



Procurement Bill

UK Public Procurement Reform Webinar - Session 3
Sector Specific Regimes

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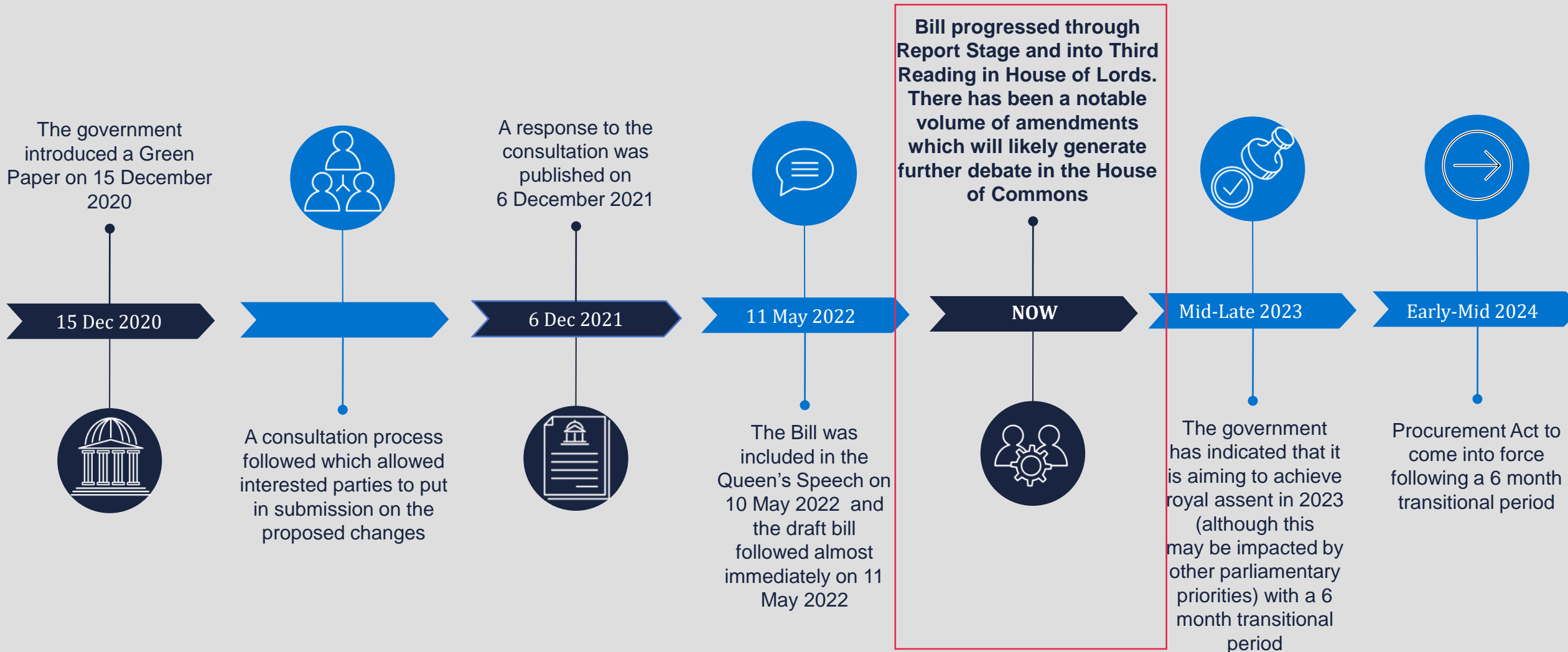
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Introduction

The Procurement Bill – why are we here?

- Brexit viewed as offering a “once in a lifetime opportunity” to reform the UK procurement regime
 - Simpler, more flexible commercial system
 - Remain compliant with international obligations (e.g. WTO GPA)
 - Open up public procurement to new entrants – SMEs and innovators
 - Transparency throughout the commercial lifecycle
 - Consolidation of the rules on procurement to create a single, consistent regime – reduce red tape
 - Tougher action on underperforming suppliers
 - Protecting national security
- Change in a lot of the legislative language (intentional move away from EU legislation) – may seem unfamiliar at first but much remains fundamentally the same

Timelines for the Procurement Bill



Today's topics

1. Utilities procurement
2. Defence sector procurement

Utilities Procurement

What is a utility (1)

“Utility” – section 35(4) or “Contracting Authority” – section 2(1)(b):

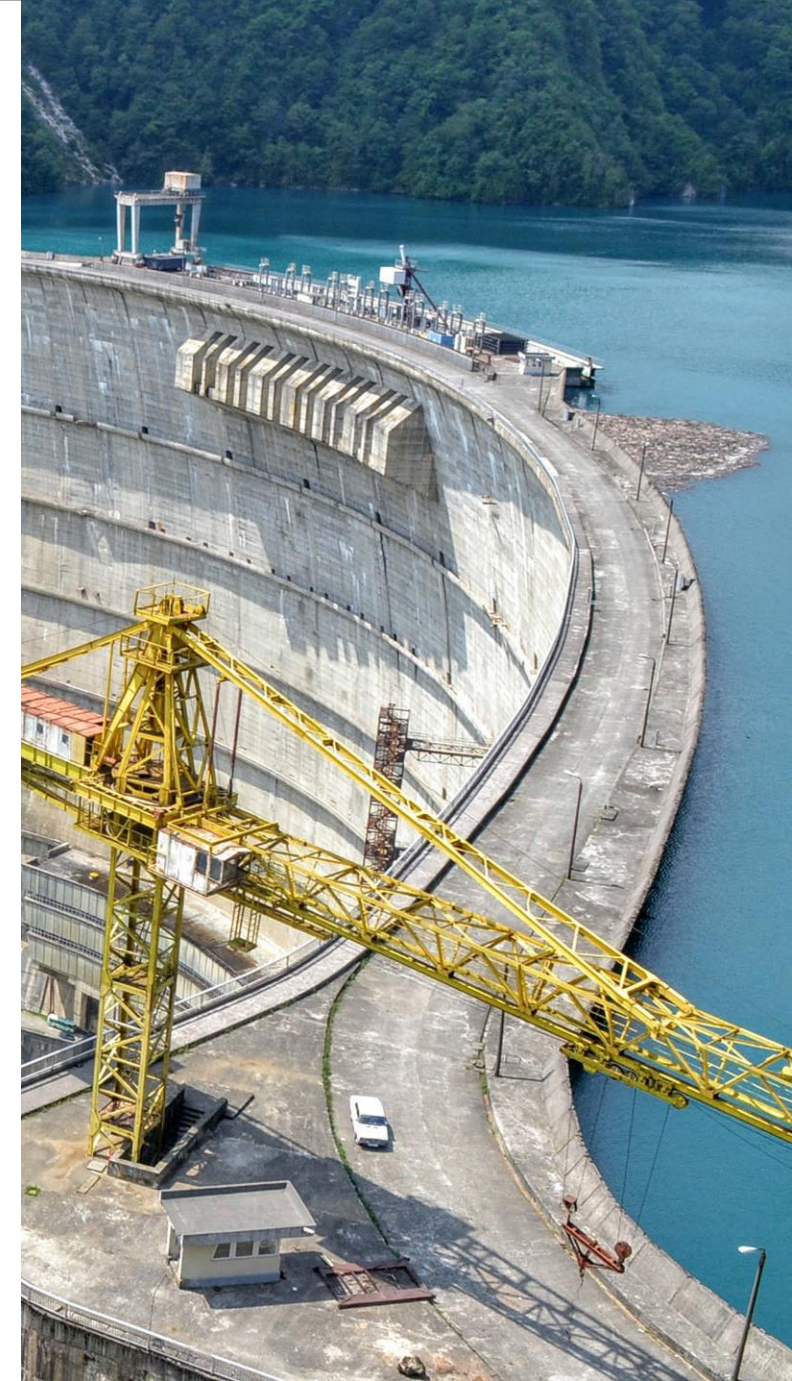
- A public authority, or public undertaking, that carries out a utility activity or a private utility

“Public authority” – section 2(2)

- Public funding (including NHS) or public authority oversight (management/control) (“bodies governed by public law” under the UCR)

“Public undertaking” – section 2(2)

- Public authority oversight (arrangement/control) and operate on a commercial basis



What is a utility (2)

“Utility activity” – section 6(2)

- A kind specified in Part 1 of Schedule 4 and is not specified in Part 2 of Schedule 4 (familiar list of activities that have been previously ruled by the EU as being subject to a competitive market)
- Not carried out wholly outside the UK
- If not a public authority or a public undertaking, then carried out pursuant to a special or exclusive right

“Private utility” – section 5(3) – see later slides

Utility Activities – what's in

Schedule 4 – Part 1

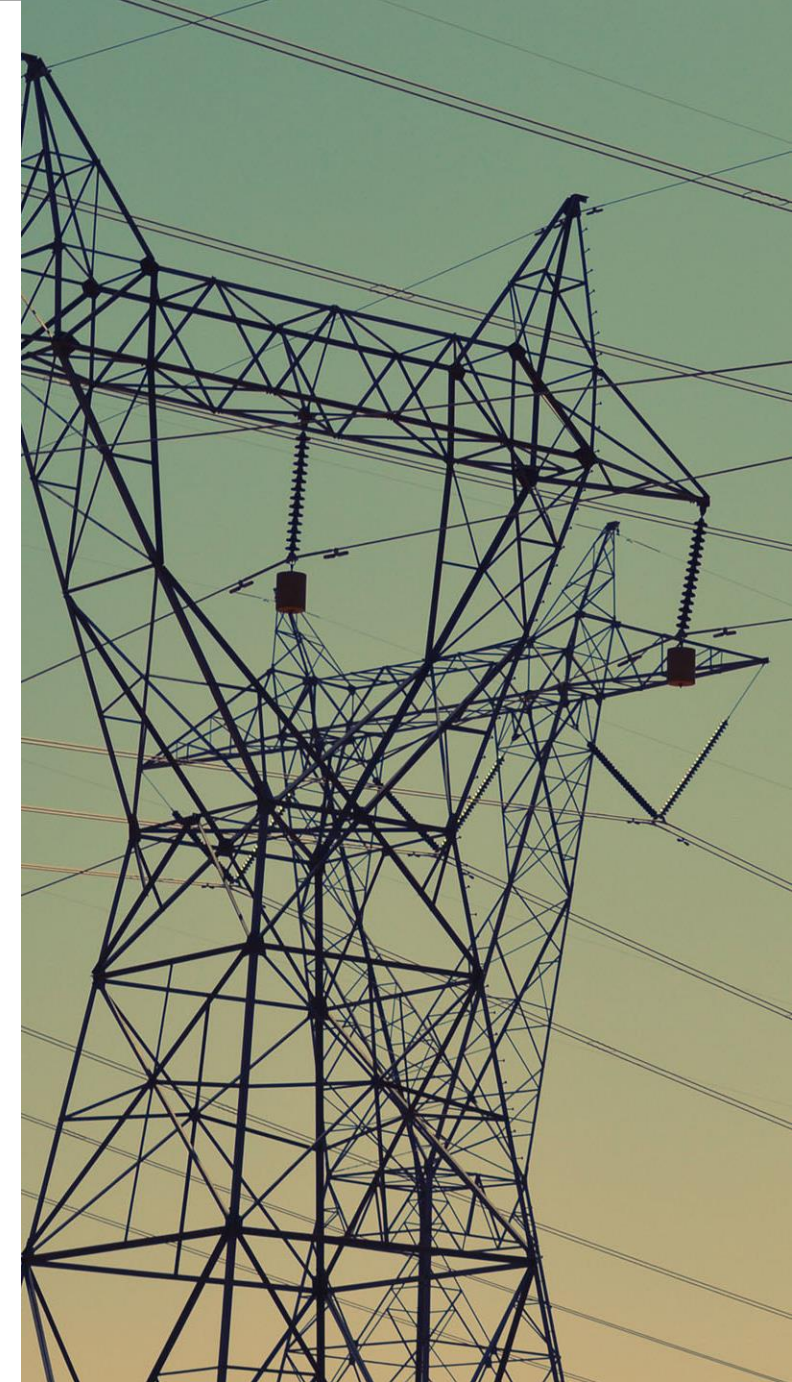
- Gas or heat networks (exceptions if required for other activities and under 20% of turnover)
- Electricity networks (exceptions for own electricity where less than 30% of production)
- Water networks (exceptions for own water where less than 30% of production)
- Transport: provision or operation of a network for general public by rail, tram, bus or other means
- Ports –airport, port or other terminal facility for passage of goods by sea or inland waterway
- Extraction of oil and gas, searching for or extracting coal or other solid fuels
- NOT postal services

Utility Activities – what's out

Schedule 4 – Part 2

All activities which have previously been ruled by the EU to be directly exposed to competition:

- Generation, production or sale of electricity (wholesale or retail) in England, Scotland or Wales
- Sale (wholesale or retail) of gas in England, Scotland or Wales
- Exploration for oil or natural gas in England, Scotland or Wales
- Production of oil or natural gas in England, Scotland or Wales or development of infrastructure for such production



Principles / objectives

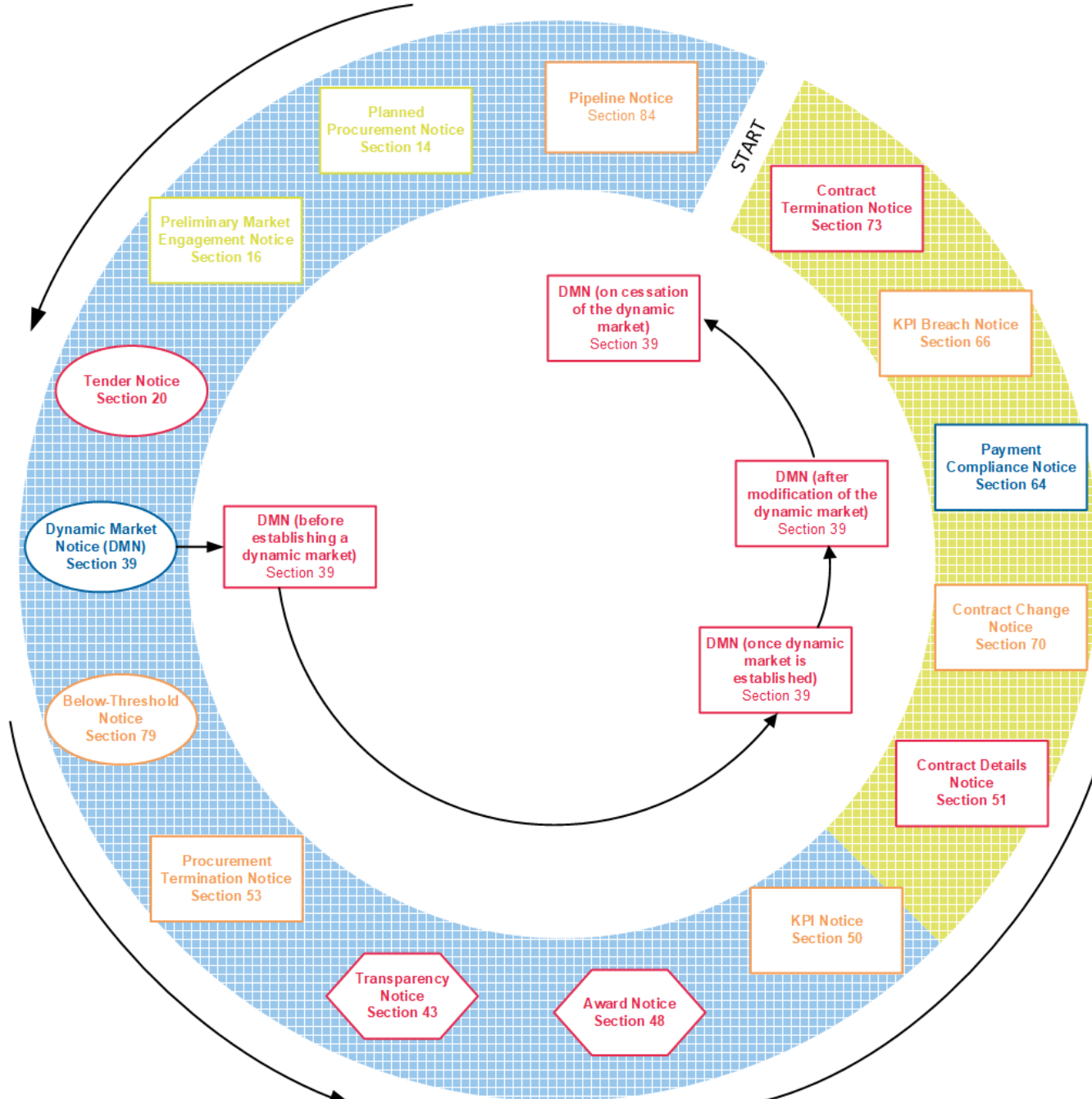
- Contracting authority may not carry out a covered procurement (public contracts) except in accordance with the Act (s 11(1))
- Must have regard to (s 12):
 - Delivering value for money
 - Maximising public benefit
 - Sharing information
 - Acting with integrity
- Must treat suppliers the same unless a difference between suppliers justifies different treatment, and must take all reasonable steps to ensure it does not put a supplier at an unfair advantage or disadvantage
- Must have regard to barriers faced by SMEs and consider removing or reducing them
- Must have regard to National Procurement Policy Statement (s 13(10))

Where are transparency and proportionality?









- Proportionality – woven into particular provisions e.g. s20(3) re competitive tendering procedures must be a proportionate means of awarding the public contract
- Transparency – mechanical transparency through process – much stricter regime of notice and publication requirements throughout the life of the contract.



Notices – Contract Lifecycle



Key

	Contracting authority must publish		The obligation to publish these notices arises at the same point in the contracting lifecycle
	Contracting authority must publish, if certain conditions are satisfied		The obligation to publish these notices arises at the same point in the contracting lifecycle
	Contracting authority may publish		These notices occur pre-contract award
	Contracting authority has a continual obligation to publish		These notices occur post-contract award

Choice of procedure

- Competitive award:
 - Open procedure
 - Competitive flexible procedure – replaces remainder of existing procedures other than open
- Direct award in special cases (section 41 and Schedule 5) – **may** carry out a selection process or other preliminary steps before awarding a contract under this section
 - Familiar grounds (“only show in town”; prototypes; repeat procurements; insolvency; extreme urgency – also with “user choice” contracts and defence and security)
- Direct award to protect life (section 42) – can issue regulations if necessary to protect human, plant or animal life or protect public order or safety - catch all re e.g. pandemic
- Direct award after switching procedures (section 43) – no suitable tenders/responses
- Transparency notice before awarding and contract award notice before entering into contract – triggers standstill (not if extreme urgency, protect life, user choice, private utilities)

Commercial purchasing tools

- Closed framework – 8 years (as currently under UCR)
- Open framework – reopens to new entrants during its term – also 8 years
- Dynamic markets – open for entrants throughout term - replaces existing dynamic purchasing systems and qualification systems – very similar structure but note – not just “off-the-shelf” and can charge membership fees

Contract modifications

- Permitted modifications
 - Permitted (schedule 8) – familiar grounds (contractual provision; unforeseeable circumstances; additional goods and disproportionate technical difficulties or substantial duplication of costs)
 - Not substantial
 - Below threshold
- May be required to:
 - Publish contract change notice (not if private utility)
 - Maintain 8 working day standstill period before modification
 - Publish amended contract (not if private utility)

Contract Management

- Greater focus on ongoing contract management
- KPI obligations if high value contracts (>£5m) – assessed at least annually
- Publication obligations: payment compliance notice, performance assessment information, contract change notices, modifications, contract termination notices
- Links to exclusions and debarment list: management of underperforming suppliers
- Performance notices – discretionary ground for exclusion:
 - Poor performance under one contract has potential impact on future contracts including Ministerial investigations and central debarment list

Private Utilities

What are they

- Carry out a utility activity pursuant to a “special or exclusive right”:
 - Must have been granted right pursuant to “*any statutory, regulatory or administrative provision*”
 - The provision must “*substantially limit the ability of persons not granted the right to carry out the activity.*”
- Not a special or exclusive right if granted following a competitive tendering procedure under section 19 (effectively open procedure or competitive flexible procedure)
- Not a special or exclusive right if granted under another process which the opportunity to be granted a right was widely publicised enough to avoid artificial narrowing of competition and grant of right was based on criteria that did not favour or disadvantage certain persons

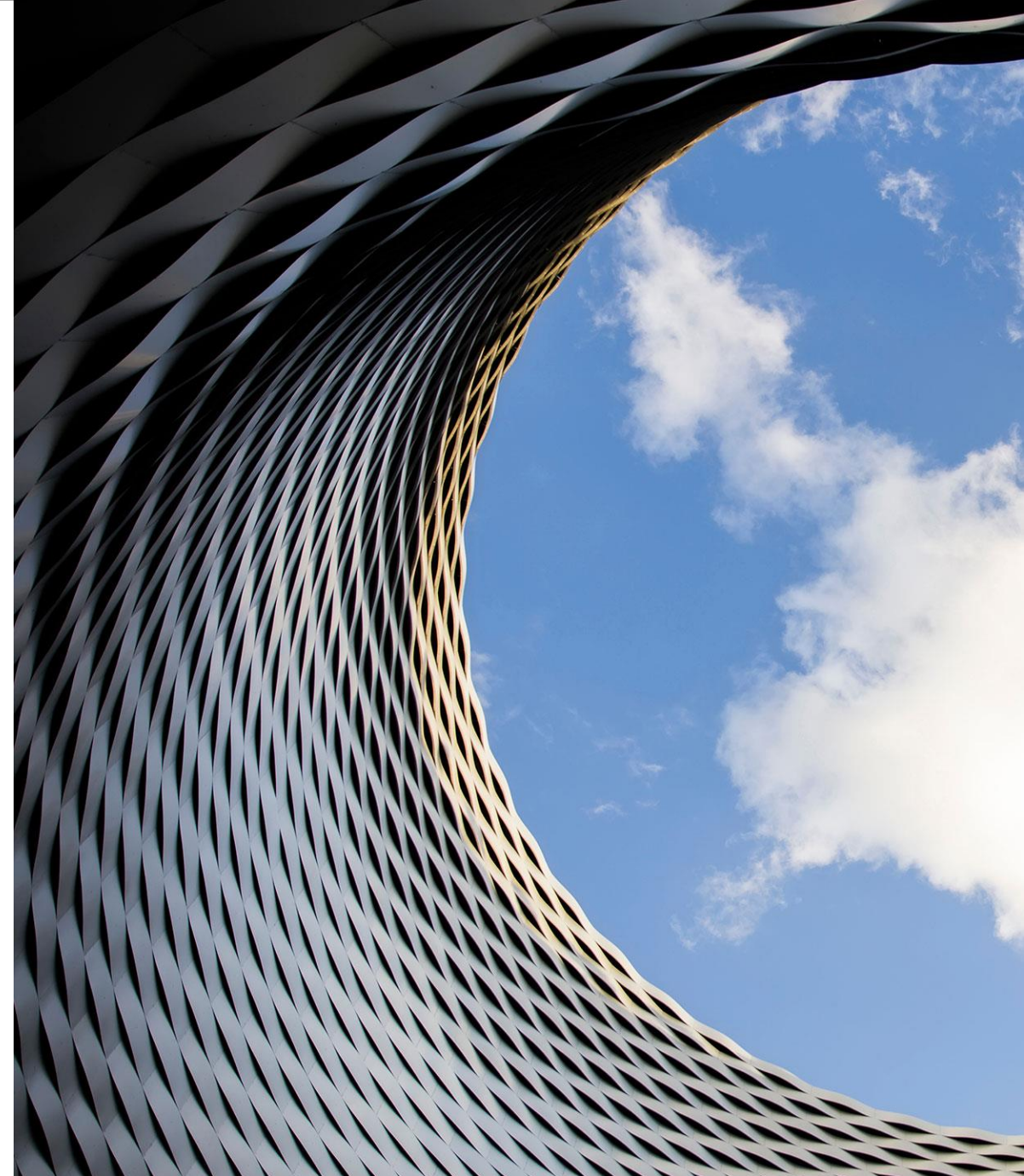
Private Utilities

Exceptions

- No need to comply with national procurement policy (section 13(11), section 14(9) in respect of Wales)
- No maximum term on frameworks (section 47(5)(b))
- Discretion around excluded suppliers (section 57)
- No requirement to specify or assess performance against KPIs (section 52(5) and 70(7))
- No requirement to publish a contract details notice (section 53(6) or procurement termination notice (section 55(3)) or contract change notice (section 74(6))
- No implied payment terms (section 67) or associated publication obligations
- No power for an appropriate authority to conduct a procurement investigation (section 104)
- N.B. general provision to make further regulations to reduce burden on private utilities (section 117)

Exempted Services

- Schedule 2 – paragraphs 28 to 34
 - Contract for further sale or lease of goods, works, services
 - Supply of water to water utility
 - Supply of energy or fuel for production of energy
 - Contracts with utility joint ventures
 - Contract with affiliated persons



Transport services – exempted contracts

- Schedule 2 – paragraph 17 *“A contract that is required to be awarded in accordance with the public service obligations regulations”*
 - amendment made in HL refers expressly to Regulation 1370/2007
 - retains complexity of current procurement regime, current approach will require regulations to match revised statutory regime or PSOs could be caught
- Schedule 2 – paragraph 36 *“A concession contract for the provision of public passenger transport services.”*
 - where a competitively procured, then the concessionaire will also not be subject to these procurement obligations
 - query what may be contractually imposed to ensure that wider procurement objectives are met

The Procurement Bill: Overhauling defence procurement

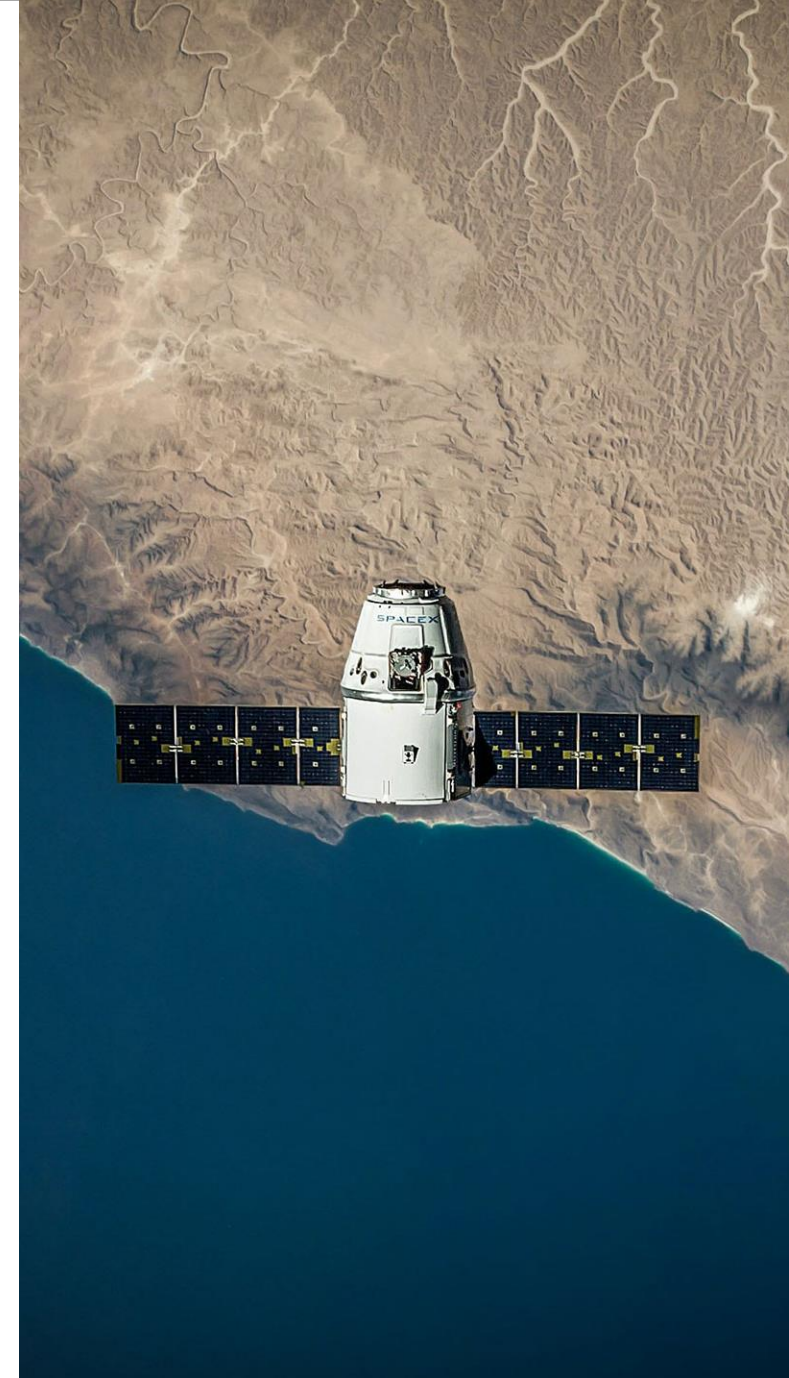


Topics

Overview of current regulatory regime

Overview of impact of the Procurement Bill

**Overview of some of the key changes envisaged by the Procurement Bill
(with reference to the current regulatory regime)**



Current regulatory regime

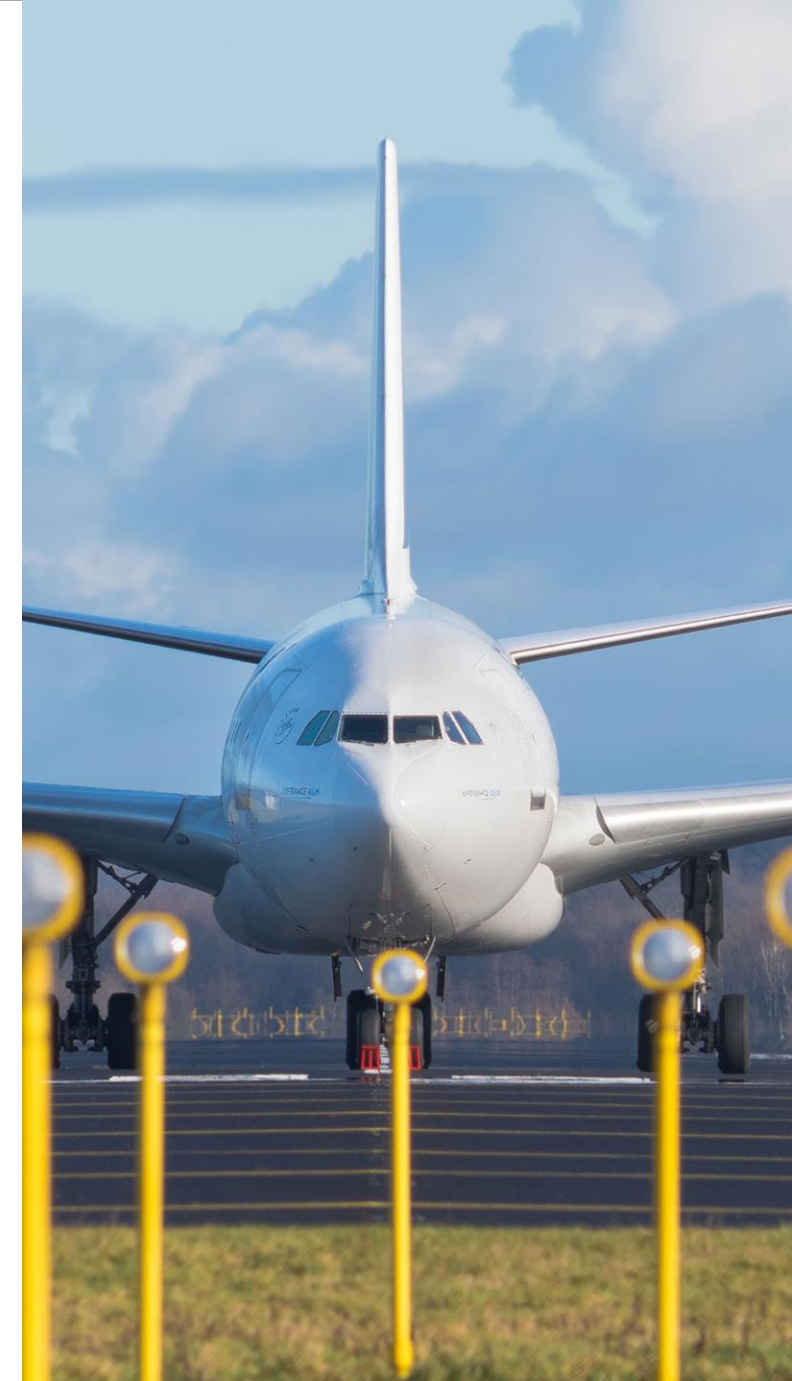
The Defence and Security Public Contracts Regulations 2011 (DSPCR)

**The Defence Reform Act 2014 (DRA)
Single Source Contract Regulations 2014 (SSCR)**



Impact of the Procurement Bill

- The Bill envisages that defence procurement in the UK will be overhauled
- The Defence and Security Public Contracts Regulations 2011 (DSPCR) will be repealed
- Consolidation into a single legislative framework; thereby, ensuring greater harmonisation and consistency
- Specific provisions/derogations relating to defence and security will be incorporated into such framework, and secondary sector-specific guidance will be issued
- Steps have been taken to assist with the delivery of the Defence and Security Industrial Strategy



Key Changes

Territorial Extent

- The Bill extends to England and Wales, Scotland and Northern Ireland
- Majority of provisions in the Bill apply equally to English, Welsh and Northern Ireland contracting authorities
- Does not make provision for all public procurement in Scotland

Thresholds

- Threshold for works contracts continues to be consistent regardless of whether the contract is a defence and security contract. Envisaged to be: £5,336,935 (including VAT)
- Threshold for defence and security contracts for services is higher than for general services contracts. Envisaged to be £426,955 (including VAT)



Key Changes

Application

- DSPCRs position transposed into the Procurement Bill but subject to:

Further detail has however been provided which provides clarity to terms and concepts previously referred to in the DSPCRs

Wider application such that more contracts are likely to be captured by the definition of “defence and security contract”

Key Changes

Application

Regulation 6(1), DSPCRs

- (a) the supply of military equipment, including any parts, components or subassemblies of military equipment**
- (b) the supply of sensitive equipment, including any parts, components or subassemblies of sensitive equipment**
- (c) work, works, goods or services directly related to equipment referred to in sub-paragraph (a) or (b) for any and all elements of its life cycle**
- (d) work, works or services for specifically military purposes or**
- (e) sensitive work or works or sensitive services**

Clause 6(1), Procurement Bill

- (a) military equipment**
- (b) sensitive equipment**
- (c) goods, services or works necessary for the development, production, maintenance or decommissioning of military equipment or sensitive equipment**
- (d) logistics services relating to military equipment or sensitive equipment**
- (e) goods, services or works for wholly military purposes**
- (f) sensitive services or sensitive works**
- (g) goods, services or works that are otherwise relevant to the operational capability, effectiveness, readiness for action, safety or security of the armed forces**

Key Changes

National Security Exemption

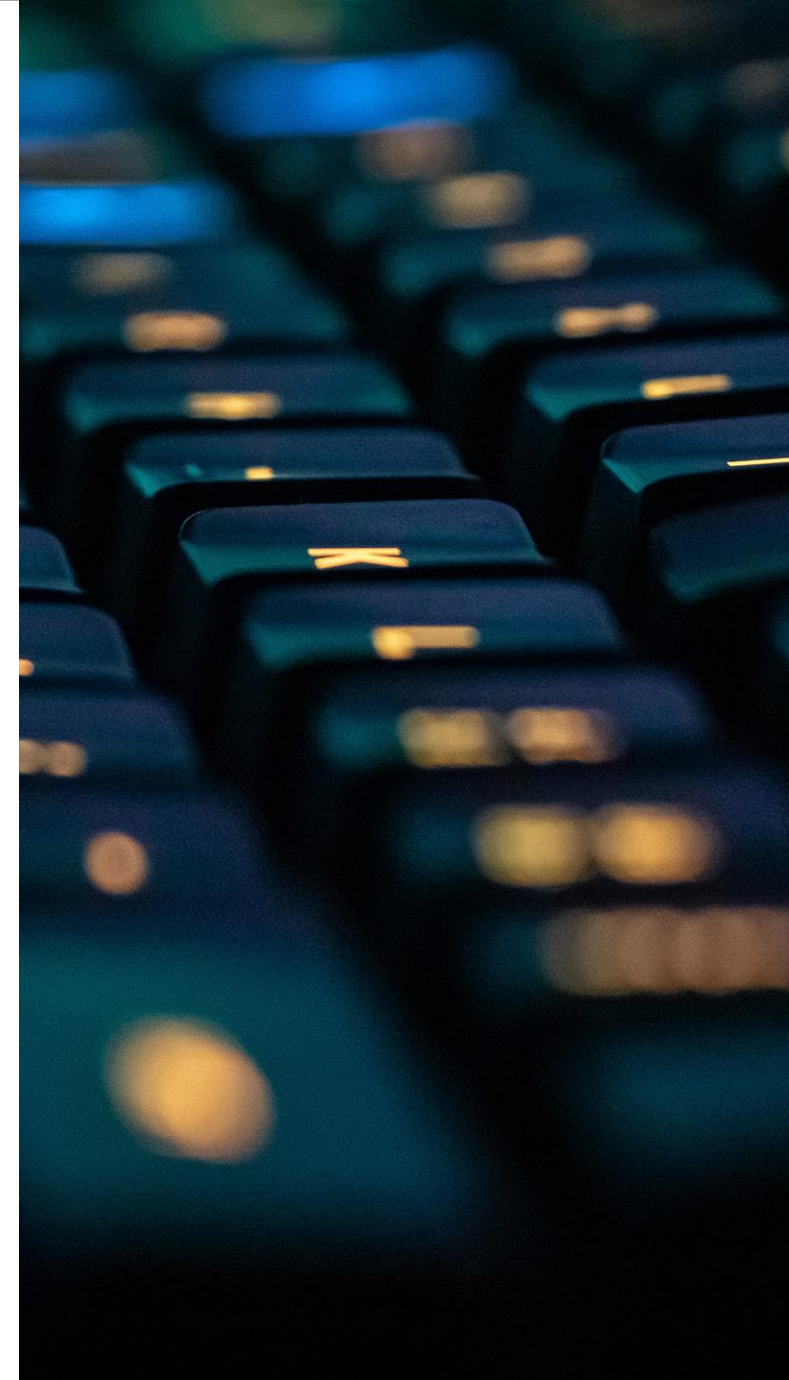
- The Bill provides that a contract can be exempted for the purposes of the Act on the basis of a national security exemption
- Broad discretion for a contracting authority to determine that a contract “*should not, in the interests of national security, be subject*” to the Act

National Security Exclusion

- Sets out that a discretionary exclusion ground applies if the supplier or a connected person poses a threat to the national security of the United Kingdom

Termination: National Security

- Sets out a mechanic which enables termination of a contract on the basis of an implied right to termination in the event that there is a change in circumstances relating to the threat posed to national security



Key Changes

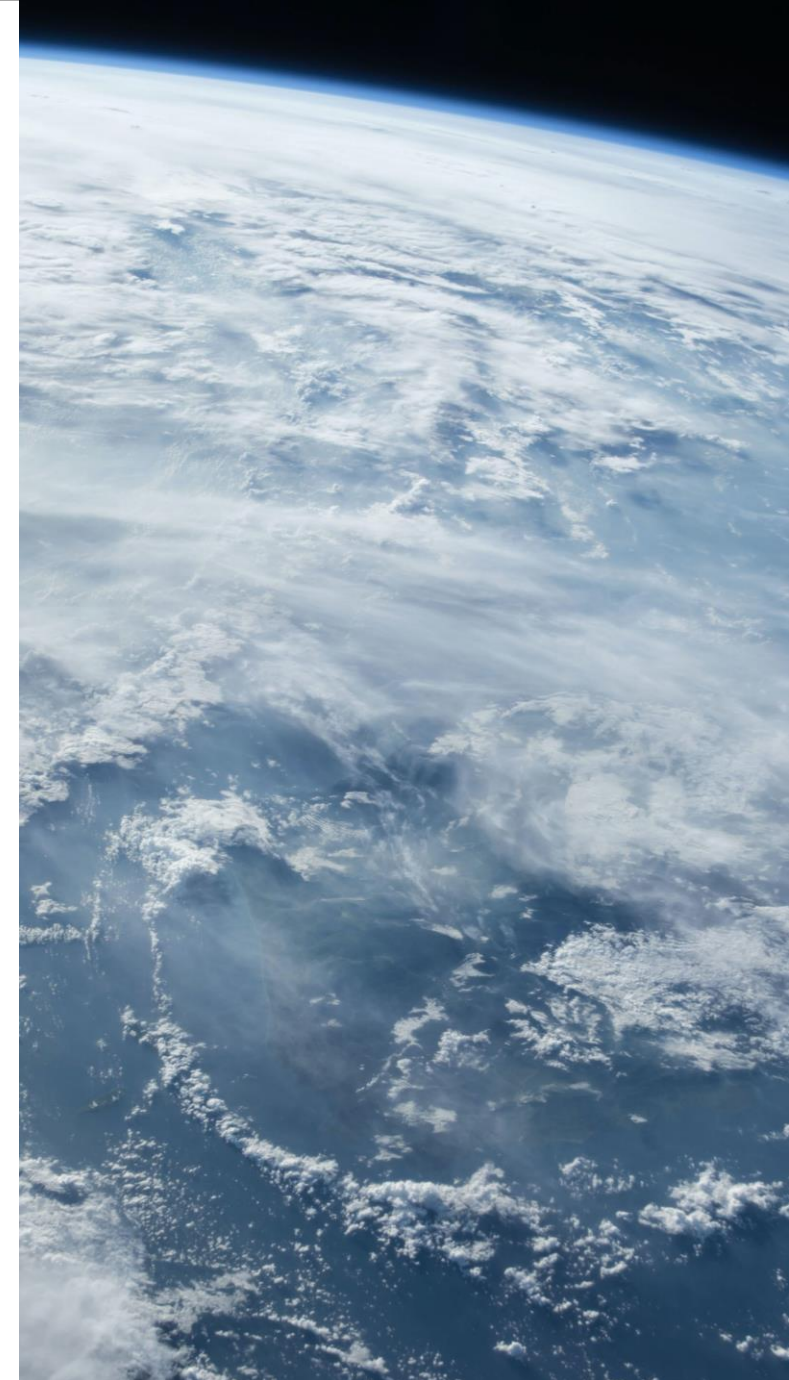
Supplier's Past Performance

- The Bill contains a discretionary ground to exclude a supplier for breach of contract and poor performance. This includes if a supplier:
 - a) has not performed a relevant contract to the regulated authority's satisfaction
 - b) was given proper opportunity to improve performance, and
 - c) failed to do so
- Previous concerns have been raised about the lack of account for suppliers' previous poor performance when awarding defence contracts
- The Public Accounts Committee has noted the lack of risk associated with underperforming under the current regime:
“suppliers understand that poor performance on one contract will not stop them winning the next”

Key Changes

Procurement Procedures

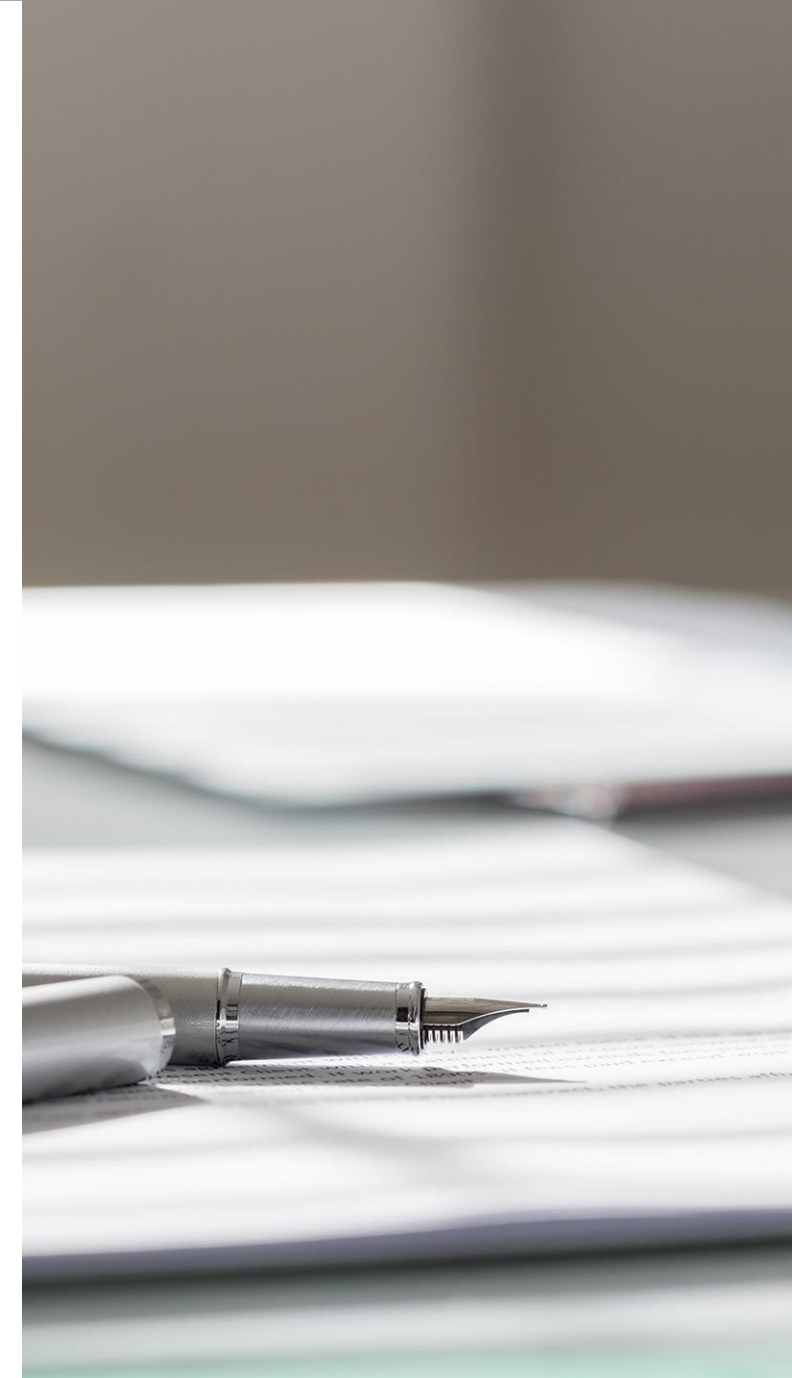
- The MoD will be able to select from three procedures when running a procurement:
 - i. a competitive flexible procedure
 - ii. an open procedure for “off the shelf” competitions
 - iii. a direct award procedure
- These will replace the existing procedures: under the DSPCRs:
 - i. Restricted procedure
 - ii. Negotiated procedure
 - iii. Competitive dialogue procedure
 - iv. Negotiated procedure without prior publication



Key Changes

Framework Terms

- The Bill extends the maximum duration of a “closed framework” to eight years for defence and security frameworks (from seven years under the DSPCRs)
- Increased flexibility to extend the maximum term beyond eight years if the contracting authority considers that “*the nature of the goods, services or works to be supplied... means that a longer term is required*” provided that such reasons are set out in tender or transparency notice for the framework. This replaces the “*except in exceptional circumstances*” drafting in the DSPCRs
- Introduction of “open frameworks” for all contracts – allows new suppliers to be added to the scheme across a period of up to eight years



Key Changes

Direct Awards

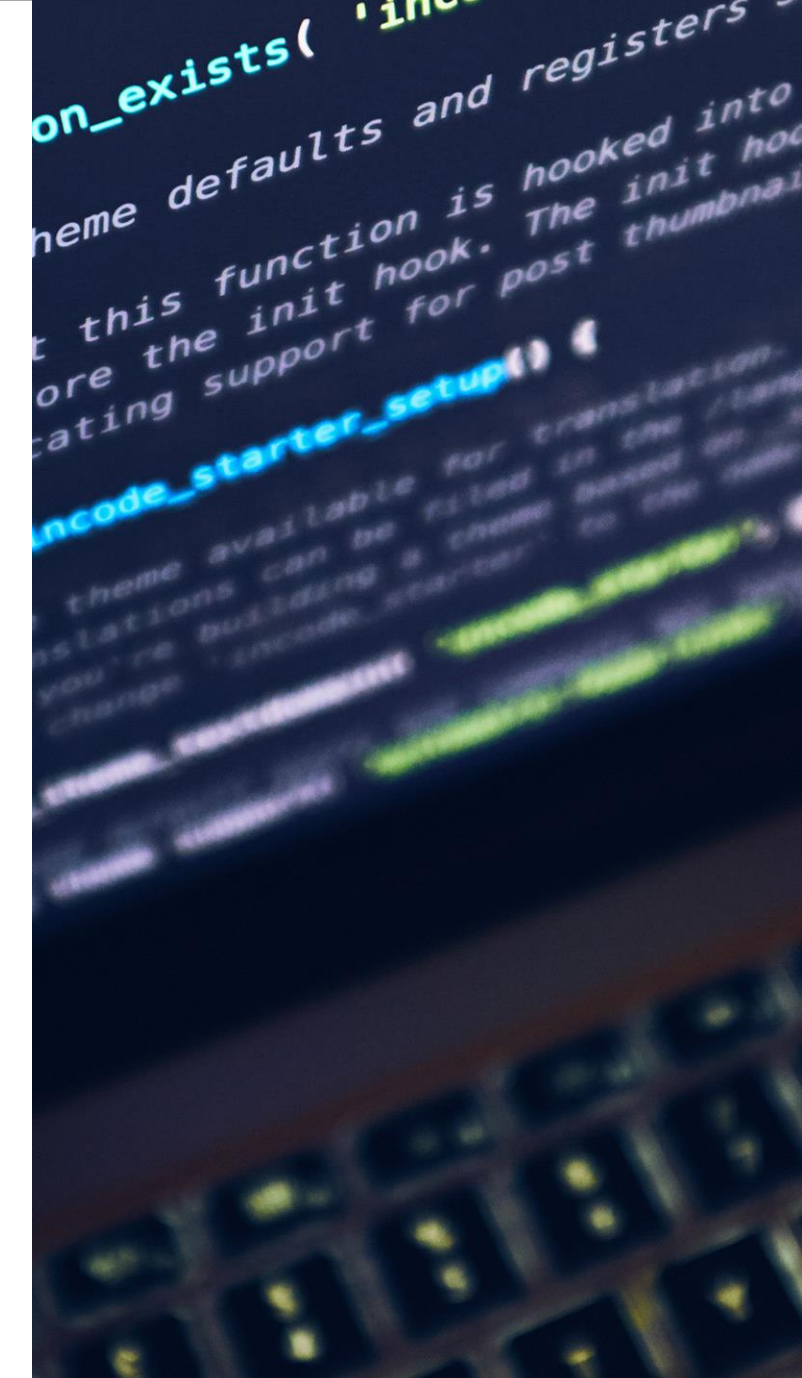
- The Bill increases flexibility to enable award defence and security contracts directly to specific suppliers
- A Minister may directly award a public contract if:
 - a direct award justification applies and the direct award is to a supplier that is not an excluded supplier (unless there is an *overriding public interest*) or
 - they consider it “necessary” to “(a) protect human, animal or plant life or health, or (b) protect public order or safety.”
- Defence and security-specific justifications
 - Supply of air and transport services
 - Award of a new QDC (in lieu of permissible modification)
 - Operational capability, effectiveness, readiness for action, safety or security of armed forces



Key Changes

Contract Modifications

- Will be codified by the Bill
- The Procurement Bill allows for increased flexibility in defence contracts
- Modifications of a defence authority contract are permitted “*where it is necessary to enable the contracting authority to –*
 - (a) *Take advantage of developments in technology, or*
 - (b) *Prevent or mitigate an any adverse effect of those developments*”
- Modifications are also permitted to ensure there are no gaps in the provisions of goods, works or services which could have an operational impact



Key Changes

Transparency/Confidentiality

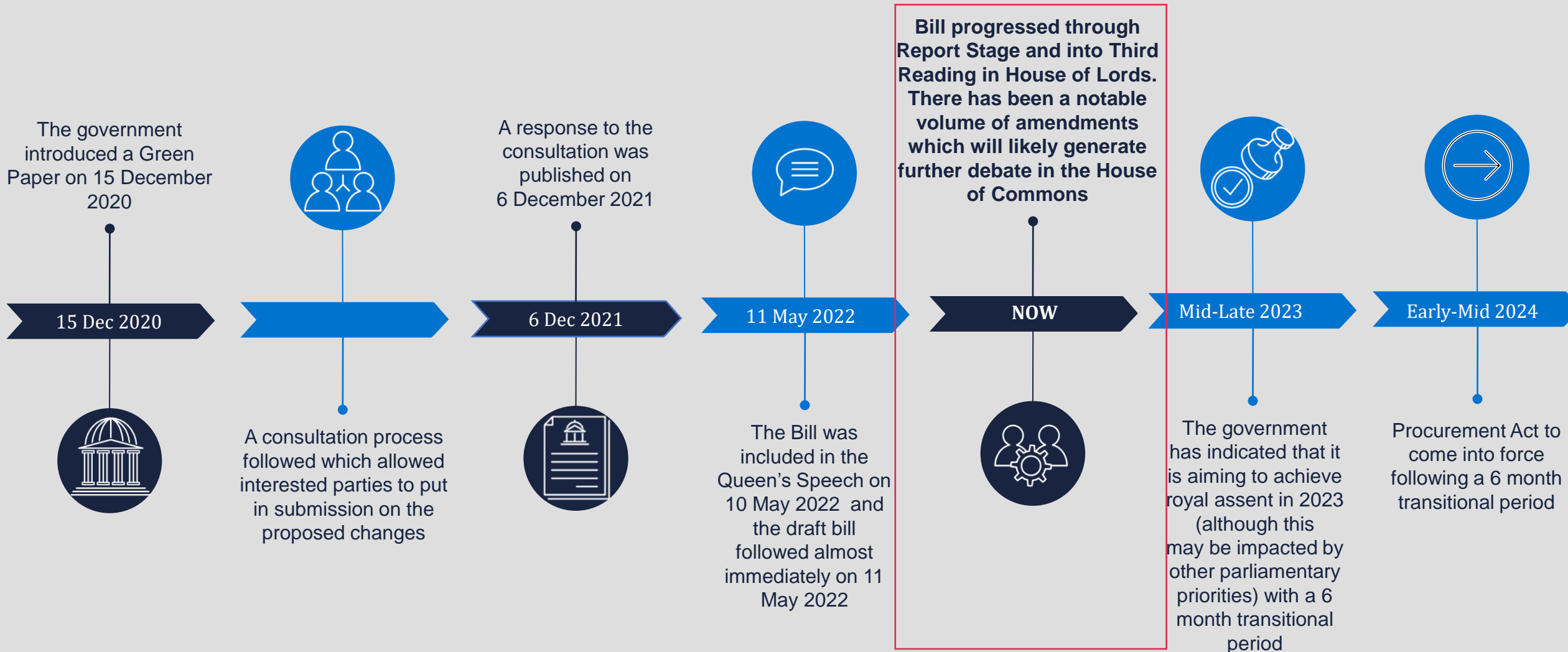
- Wide transparency requirements under the Bill
- There is a general exemption from duties to publish or disclose information which, for example, enable a contracting authority to withhold information from publication or redact information for the purpose of safeguarding national security
- The contracting authority is required to disclose the reasons for withholding or redacting information, unless in doing so this would be contrary to national security
- There is a similar general exemption for commercially sensitive information
- There are also more specific exemptions



Single Source Contract Regulations: Proposed Reforms

- Amendments relating to the single source framework form a small part of the Bill
- The Bill also separately includes a schedule of amendments to the single source regulatory regime
- Further secondary legislation is expected in two tranches with the first to “implement key flexibilities such as alternative pricing methods”
- Overview of changes in the Bill
 - To give the SoS powers to specify the circumstances in which an agreement to enter into new work is or is not to be treated as a new contract for the purposes of the single source regulatory regime
 - To give the SoS a power to specify when a contract is to be treated as “substantially for defence purposes”
 - Expands the definition of QDCs to include cross-Government contracts
 - Changes to the profit rate calculation
 - Increased flexibility in relation to the pricing formula to ensure a fair price is established, particularly in relation to “non-traditional” contracts
 - Increased reporting flexibility
 - Widens range of referrals to the SSRO, and powers of the SSRO

Timelines for the Procurement Bill



DLA Piper – Procurement Reform blogs

[UK Government Blog – click here](#)

[Webinar Q&A – Planning and Commencing a Procurement](#)

Andy Batty, Steven Condie, James McGachie, Peter Brook and Martyn Scott – 20 October 2022

[Set menu or smorgasbord: will the Procurement Bill help to streamline planning and commencing procurements?](#)

Matthew Cliff - 12 October 2022

[The Public Procurement Bill – delegated powers – ‘to delegate, or not to delegate: that is the question’](#)

Jonathan Blunden – 21 September 2022

[Webinar Q&A – The Procurement Bill – what is it, why is it here, an overview and initial thoughts on content, structure and its potential impact](#)

Andy Batty, Steven Condie, Joanna Haigh, Jessica Hill, Martyn Scott – 29 July 2022

[Procurement Challenges – A new regime but not a revolution](#)

Jessica Hill - 7 July 2022

[Same as it ever was? Has the Procurement Bill seized a once in a lifetime opportunity?](#)

Matthew Cliff - 20 June 2022

[Transparency, Transparency, Transparency – A summary of the changes to the transparency obligations in the Procurement Bill.](#)

Rebecca Walker - 16 June 2022

[Public Procurement Reform – Procurement Bill updates.](#)

Andy Batty - 12 May 2022

[Debarment from UK Government contracts – back to the future](#)

Richard Bonnar - 5 May 2022

[Public Procurement Reform – Frequently Asked Questions](#)

Daniel Lavender - 24 March 2022

[Public procurement reform – ‘Crisis? what crisis’](#)

Jonathan Blunden - 22 December 2021

[Procurement Challenges – the future](#)

Jessica Hill - 16 December 2021

[Public procurement reform ... the times they are a-changin’](#)

Jonathan Blunden - 8 December 2021



Upcoming Webinars

Webinar 4 – Running procurements and procurement challenges – Date TBC

Webinar 5 – Contract management and further updates – Date TBC

If you have any follow up questions after the webinar, please send them to ProcurementReform@dlapiper.com

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Please contact Eleanor or Louis if you have any queries around Defence Sector Procurement

Thank you

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