



# UK Procurement Law Bill - Latest Update

21<sup>st</sup> June 2022

# SPEAKER

---



Professor Sue  
Arrowsmith QC (hon),  
Professor Emerita at the  
University of  
Nottingham

# AGENDA

- Welcome and Introductions, *Jennifer Smith, Head of Training and Consultancy, Achilles*
- UK Procurement Law Bill – Latest Update, *Prof. Sue Arrowsmith, Professor Emerita at the University of Nottingham*



University of  
**Nottingham**

UK | CHINA | MALAYSIA

A large, high-resolution image of the Earth as seen from space, showing the Western Hemisphere with North and South America. The image is set against a dark, starry background. A white rectangular border is superimposed over the center of the image, containing the title and speaker information.

# **The Procurement Bill – latest update**

Professor Sue Arrowsmith QC  
(Hon)

Professor Emerita

[sue.arrowsmith@nottingham.ac.uk](mailto:sue.arrowsmith@nottingham.ac.uk)



# Outline

## 1. General

- Sources of information
- Timescales and process
  - Including regulations and guidance
- Training
- Devolution issues

## 2. What's new?

- Some provisions that are new or different *since the Response to the Green Paper*



# Sources of information

<https://www.gov.uk/government/collections/transforming-public-procurement>

Collected information from Government as the process unfolds

<https://bills.parliament.uk/bills/3159>

Information on progress through Parliament



# Timescales and process





# Timescales and process

## Government amendments

- Typos
- Amendments where Bill does not reflect intended policy
  - Teckal (in-house) exemption?
  - Dynamic markets?







# Timescales and process

## Secondary legislation (Regs)

- Drafted in parallel with process of Bill through Parliament
  - So ready for adoption as soon as Bill received royal assent
- Will include:
  - Forms of notices
  - Other matters listed in Bill: see memorandum on delegated powers
- Don't expect to see everything that is "missing" from the Bill!
  - E.g. lists of permitted evidence; rules on abnormally low tenders?



# Timescales and process

## Guidance

- Available as soon as feasible
- Likely to include:
  - Explanation of the differences from current PCRs etc
  - Explanation of which rules are intended to stay the same despite new terminology
  - Templates of procedures suitable for various types of contract





# Training

Information drops  
(non-specialists)

Self-guided e-  
learning: 10 hours?  
(skilled practitioners)

Virtual instructor-led  
deep dives – inter-  
active in small groups  
: 3 days?  
(leaders of strategy)

Communities of  
practice



# Training

- Not intended to replace private training but operate alongside







# Executive postgraduate programme in public procurement law (LLM/Diploma/Cert), University of Nottingham

- Designed for those with and without a legal background
- Part time
  - Fits with professional commitments
- Distance learning (with optional intensive teaching days)

Email:

[law.execcpp@nottingham.ac.uk](mailto:law.execcpp@nottingham.ac.uk)





# Devolution issues

- Bill applies to England, Wales and Northern Ireland
  - Each will make own supplementary rules
  - Also some derogations from Bill for Wales and Northern Ireland
- Scotland will have separate legislation





# What's new? Objectives and principles

## EU DIRECTIVES

Main objective: to open up markets to cross-border competition.  
Tendering to prevent discrimination.

## CURRENT DOMESTIC REGULATIONS

Same objectives; source of confusion

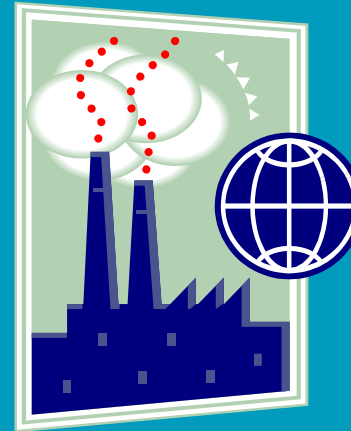






# Objectives of the Procurement Bill

- Explicit change of focus
  - Still have *one* objective of opening markets, as required by trade agreements, such as the WTO's Government Procurement Agreement (GPA)
  - But now also aim to give effect to “domestic” objectives
    - Ie not limited solely to what needed to implement GPA







# What's new? Objectives and principles

| “STATUTORY OBJECTIVES”   | “PRINCIPLES”  |
|--|---|
| <ul style="list-style-type: none"><li>Contracting authorities <i>must have regard to</i> the importance of these (clause 11)</li><li>Will court consider them in interpreting the rules, as underlying objectives of the regulatory rules?</li></ul> | <ul style="list-style-type: none"><li>Rules to be applied without a margin of discretion (or with more limited discretion)</li></ul>          |
| Delivering value for money   | Non-discrimination against suppliers covered by international Treaties (clause 82) – broadly meaning no discrimination on nationality grounds |
| Maximising public benefit  | Must treat suppliers the same unless difference justifies different treatment (clause 11(2)-(3))  |
| 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  |   |
| Note: competition NOT included (although mentioned in the Response)  | Note: transparency not an explicit rule in this category – dealt with by specific obligations and the statutory objective                     |



# What's new? Objectives and principles

- Need to document that have had due regard to the stated objectives





# What's new? Objectives and principles

As well as the kind of tendering rules found in current regs (and required by the GPA), Bill includes *additional* legal rules dealing with “domestic” objectives

- Additional aspects of procurement policy will in future be dealt with by legal rules rather than just guidance

e.g.

- New transparency requirements, such as advance notices of “direct awards”
- Obligation to have regard to National Procurement Policy Statement
- Mandatory exclusions to support domestic policies on modern slavery, corruption etc
- Others in due course?



# What's new? Terminology

## My proposal

- Use familiar (EU) concepts, rules and terminology *where appropriate* i.e.
  - Where no change intended; *and*
  - Where no specific problem with the current terminology (e.g. misleading)

## Why?

- Familiarity
- Certainty in the light of existing case law and literature
- Commonality with regimes of trading partners – benefits both parties



# What's new? Terminology

## Approach adopted

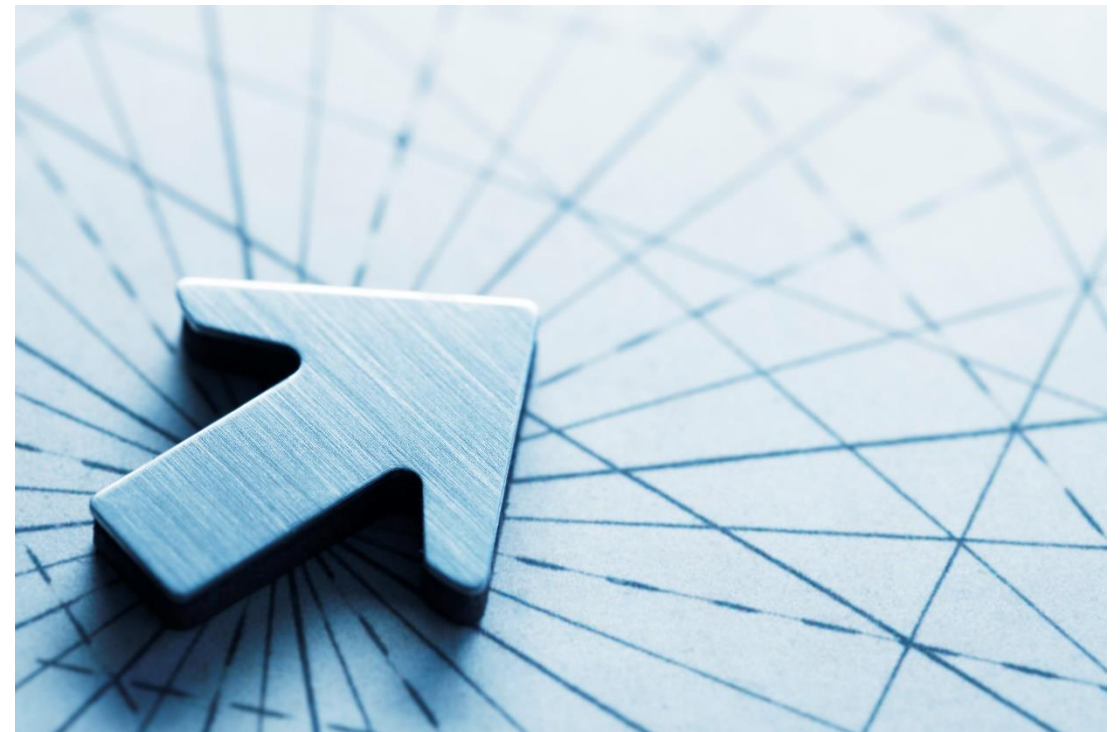
- “Bespoke” terminology
  - Even when the rules/concepts are intended to be the same?
- Reasons?
  - Political
  - To avoid being tied to ECJ interpretations
- Government-wide policy





# What's new? Terminology

- Invites reopening of settled issues, even when no difference intended?
- But Government intends to mitigate this problem with guidance explaining where changes *are* intended



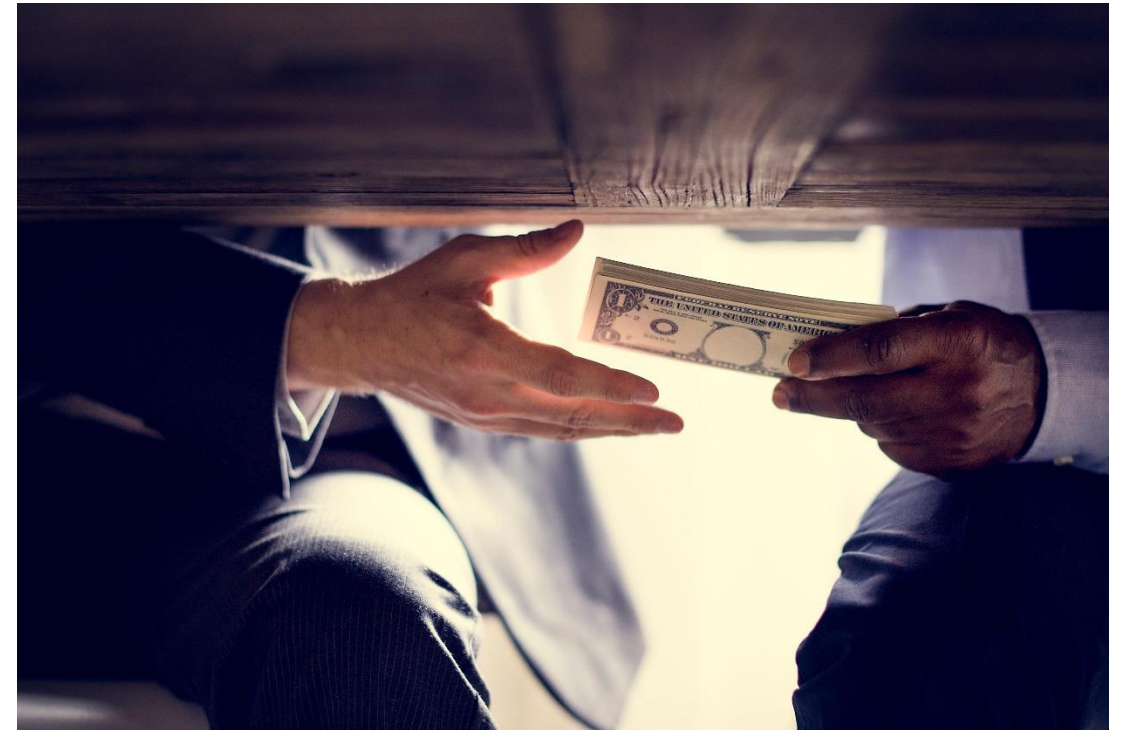




# What's new? Terminology

## Approach adopted

- Confusing/misleading terms
  - Direct awards
    - No clear meaning
    - Tends to suggest going to single supplier, contrary to policy expressed in Green Paper
    - Why not use Green Paper/GPA term “limited tendering”?





# What's new? Terminology

## Approach adopted

- Use of terms in a different way from old/other regimes e.g.
  - Contracting authority: used in Bill to refer to *all* regulated entities, including public undertakings etc
  - Also “core” definition formulated differently in Bill (public functions)
    - May be amended to ensure full coverage, as required by GPA?
- Contract award notice
  - Used for what is currently the “standstill notice” rather than post-contract notice
- Open framework agreement (different from UNCITRAL)

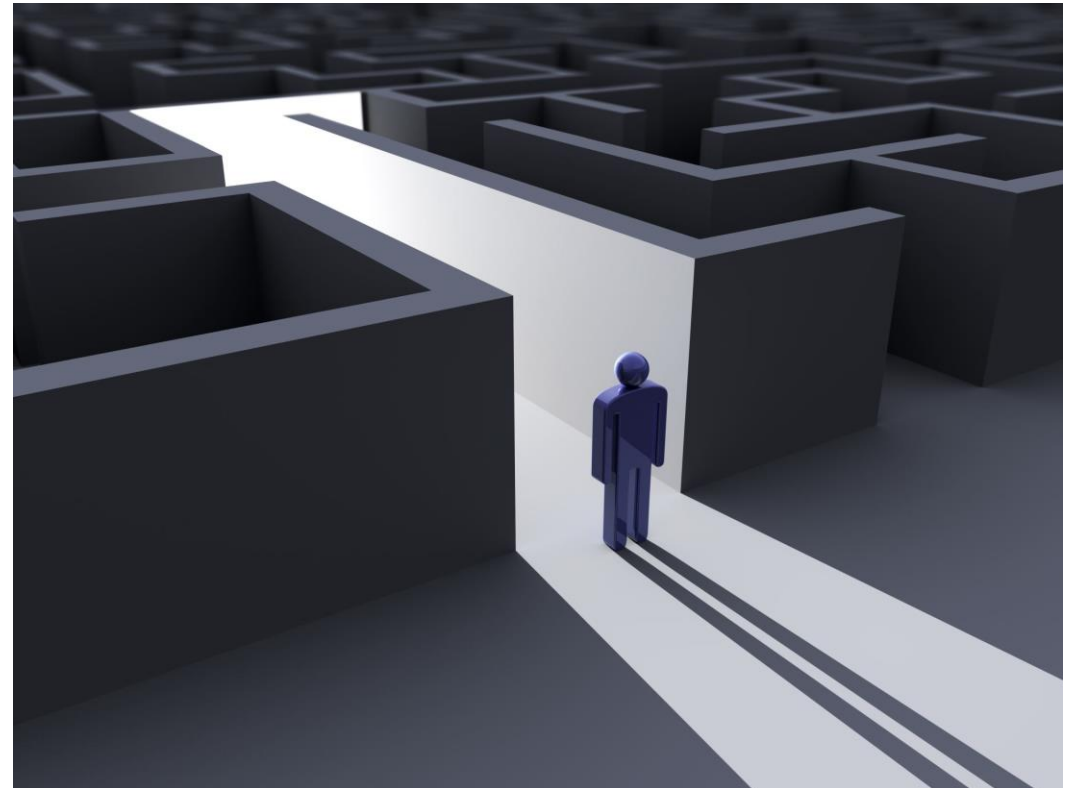




# What's new? Terminology

## Approach adopted

- Where same terms used in different way clear explanations needed in guidance





# What's new? Subjective language

## e.g. award criteria (cl 22(2))

- A contracting authority “must be satisfied that they” e.g.
  - Relate to the subject-matter of the contract
  - Are sufficiently clear, measurable and specific
  - Are a proportionate means of assessing tenders

= wider margin of commercial discretion?



# What's new? Choice of award procedures

## Available procedures (cl 19)

- Open procedure
- “Such other competitive tendering procedure as the contracting authority considers appropriate”
  - “competitive flexible procedure”?
  - “C-POOP”?
- Direct award
- In competitive procedure *must ensure* that the procedure is proportionate means of awarding contract having regard to nature, complexity and cost (clause 19(3))



# What's new? Award criteria

## Formulation of criteria (CI 22)



Limited to subject-matter of contract  
Exceptions?



“Clear, measurable and specific”





# What's new? Award criteria

## Formulation of criteria (CI 22)

- Must indicate relative importance by weighting, ranking or some other way
- Must set out “assessment methodology”
  - i.e. describe how tenders are to be assessed by reference to the award criteria, in particular whether failure to meet can disqualify
- Guidance needed
- Disclosure



# What's new? Correction of tenders after submission

- In what circumstances can defective tenders be accepted? e.g. where omit information or documents
- Only *required* to reject tender for breach of procedural requirements (including omissions) where the authority considers that ignoring it *would put the tenderer at an unfair advantage* (CI 18(3))
  - Discretion to reject where no such advantage?



# What's new? Standstill

## Standstill

- As previously proposed, there is a mandatory notice and standstill prior to direct awards (cl 49)
- Is for minimum 8 *working days*





# What's new? Standstill

## Standstill

- Exceptions
  - Urgency and protection of life etc
  - Framework agreements and dynamic markets – general exception
    - Why not based on size of contract?
  - Light touch contracts







# What's new? Standstill

## Standstill

- For major modifications of contracts of more than £2 million there is mandatory notice (cl 70), as proposed
- But for modifications standstill is *voluntary* (cl 71)





# What's new? Remedies

- Not much!
- Several points of detail





# What's new? Remedies

## Automatic suspension

- *Automatic* suspension of conclusion of the contract will apply only when challenge brought and notified to CA *before the end of the standstill period* (cl 90(3))
  - Much earlier than expiry of time limit for challenge



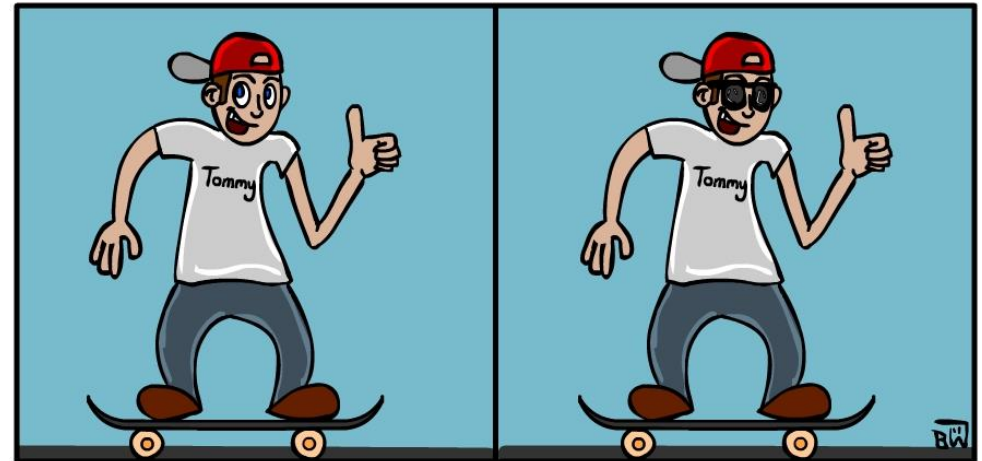


# What's new? Remedies

## Test for suspension

- In theory replaces current test with “procurement specific” test listing number of factors for court to consider:
  - Public interest including in:
    - upholding the law
    - avoiding delay
  - Interests of suppliers, including whether damages adequate remedy for the claimant
  - Any other matters the court considers appropriate

See if you can  
SPOT THE DIFFERENCE



Answer: Tommy on the right  
hates Muslims



# What's new?

## Reminder

- Have covered only developments *since* the Response to the Green Paper – and only (very) selectively





University of  
**Nottingham**

UK | CHINA | MALAYSIA

**Thank you!**

# POLLS

---

“

Register your interest to learn more about:

- Regulated Procurement Academy
- Reform of Public Procurement Law training course

”

# THANK YOU

BECAUSE INSIGHT BEATS HINDSIGHT  
[www.achilles.com](http://www.achilles.com)