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WhitePaper

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# What practically should Scotland's procurers be doing to prepare for reform?

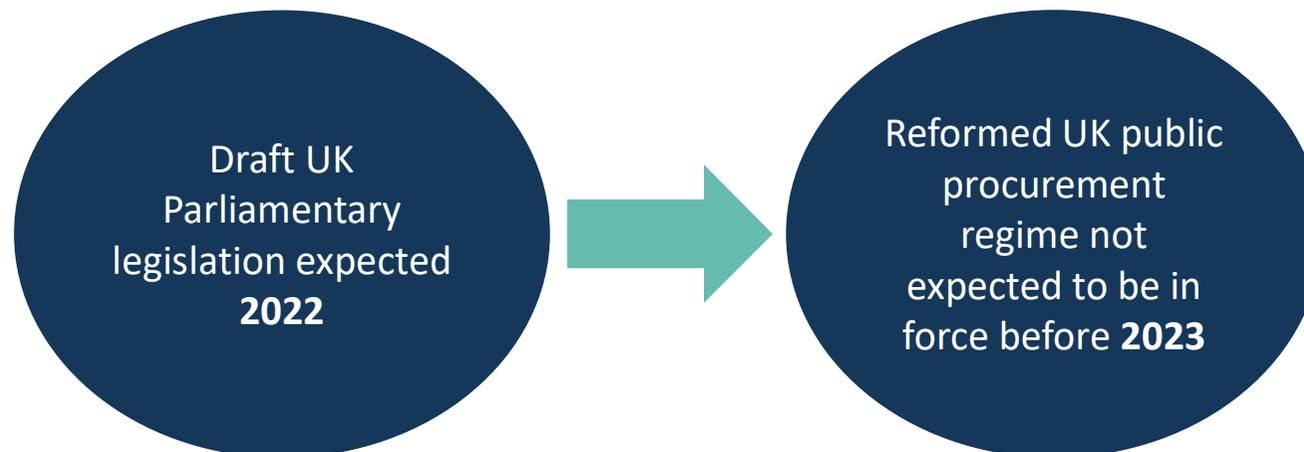
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## Introduction & Scope

*What practically should Scotland's procurers be doing to prepare for reform?*

UK Cabinet Office Green Paper (15<sup>th</sup> December 2020):

Transforming public procurement



# UK Public Procurement Law: Current Position

- As of 1 January 2021, the UK is no longer part of the EU, but:
  - Current EU derived procurement regulations continue to apply until amended/revoked
  - Previous EU case law precedents apply in UK law until overturned
  - The new regime in place since 1 January 2021 is to proceed under the General Procurement Agreement (GPA) founded on principles of non-discrimination, transparency and impartiality
  - Other trade agreements with additional international commitments may relate to public procurement
- No change to procurement law for Scotland and the rest of the UK as yet



# GP Reform Area 1: National Procurement Policy

## *Interdependent principles for the new legislation:*

### Public Good

Procurement should support the delivery of strategic national priorities including economic, social, ethical, environmental & public safety.

[updated proposal = **Public Benefit**]

### Value for Money

Procurement should enable the optimal whole-life blend of economy, efficiency and effectiveness that achieves the intended outcome of the business case.

### Transparency

Openness that underpins accountability for public money, anticorruption, and the effectiveness of procurements.

### Integrity

Good management, prevention of misconduct, and control in order to prevent fraud and corruption.

### Fair Treatment of Suppliers

Decision-making by contracting authorities should be impartial and without conflict of interest.

### Non-discrimination

Decision-making by contracting authorities should not be discriminatory.

# GP Reform Area 1: National Procurement Policy

***Contracting authorities to have regard to national priorities of strategic importance in public procurement – National Procurement Policy Statement\****

UK Government published a National Procurement Policy Statement in June 2021:

**[National Procurement Policy Statement](#)**

NPPS does not apply to Scotland's procurers. See Scottish Government Procurement strategy: April 2021 to March 2023

*\*The first NPPS was published in June 2021*

## GP Reform Area 2: Simpler Regulatory Framework

Proposal to **remove separate procurement regulations** covering different areas – consolidating different sets of regulations into one instrument

## GP Reform Area 3: Using the Right Procedures

Proposal to **overhaul the complex and inflexible procurement procedures** and replace them with three procedures:

A new flexible procedure that gives buyers freedom to negotiate and innovate to get the best from the private, charity and social enterprise sectors.

An open procedure that buyers can use for simpler, 'off the shelf' competitions.

A limited tendering procedure that buyers can use in certain circumstances, such as crisis or extreme urgency.

## GP Reform Area 4: Awarding the Right Contract to the Right Supplier

Proposal to retain the requirement for evaluation of tenders to be made solely from the point of view of the contracting authority – amended so that a **wider point of view can be taken** exceptionally within a clear framework

Reform of the procurement regime to allow past performance to be taken into account more easily in evaluation.

Suppliers likely to resist this.

*updated proposal:*  
New Exclusions Framework to be developed

## GP Reform Area 5: Using the Best Commercial Contracting Tools

New Dynamic Purchasing System (DPS+) to be available for all types of procurement

New options in framework agreements including 'open framework' with multiple joining points and a maximum term of 8 years

Proposal to allow award criteria not related to the subject matter of the contract

## GP Reform Area 6: Ensuring Open & Transparent Contracting

Proposal to embed transparency by default throughout the commercial lifecycle

Implementing the Open Contracting Data Standard so that data across the public sector can be shared and analysed at contract and category level.

The Green Paper proposes establishing a single digital platform for supplier registration that ensures businesses only have to submit their data once to qualify for any public sector procurement.

Scotland's procurers should note this direction of travel and as and when proposals are produced, be aware of the impact on procurement data to be collected and shared.

# GP Reform Area 7: Fair & Fast Challenges to Procurement Decisions

- Reform of Court processes:
  - using a tribunal system (low value claims, issues on ongoing procurements) *not in updated proposals*
  - refocusing redress for suppliers onto pre-contractual measures preserving their opportunity to participate *not in updated proposals*
  - capping the level of damages available to aggrieved bidders *not in updated proposals*
  - removing automatic suspension on the award of contracts let competitively in crisis or extreme urgency situations
  - removing the mandated requirement to provide an individual debrief



## GP Reform Area 8: Effective Contract Management

Proposal to tackle payment delays in public sector supply chains and give small businesses, charities and social enterprises in the supply chain better access to expose payment delays.

Also:

Allowing more flexibility to amend contracts in times of crisis

A new requirement to publish contract amendment notices

Capping the profit paid on contract extensions where the incumbent raises a legal challenge

# Preparing for the Reforms

- Scotland and Procurement Policy
- Public Law Procurement challenges
- *R (Good Law Project Ltd) v Secretary of State for Health and Social Care [2021] EWHC 346 (Admin)*
- *R (Good Law Project) v Minister for the Cabinet Office [2021] EWHC 1569 (TCC)*
- Introducing ‘interdependent principles’ into procurements including the public good
- Increased litigation risk in relation to procurements where non-compliance with policy
- Be careful over policy compliance in procurements



# Preparing for the Reforms

- Procurement Policy Drivers

*‘Procurement reforms providing for a simplification and flexibilisation of the procedural regime set by the current rules’.*

[EU procurement reforms of 2014, under Directives 2014/17/EC and Directives 2014/17/EC]

- Consolidation of legislation and flexibility
- Scottish procurers should remain engaged as the legislative picture emerges
- Understand the Scottish National Procurement Policy Framework as it may evolve
- Consider for example value for money and complex and potentially higher cost procurements aiming to increase the public good.
- Scottish procurers should consider their own policy aims and priorities – and review policies
- Timing – worth doing so sooner rather than later



# Contact



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