

HOUSE OF LORDS

Delegated Powers and Regulatory Reform  
Committee

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21st Report of Session 2022–23

**Procurement Bill:  
Government Response**

**National Security Bill:  
Government Response**

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### *The Delegated Powers and Regulatory Reform Committee*

The Committee is appointed by the House of Lords each session and has the following terms of reference:

- (i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;
- (ii) To report on documents and draft orders laid before Parliament under or by virtue of:
  - (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
  - (b) section 7(2) or section 19 of the Localism Act 2011, or
  - (c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

- (iii) To report on documents and draft orders laid before Parliament under or by virtue of:
  - (a) section 85 of the Northern Ireland Act 1998,
  - (b) section 17 of the Local Government Act 1999,
  - (c) section 9 of the Local Government Act 2000,
  - (d) section 98 of the Local Government Act 2003, or
  - (e) section 102 of the Local Transport Act 2008.

### *Membership*

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### *Contacts for the Delegated Powers and Regulatory Reform Committee*

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103. The Committee's email address is [hldelgatedpowers@parliament.uk](mailto:hldelgatedpowers@parliament.uk).

### *Historical Note*

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

# Twenty First Report

## **PROCUREMENT BILL: GOVERNMENT RESPONSE**

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1. We considered this Bill in our 3rd Report of this Session.<sup>1</sup> The Government have responded by way of a letter from Baroness Neville-Rolfe DBE CMG, Minister of State at the Cabinet Office. The response is printed at Appendix 1.

## **NATIONAL SECURITY BILL: GOVERNMENT RESPONSE**

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2. We considered this Bill in our 20th Report of this Session.<sup>2</sup> The Government have responded by way of a letter from Lord Sharpe of Epsom OBE, Parliamentary Under-Secretary of State at the Home Office. The response is printed at Appendix 2.

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1 *3rd Report*, Session 2022–23, HL Paper 15.

2 *20th Report*, Session 2022–23, HL Paper 113.

## APPENDIX 1: PROCUREMENT BILL: GOVERNMENT RESPONSE

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### Letter from Baroness Neville-Rolfe DBE CMG, Minister of State at the Cabinet Office, to the Rt Hon. the Lord McLoughlin CH, Chair of the Delegated Powers and Regulatory Reform Committee

Thank you for your Committee's report following its review of the provisions in the Procurement Bill. As the new minister responsible for the Procurement Bill, I welcome both this report and the thought provoking debate on it in Grand Committee. I am fully seized of the need to ensure that the delegated powers in the bill are appropriate, and subject to the appropriate level of Parliamentary scrutiny. The Government has carefully considered the Committee's recommendations and is in agreement with the majority of the findings.

#### *Financial thresholds (paragraphs 17)*

##### *Committee view*

The Committee objected to using the negative procedure to amend thresholds in six clauses (51, 65,70,78,79 and 84 of the Bill as introduced) except where the amendment is not in line with inflation or is a reduction to that threshold. The Committee asserted that any increase to a threshold which would reduce transparency in procurement should merit the fuller scrutiny afforded by the affirmative procedure.

##### *Government Response*

We accept the comments from the DPRRC and the concerns around proper scrutiny of any reduction in transparency. We are tabling amendments at Report stage to amend the Procurement Bill on most of these clauses so that the affirmative procedure is used at every use rather than only where regulations would make an above-inflation increase to thresholds. Taking this approach goes further than the request in the report and I trust addresses the concerns raised. In addition, we consider that the rationale applies equally to the power to amend thresholds in clause 49 of the Bill (as amended at Committee) and as such will amend that power to make it subject to the affirmative procedure as well. The only aspect on which we differ from the DPRRC's recommendation is in Clause 78(3) (of the Bill as introduced - now clause 80(3)), which governs the value at which requirements on contracts below the GPA threshold takes effect. As the GPA threshold will be set using the negative resolution procedure and this power is linked to that threshold, I believe that the negative resolution procedure is appropriate here.

#### *Transparency powers (paragraph 26)*

##### *Committee view*

The Committee recommended placing more detail about transparency obligations on the face of the Bill and noted that the Government had not provided illustrative examples in order to be able to scrutinise clause 86 (now clause 88).

##### *Government Response*

We note the comments from the DPRRC about clause 86. We acknowledge that the contents of the notices in the Bill will be key to establishing the level of transparency provided by the new regime and the Committee rightly identifies the level of aspiration that the Government has in relation to this issue. However, we

respectfully disagree with the Committee's view that this means that the detail of the regime should be set out on the face of the Bill.

The Bill already sets out clearly the legislative framework for transparency. It establishes the notices that will be required at different stages of a procurement, including the obligation to publish triggers for publication and implications of both publication and failure to publish. The Committee may wish to note that the Bill also creates a number of new areas in which contracting authorities will be required to publish information, thereby increasing transparency. In addition, we have made a number of public commitments to greater transparency, not least on the floor of the House, and this is rightly acknowledged in the report. However, the Government remains of the view that it is appropriate for the detail of these notices to be set out in regulations.

It is commonplace for Acts of Parliament to make provision for the detail of matters to be included in notices to be set out in secondary legislation and often in Regulations subject to the negative resolution procedure. Acknowledging the relative importance of the content of the transparency notices, we have made provision for those to be subject to the affirmative resolution procedure to allow Parliament greater debate on this subject. This Bill is therefore consistent with, or goes beyond, other Acts of Parliament.

The details required to be set out in notices will be subject to change over time - for example to reflect changes in technology, how to calculate certain data, updates to international data standards we publish to, and amendments we may need to make to improve usability of the system or to track new metrics. The flexibility is also necessary to ensure that the regime can keep pace with evolving commercial practice so that the information being placed in the public domain remains useful and its publication therefore justifies the use of contracting authority time in sourcing and publishing it.

As set out in the Delegated Powers Memorandum, this does not give the Government an entirely free hand in how to exercise the powers. For example, the UK's international obligations require certain minimum levels of information to be set out in these notices. Whilst we note the Committee's views on this point, putting more information on the face of the Bill would mean that users of the regime would need to look in multiple places to understand what they need to publish (or can expect to see published) and that is not helpful to users of a new (and very technical) regime. We therefore remain of the view that it would be preferable to users of the new regime just to have to look in one place for the transparency obligations and that there would not be a significant increase in the certainty of the regime if some matters (for example relating to compliance with international obligations) were placed on the face of the Bill.

Whilst we are not at this time able to provide the Committee with draft Regulations, in order to provide greater clarity on the contents of the notices we have included an Annex to this letter which details indicative types of data we expect to be required under the key transparency notices named in the bill.

#### *Disapplication of duty in section 17 of the Local Government Act (paragraph 34)*

##### *Committee view*

The view of the Committee is that the Government has failed to adequately explain why Ministers are to be given such a broad power to override the existing statutory bar on public authorities taking into account the matters specified in section 17

of the 1988 Act in the exercise of their procurement functions. Ministers should explain the Government's proposed use of the power and justify it otherwise the breadth of the power should be narrowed.

*Government Response*

This power is required to enable Ministers to make regulations to disapply section 17 of the Local Government Act 1988 on a case by case basis, to ensure that authorities subject to the 1988 Act are not disadvantaged in respect of procurement policies that are otherwise beneficial to all contracting authorities.

The Committee may wish to be aware that a similar such power already exists in section 19 of the Local Government Act 1999, but is not broad enough to deliver the required disapplication across the whole of the Procurement Bill, so a bespoke power is required. In particular an Order made under LGA 1999 altering the effect of section 17 of the LGA 1988 would not apply to all the authorities that are subject to section 17, and would therefore be insufficient to disapply section 17 in respect all authorities when necessary.

*Light Touch Contracts and Reserving contracts to public service mutuals (paragraph 38 and 42)*

*Committee view*

The Committee views the reasons given for leaving to regulations the question of which contracts should be subject to the "light touch" regulatory regime (and which contracts can be reserved for public sector mutuals) as inadequate. Unless the Government can fully justify doing otherwise, the Bill should include criteria for determining which contracts should be subject to these regimes.

*Government Response*

We believe that these powers are indeed justified. They are so that we can set out what is classified as a Light Touch Contract and as a contract which may be reserved for public service mutuals (these are a subset of Light Touch Contracts). It is not practicable to include these on the face of the Bill, as the definition of what can be classified as a Light Touch Contract (presently and going forwards) rests on Common Procurement Vocabulary (CPV) codes which would not be appropriate to contain within primary legislation. In addition to the length (c500 codes) and level of detail they provide, CPV codes may evolve over time, which would (absent a power) require amendment to the Bill that would be disproportionate for the change. If we didn't have the power to amend the CPV codes from time to time, trading partners in Europe may end up with more contracts subject to less strict (light touch) regulatory requirements than those same contracts would have in the UK.

The power is not as broad as it may appear, as the Government must bring forward legislation that is compliant with international law. The GPA and/or any other international trade agreements mean that we can only designate certain services as Light Touch. Whilst there is the potential to use clause 8(2) to include other CPV codes, the Government (and ultimately Parliament in allowing the secondary legislation to pass) would have to be satisfied both that international agreements do not prohibit any extra CPV codes from being included as Light Touch Contracts and that any extra CPV codes ought to be subject to the less stringent requirements of the light touch regime.

The regulations to be made under the power in clause 8(2) will contain a list of CPV codes grouped into host categories. It will be the same as currently included in the Public Contracts Regulations 2015 plus some CPV s currently contained in the Defence and Security Public Contracts Regulations (DSPCR) as ‘part B’ services which are very lightly regulated, therefore maintaining the status quo.

The reservable light touch services will also be the same as in the Public Contracts Regulations, though we do anticipate some engagement with the public service mutual community when developing secondary legislation to establish if the full list is still appropriate (and as explained above any adjustments to the CPV codes within scope of reservable light touch services must not conflict with international agreements).

### *Power to amend the act for private utilities (paragraph 48)*

#### *Committee view*

The Committee considered that there was inadequate justification for taking a power to make regulations for the deregulation of private utilities under the Bill. They considered that Ministers should explain more fully the proposed use of the power and unless the Government can fully justify it, the breadth of the power should be narrowed.

#### *Government Response*

The power at Clause I 09 (of the Bill as introduced - now clause 112) for an appropriate authority to, by regulations, amend the Bill, is necessary to reduce the regulation of private utilities under the Bill, (e.g. by disapplying or modifying particular provisions) where market forces would work better. We wish to minimise the regulatory burden on private utilities, as procurement regulation, as with most forms of regulation, imposes costs on regulated companies who will otherwise pass the costs through to their customers.

The power is limited by our international obligations. This means that we must retain some regulation of private utilities in order to comply with our trade agreements such as notice requirements and rules on conditions for participation and award criteria. The power can only be exercised to make amendments where they do not put the UK in breach of its obligations under international trade agreements to “treaty state suppliers” - this means that where, under an international agreement, suppliers have rights to access procurements carried out by private utilities and for particular rules to apply to those procurements, those rights cannot be removed. We will continue to regulate private utilities to the extent required by those international agreements and where we consider it appropriate or necessary to make the regime work.

If a proposal to reduce the regulatory burden for private utilities is compliant with our trade obligations, the proposed amendment would be laid out in regulations subject to the affirmative procedure.

Regulators such as OFGEM and OFWAT have promoted competition in the utilities sector where this is possible, and provide a proxy for competition, with protection of consumers’ interests at its heart, where it is not meaningful to introduce competition. The existence of competition and oversight of private utilities justifies minimising the regulatory burden on private utilities, to lower costs of operations of private utilities, help stimulate efficiency and avoid passing costs through to customers.



*Power to exempt public passenger transport services and power to exempt concession contracts provided by any “qualifying air carrier” (paragraphs 51, 53)*

*Committee view*

The Committee considered the reasons given by the Government for leaving to regulations the question of which kinds of contracts for the provision of “public passenger transport services” are to be exempted from the Bill are inadequate. It also considered that the Government failed to provide any justification for leaving to regulations the question of which concession contracts for air services provided by air carriers are to be exempted from the Bill. The Commission considered that in each case, unless it can justify doing otherwise, the Bill should include criteria for determining which such contracts should fall within the exemption.

*Government Response*

We accept the Committee’s concerns. We have worked closely with the Department for Transport (the lead department in this area) and will propose, for public passenger transport services, a definition and, for air services, provisions describing the contracts to be exempt on the face of the Bill and remove the powers.

*Exemption for utility activities exposed to competition (paragraph 61)*

*Committee view*

The Committee considered that the reasons given by the Government for taking the power are wholly inadequate and the breadth of the power should be narrowed unless justified.

*Government Response*

The Government accepts that the decision to exempt utility activities cannot be taken lightly, not least because utilities are covered under the WTO Agreement on Government Procurement and other international agreements with procurement chapters. An exemption under those agreements is available only where competition exists.

In order to address the Committee’s concerns, we propose to remove the power in paragraph 7 of Schedule 4 to develop an administrative system to exempt utility activities exposed to competition. This is replaced with a more transparent procedure whereby the power is instead a power for an appropriate authority to exempt such utility activities only by secondary legislation, using the affirmative procedure. The test to be met as to whether utility activities can be exempted will remain as set out at paragraph 7(2) (this has been moved to clause 5); that is, there must be fair and effective competition in the relevant utility market and entry to that market must be unrestricted. This amendment will ensure greater scrutiny of each exemption.

*Determining the price payable under a defence contract (Paragraph 66)*

*Committee view*

The Committee viewed that the power to make regulations under section 3(3) of Schedule 10 should be subject to the affirmative procedure unless justified by the Minister.



*Government Response*

Paragraph 3(3) of Schedule I O amends the Defence Reform Act 2014 and provides the Secretary of State with a power to make Single Source Contract Regulations to permit Qualifying Defence Contracts (QDC) to be priced other than in accordance with the pricing formula set out in the Act in specified circumstances. These circumstances are envisaged to include items that are priced by reference to market prices, prices that are regulated by other means, requirements that have previously been competed but where the Secretary of State wants to enter into a new single source contract to procure additional goods, works or services from the same contractor and where a contract has been converted to a QDC and it may be impracticable to re-price the existing scope in accordance with the pricing formula.

The Committee considered this power to be of sufficiently significant novelty for the regulations to be made following an affirmative procedure. We have accepted this recommendation, and included in the Bill a provision to amend the Defence Reform Act to specify that regulations made under paragraph 3(3) will follow the affirmative procedure.

Once again, I would like to thank the Committee for its report and believe that we will have a better bill as a result of its scrutiny.

*Indicative content of tender, award and contract detail notices for above threshold procurements*

**Table 1: Indicative types of data**

<b>Common fields in all 3 notices</b>	
<b>Field</b>	<b>Reason</b>
Title and short description of Procurement	To identify the subject of the procurement
Details of the lead contracting authority and any other contracting authorities party to the contract if it is a joint procurement	To provide details of the parties for whom the goods/services are being procured
Description of the contract, including location	A detailed description of what is being procured  This will include the type of procurement (supplies, services, works) and a classification of the items using a standardised format
Contract Value	Estimated or Actual value depending on its stage in the Procurement Cycle
If a contract is set up to allow lots	Lots can make a contract more attractive for smaller or regional suppliers
An identifier for the procurement	A unique reference number for the procurement

Source: Cabinet Office

**Table 2: Other indicative fields per notice**

<b>Field</b>	<b>Tender Notice</b>	<b>Award Notice</b>	<b>Contract Detail Notice</b>
Is this a recurring contract? If yes, include an estimate of when it will next be tendered	X		
Procurement Method (such as Open/Competitive Flexible/Framework or Below Threshold)	X		X
Is this contract covered by the WTO Agreement on Government Procurement (GPA)	X		
Is the contract reserved (i.e. for supported employment providers or public service mutuals)?	X		
Redacted copy of the contract (where thresholds are met)			X
Other information necessary to contact the procuring entity and obtain all relevant documents relating to the procurement	X		
Is the contract suitable for SME/VCSEs?	X		
Where applicable, the address and any final date for the submission of requests to participate in the procurement	X		
A list of and brief description of any conditions of participation (unless included in tender documents provided at the same time as the tender notice)	X		

Field	Tender Notice	Award Notice	Contract Detail Notice
Where the contracting authority intends to limit the number of qualified suppliers invited to tender, the criteria to be used and any limitation on the total number to be invited to tender	X		
Award Criteria (price and quality)	X		
Explain why a contract is not using lots (if relevant)	X		
Is this contract directly awarded in accordance with regulations made under clause 41 to protect life etc.			X
Has the contract been awarded to SME/VCSE?		X	X
Name and address of the successful supplier			X
Has the contract been awarded to a supplier subject to a mandatory exclusion? If so, why?		X	
Basis of Award (Most Advantageous Tender or other)		X	
Is the Award subject to a standstill period?		X	
The date that assessment summaries were sent to bidders		X	
Is the Contract being awarded by a Central Purchasing Authority	X		X
Date the contract was signed			X
Details of Key Performance Indicators in the contract			X

Source: Cabinet Office

**21 November 2022**

## APPENDIX 2: NATIONAL SECURITY BILL: GOVERNMENT RESPONSE

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### Letter from Lord Sharpe of Epsom, Parliamentary Under-Secretary of State at the Home Office, to the Rt Hon. the Lord McLoughlin CH, Chair of the Delegated Powers and Regulatory Reform Committee

Thank you for your report following the Committee's scrutiny of the provisions of the National Security Bill. The Government has carefully considered the Committee's report and our response is set out below.

I am grateful for the feedback of the Committee on the Department's delegated powers memorandum. I acknowledge the gaps that were identified in our original memorandum and thank you for allowing the Department to submit a revised version.

#### *The recommendation of the Committee*

The Committee drew attention to Clause 77 of the Bill. This contains a power to make regulations about publishing and copying information provided to the Secretary of State under the Foreign Influence Registration Schemes (FIRS). The legislation provides for the regulations to be subject to the **negative** resolution procedure.

The Committee has recommended an **affirmative** procedure as a more appropriate level of parliamentary scrutiny, and notes the significant political interest there will be in this provision.

#### *Government response*

The Government acknowledges the Committee's point that policy could be subject to later change and agrees that this is an area likely to be of high interest to Parliament. As set out in the Delegated Powers Memorandum, in providing for the negative resolution in this instance, the Government has sought to find the right balance between ensuring that Parliament is able to scrutinise these provisions and ensuring that we are able to amend the practical aspects of the scheme in an agile way. The Government is carefully considering the Committee's recommendation to make this procedure affirmative.

I am grateful to the Committee for their consideration. I am placing a copy of this letter into the House library.

**16 December 2022**

### APPENDIX 3: MEMBERS' INTERESTS

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Committee Members' registered interests may be examined in the online Register of Lords' Interests at <https://www.parliament.uk/hlregister>. The Register may also be inspected in the Parliamentary Archives.