decision "as soon as possible".	Section 53 introduces a new requirement to publish a Procurement Termination Notice in circumstances where a procurement is abandoned.
Excluding suppliers/debarment	At present suppliers may be excluded under Regulation 57 PCR 2015 under a mandatory or discretionary exclusion ground. However, there is no obligation to notify any centralised authority of this. although central government bodies are under guidance around addressing poor past performance in references for large government contracts, there is no centrally managed debarment list with statutory force.	Section 56 requires a contracting authority which has excluded a supplier to give notice to an "appropriate authority" within 30 days of this exclusion. Under section 57, the appropriate authority may then decide to investigate whether the supplier is indeed an excluded supplier (mandatory exclusions) or an excludable supplier (discretionary exclusions); authorities and suppliers are required to cooperate (section 58). Section 59 then states that this report is then used by the Secretary of State to determine whether the supplier should be added to a Debarment List (notice and an explanation must be provided to the supplier). Section 60 states that a supplier may apply to be removed from the Debarment List - but the Secretary of State must only consider this if a material change in circumstances is evidenced. Section 61 contains a right of appeal by suppliers, but the appeal process is to be dealt with in secondary legislation and not in the Bill itself, meaning that, as yet, we do not have sight of the intended appeal route.
Past performance	Regulation 57(8)(g) provides a discretionary ground to exclude for serious poor performance where this has led to early termination/payment of damages or similar.	This ground is expanded to also include a situation where a supplier has "failed to remedy" a breach following the authority having exercised a contractual right to require it to do so. This represents a widening of the ground – poor performance is rarely dealt with via termination/a court order, but rather, contractually as between the parties. These latter measures may now come within scope of this ground.

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		Schedule 7(13)(3) sets out this discretionary ground for "failure to remedy". This applies where the supplier has not performed the contract to the authority's satisfaction and has failed to remedy upon being given the opportunity to do so. The challenge for suppliers here is that the ground gives the authority a good deal of discretion and does not carve out situations where the failure to remedy is outside the supplier's control. That said, the authority will need to act in accordance with the procurement objectives, which will include being proportionate and fair. Section 50 sets out the intention to create and publish a Contract Performance Register to make transparent supplier performance against key KPIs etc. Section 50 applies to contracts valued at over £2 million. Unless the contract is of a type that cannot be assessed by KPIs, at least three KPIs must be published, and then performance against these assessed and published at least annually in accordance with section 66. Where a performance failure is more serious, and has not been remedied, this must be assessed and published within 30 days of the relevant failure (note this does not apply to Light Touch regime contracts).
Supplier Registration System – simplified selection stage	There is no central registration system currently for the collation of data around selection criteria.	Explanatory note 27 confirms that a single digital platform is to be used for supplier registration although at this stage the Bill is silent on this and who will hold responsibility for it. The Response to the Green Paper suggested that the system will be a single point, electronic data storage system, owned by the Cabinet Office. Suppliers will register on the system and be responsible for the accuracy of the data they input. When a supplier enters a competition, their self-declaration (that none of the exclusion grounds apply and that they meet the conditions for participation) will be submitted to the contracting authority via the system. We expect (having seen recent proposed amendments to the Bill in the House of Lords) that the power to create this system will be reserved to secondary legislation.
Part 4 – Management of Public Contracts (sections 62-73)		
Implied Terms	At present terms around prompt payment of invoices are implied into public contracts via Regulation 113 and 113A PCR 2015	This continues in the Bill and is supported by a new obligation to publish a Payments Compliance Notice (see section 64).

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Contract modification	Public contracts may be modified in one of the six "safe harbour" situations set out in Regulation 72 PCR 2015.	The current safe harbours are retained at Schedule 8 and extended with: • a new safe harbour for modifications required due to the materialisation of a "known risk"; and • a new safe harbour in situations where section 41 would also apply to allow the contract to be awarded directly (due to urgency and the need to protect life). The old safe harbour for transfer to a new supplier on insolvency etc. is retained but interestingly there is now no requirement that the succeeding supplier meet the original selection criteria. Section 69(3) now clearly defines substantial modifications: • increase **or decrease** of the term by more than 10% of the maximum term provided for at award; and/or • changes overall nature or scope; and/or • materially changes the economic balance in favour of the supplier. A new concept of "convertible contract" is introduced – a contract that **will become** a public contract as a result of the modification – and it is clarified that the rules on modifications apply to these contracts.
Contract Change Notices	Currently the PCR 2015 require publication of contract modification notices in two of the six permitted safe harbours only.	Contract Change Notices will be required for all contract amendments, except where the amendment does not change the scope of the contract, and: • increases or decreases the value by less than 10% (goods and services)/15%(works), or • increases or decreases the initial contract term by less than 10% of the original contract term. Contract change notices will not be needed for Light Touch Regime contracts. Where it is required, the Contract Change Notice must be published BEFORE the change is made and under section 71 an authority may elect to hold a **voluntary** standstill period. If the change is over £2 million in value, this will be a "qualifying modification" and will require a copy of the modified contract to be published within 90 days of the date of the modification.
Terminating a public contract	At present Regulation 73 PCR 2015 implies a right to terminate	This continues via section 72. In addition, section 73 brings in a new obligation to publish a Contract Termination Notice where a public contract is terminated.

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	in certain circumstances into a public contract.	
Part 5 – Conflicts of Interest (sections 74-76)		
Duty to identify and mitigate, conflicts assessments	Regulation 21 PCR 2015 requires authorities to identify and mitigate conflicts of interest.	This continues in sections 74 to 76, with a new requirement at section 76 to prepare a formal conflicts assessment ahead of publication of the Tender Notice.
Part 6 – Below-threshold contracts (sections 77-80)		
Contract Notices, restriction on separate selection phase for under threshold contracts, de minimis values, implied terms, award notices	At present Part 4 of the PCR 2015 contains the "Contracts Finder" regime for the publication of information about under-threshold contracts, as well as a restriction on holding a separate selection stage for an under-threshold contract, and certain implied prompt payment terms.	These features appear to continue in the new regime. The de minimis thresholds are increased slightly to £12,000 (central government) and £30,000 (sub-central authorities). A new concept of a "below-threshold tender notice" is introduced, and it is not clear whether this will continue to be published to Contracts Finder or whether instead to FTS.
Part 7 – International Obligations (sections 81-83)		
Treaty state suppliers and international obligations	The UK is party to certain international agreements, under which certain UK contracting authorities are required to extend entitlements to access the UK procurement regime to the goods, services and suppliers of other states.	This Part gives effect to these obligations (and lists out at Schedule 9 the relevant international agreements). Secondary legislation will be used to update these provisions from time to time as needed.
Part 8 – Information and Notices (sections 84-88)		
Embedding of transparency	Transparency is a key principle in both the PCR 2015 and in	The range of notices required has been expanded requiring consideration and resourcing by authorities. Further guidance will be welcome on the content of each of the notices. Authorities

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	various procurement policy notes. There are regulatory requirements to publish various notices, but these are more limited currently than what is being proposed (see next column).	will also need to ensure that their e-tendering portals are ready to effect changes to the number and format of the notices in good time. Some of the names of notices have been simplified since they were first suggested in the Green Paper/response, e.g., Appropriate Tender Notice, is now simply a Tender Notice. Section 86 states that secondary legislation may be made governing the form and content of notices, and we expect to see further detail here in the future on what the shape and content of new notices is to look like. See our Procurement Phrasebook for the details here.
Open Data Contracting Standard (ODCS)	The ODCS enables disclosure of data and documents at all stages of the contracting process by defining a common data model. It is not yet a regulatory requirement for authorities to adopt it.	The consultation response suggested that adoption of the ODCS be mandatory, so that data across the public sector can be shared and analysed at contract and category level. No provisions appear to exist on this as yet in the Bill, although explanatory note 31 does note the problem of information being published in multiple locations and suggests that the Bill may try to address this. It is not clear whether adoption of the ODCS has been dropped for the moment and greater reliance placed on the new regime of publishing various new types of notice?
Part 9 – Remedies for breach of statutory duty (sections 89-95)		
Review system	At present a claim must be made in the High Court, which can be burdensome for both suppliers and authorities.	The government continues to seek routes to improve and speed up the system, perhaps via amendments to the Civil Procedure Rules or the Technology and Construction Court Guidance. One proposal is to appoint a specialist procurement law judge – working alongside court reform proposals. The difficulty will continue to be the high cost of litigation and the inability to access an effective review scheme without spending substantial sums in instructing lawyers and issuing proceedings.
Automatic suspension	At present the court will apply the long-standing "American Cyanamid" test - used in all cases where injunctive relief is sought - to assess whether the suspension should be maintained or lifted. The test is not procurement specific.	Section 91 empowers the court to make a variety of orders (for example, lifting the auto-suspension, or extending it, suspending the procurement, suspending contract performance, suspending the making of a contract modification). Section 91 (2) sets out a new test for the court to apply in deciding how to exercise these powers: - have regard to the public interest; - have regard to the interest of suppliers (including whether damages are an adequate remedy for the supplier); and

	Position under current regime	Current position in the Procurement Bill (n.b. subject to change as the Bill evolves)
		- any other appropriate matters. The Green Paper suggested that automatic suspension would be made unavailable in cases of extreme urgency/crisis although it is not clear if this has translated into the Bill as yet.
Disclosure of evaluation documents	At present, there is no express requirement to share evaluation documentation with the other tenderers/the market.	The consultation response trailed a requirement that tenderers be provided with selected evaluation documents for the winning bidder (redacted for commercial sensitivity). Also, that all bidders would be provided with their own, unredacted, evaluation document(s) to enable them to compare the relative advantages of the winning bid against their own. It is not clear that this idea has translated into the draft Bill. Section 48 requires tenderers to be sent an "assessment summary" together with the Contract Award Notice. However, this is simply defined as meaning "information about the contracting authority's assessment" of the recipient's tender and the winning tender. It is not clear whether this means the full evaluation documents as was previously trailed in the Green Paper. See further our comments on Debrief Letters above. There is useful confirmation that there is no need to apply a standstill period to direct award nor to Light Touch regime contracts. The standstill period is changed to 8 working days (rather than 10 calendar days ending on a working day).
Part 10 - Procurement Oversight (sections 96-98)		
Creation of a Procurement Review Unit (PRU)	The Public Procurement Review Service (PPRS) can currently deal with informal complaints by tenderers, publish findings and issue guidance to authorities, but has no formal enforcement powers.	The response to the consultation trailed a new Procurement Review Unit to sit above the PPRS. Its role would be to focus on non-compliance and systemic and institutional challenges, building on work done by PPRS (which will continue to exist as a subset of the PRU). It would have a power to make recommendations and an authority will have a duty to implement these. The PRU would have an independent panel of procurement experts empowered to investigate potential procurement challenges and provide advice. The government will also use the PRU to monitor how the new legislation is working in practice. The PRU is likely to be helpful as a source of expertise and guidance. There will be limitations on its impact, particularly around resourcing and lack of enforcement powers – it will not be analogous to, say, the Employment Tribunal. While the PRU may make recommendations that an authority will have a duty to implement, it will not be able to adjudicate on the lawfulness of a particular procurement – this will require, as now, a High Court challenge.

	Position under current regime	Current position in the Procurement Bill (n.b. subject to change as the Bill evolves)
		Now that the draft Bill is published, we can see that sections 96-98 implement these ideas and cover oversight of procurement. The PRU is not expressly named but an "appropriate authority" is empowered to investigate an authority's compliance. As part of this, it can order an authority to provide documents and to co-operate. Following an investigation, if it is considered that there is a breach or potential breach, the appropriate authority may issue a "section 97 recommendation" setting out what action should be taken to remedy the situation. The authority concerned must report on progress, and the appropriate authority may issue general guidance and lessons learned to contracting authorities at large. Government departments and utilities may not be investigated under sections 96-98. The appropriate authority does not have the power to adjudicate on the lawfulness or otherwise of a particular procurement and may only make recommendations, not orders.

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