

PROCUREMENT BILL [HL]

EXPLANATORY NOTES ON COMMONS AMENDMENTS

What these notes do

These Explanatory Notes relate to the Commons Amendments to the Procurement Bill [HL] as brought from the House of Commons on 14 June (HL Bill 147).

- These Explanatory Notes have been prepared by the Cabinet Office in order to assist the reader of the Bill and the Commons amendments, and to help inform debate on the Commons amendments. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes, like the Commons amendments themselves, refer to Bill 218, the Bill as first printed for the Commons.
- These Explanatory Notes need to be read in conjunction with the Commons amendments and the text of the Bill. They are not, and are not meant to be, a comprehensive description of the Commons amendments.
- Commons Amendments 1 to 104 were tabled in the name of the Parliamentary Secretary for the Cabinet Office, Alex Burghart MP, and Minister for the Cabinet Office, Rt Hon Jeremy Quin.

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Commentary on Commons Amendments

Part 1: Key definitions

Commons Amendments to Clause 2: Contracting authorities

Commons Amendment 1

- 1 Amendment 1 would remove the specific reference to the NHS because it is unnecessary, as the NHS falls within the definition of “public authority” regardless.

Commons Amendments 2 and 3

- 2 Amendments 2 and 3 would mean that a reference to a public authority in the Bill includes the City of London.

Part 2: Principles and objectives

Commons Amendments to Clause 13: The national procurement policy statement

Commons Amendment 4

- 3 Amendment 4 would remove the requirement for a Minister of the Crown to give due regard to certain principles before publishing the national procurement policy statement.

Commons Amendment 5

- 4 Amendment 5 would remove the requirement for a Minister of the Crown to include particular strategic priorities in the national procurement policy statement.

Part 3: Award of public contracts and procedures

Commons Amendments to Clause 19: Award of public contracts following a competitive tendering procedures

Commons Amendments 6 and 7

- 5 Amendment 6 would allow contracting authorities to disregard tenders offering an abnormally low price. Amendment 7 would require contracting authorities to notify suppliers of the fact that they consider the price to be abnormally low, and give suppliers reasonable opportunity to demonstrate that they can perform the contract at the price offered before disregarding their tender, and would prevent them from doing so where they are satisfied of this.

Commons Amendments to Clause 32: Reserving contracts to supported employment providers

Commons Amendment 8

- 6 Amendment 8 would mean that an organisation could meet the test of being a “supported employment provider” if it only partly has the purpose of providing employment or support to disabled or disadvantaged individuals.

Commons Amendment 9

- 7 Amendment 9 would mean that an organisation could meet the test of being a “supported employment provider” if part of the organisation meets that test and that part is to perform the contract, or the test is met by the combined workforce of organisations or parts of organisations that will work together to perform the contract.

Commons Amendments to Clause 43: Switching to direct award

Commons Amendment 10

- 8 Amendment 10 would mean that a contracting authority could not rely on clause 19(3)(d) to justify a switch to direct award - which (in not referring to “material” breach) is broader than clause 43(2)(e).

Commons Amendment 11

- 9 Amendment 11 would mean that a contracting authority would have to apply the clause 19 rules on abnormally low tenders before relying on that fact to switch to direct award.

Commons Amendment 12

- 10 Amendment 12 would reflect the fact that some procedural requirements will be in associated tender documents.

Commons Amendments to Clause 52: Key performance indicators

Commons Amendments 13 and 14

- 11 Amendments 13 and 14 would remove the requirement to publish key performance indicators before entering into a public contract and would instead require key performance indicators to be published but not necessarily before the contract is entered into.

Commons Amendments to Clause 54: Time limits

Commons Amendment 15

- 12 Amendment 15 would make use of a flexibility in international agreements to allow shorter tendering periods for utility contracts and those awarded by an authority that is not a central government authority. It would set different minimum tendering periods where tenders may only be submitted by pre-selected suppliers (depending on whether the contracting authority and suppliers agree on a tendering period or not).

Commons Amendments 16 and 17

- 13 Amendments 16 and 17 would define terms used in Amendment 15.

Commons Amendments to Clause 56: Technical specifications

Commons Amendments 18 and 19

- 14 Amendments 18 and 19 would allow procurement documents to refer to a UK standard if the standard adopts an internationally-recognised equivalent.

Commons Amendment 20

- 15 Amendment 20 would clarify how a contracting authority is to assess whether tenders, proposals or applications satisfy equivalent standards to United Kingdom standards (including that it may require evidence).

Commons Amendment 21

- 16 Amendment 21 would clarify that the requirement in subsection (5) only applies where the matters mentioned in subsection (4) are referred to in the procurement documents.

Commons Amendment 22

- 17 Amendment 22 would remove the definition of standard and clarify the definition of “United Kingdom standard”.

Commons Amendments to Clause 57: Meaning of excluded and excludable supplier

Commons Amendments 23 and 24

- 18 Amendments 23 and 24 would make it clear that a contracting authority must be satisfied that circumstances giving rise to the application of an exclusion ground are not continuing (as an alternative to not likely to occur again) as part of the tests of whether a supplier is an excluded or excludable supplier - that is, it is no defence to say the circumstances have never ceased and therefore cannot re-occur.

Commons Amendment 25

- 19 Amendment 25 is consequential on Amendment 100 adding new paragraph 34A to Schedule 6 allowing a supplier to be debarred only in respect of particular contracts.

Commons Amendments to Clause 58: Considering whether a supplier is excluded or excludable

Commons Amendments 26 and 27

- 20 Amendments 26 and 27 are consequential on Amendments 23 and 24.

Commons Amendments to Clause 59: Notification of exclusion of supplier

Commons Amendment 28

- 21 Amendment 28 would clarify that a contracting authority would only have to notify the appropriate authority if it excludes a supplier on the basis of its own judgement (rather than the debarment list).

Commons Amendment 29

- 22 Amendment 29 would require a contracting authority to notify the appropriate authority if it excludes a supplier on the basis of a supplier being on the debarment list by virtue of the new ground to be inserted by Amendment 100.

Commons Amendments to Clause 60: Investigations of supplier: exclusion grounds

Commons Amendment 30

- 23 Amendment 30 would clarify that investigations are for the purpose of considering whether an entry to the debarment list could be added in respect of a supplier.

Commons Amendment 31

- 24 Amendment 31 would require a Minister of the Crown to keep under review whether particular suppliers or sub-contractors should be investigated under this section.

Commons Amendment 32

- 25 Amendment 32 would clarify that investigations under clause 60 are for the purpose of considering whether a supplier could be put on the debarment list, rather than potentially being connected to an application under clause 63 (debarment list: application for removal).

Commons Amendment to Clause 61: Investigations under section 60: reports

Commons Amendment 33

- 26 Amendment 33 would ensure that the investigation reports specify the description of contracts in respect of which a supplier is to be an excluded supplier by virtue of the ground added by Amendment 100, and clarify that the report can be prepared and published before an entry is made on the debarment list.

Commons Amendments to Clause 62: Debarment list

Commons Amendment 34

- 27 Amendment 34 would make it clearer that each entry will relate to one exclusion ground and, as such, could be challenged individually and would ensure that the Minister can specify the description of contracts in respect of which a supplier is an excluded supplier by virtue of the ground to be added by Amendment 100.

Commons Amendment 35

- 28 Amendment 35 is consequential on Amendments 36 and 39. It would provide additional rights to suppliers placed on the debarment list.

Commons Amendment 36

- 29 Amendment 36 would ensure that an application for interim relief under the new clause that would be inserted by Amendment 39 would suspend the Minister's decision to add a supplier's name to the debarment list.

Commons Amendment 37

- 30 Amendment 37 would limit the amendments a Minister of the Crown could make to an entry on the debarment list, ensure that a Minister can voluntarily suspend a decision to add an entry to the debarment list in light of an appeal, and clarify that a Minister can remove an entry where the particular exclusion ground does not apply (even if there are other entries relating to the supplier on the list). It would also ensure that the Minister could remove certain descriptions of contracts from the entry of a supplier that is an excludable supplier by virtue of the ground that would be added by Amendment 100 without removing the entire entry, and it would require the Minister to remove a description of contracts from the debarment list if the Minister is satisfied that the ground that would be added by Amendment 100 does not apply in relation to them.

Commons Amendment 38

- 31 Amendment 38 is consequential on Amendment 37. It would ensure that the Minister could remove certain descriptions of contracts from the entry of a supplier on the debarment list and

require the Minister to remove a description of contracts if the ground to be added by Amendment 100 does not apply in relation to them.

Commons Amendment after Clause 62

Commons Amendment 39

- 32 Amendment 39 would insert a new clause after clause 62, which would allow a supplier to apply to suspend a Minister's decision to add their name to the debarment list. If the decision is suspended, the supplier will not be able to be excluded from procurements on the basis of that entry until the suspension is lifted.

Commons Amendments to Clause 63: Debarment list: application for removal

Commons Amendment 40

- 33 Amendment 40 would ensure that a supplier can apply to change the date indicating when it will cease to be an excluded or excludable supplier. It is also consequential on Amendment 37 which would ensure that the Minister can remove certain descriptions of contracts from the entry of a supplier on the debarment list that is an excludable supplier by virtue of the ground to be added by Amendment 100 without removing the entire entry.

Commons Amendment 41

- 34 Amendment 41 would allow for the fact that a supplier may make different applications in respect of the same or different entries on the debarment list.

Commons Amendment 42

- 35 Amendment 42 is consequential on Amendment 40. It would ensure that a supplier can apply to change the date indicating when it will cease to be an excluded or excludable supplier.

Commons Amendment 43

- 36 Amendment 43 sits alongside Amendment 34. It would remove the reference to maintaining an entry on the debarment list from things to be published as part of a report of an investigation under clause 60. It is clause 63 that is concerned with maintaining entries, not clause 60.

Commons Amendments after Clause 63

Commons Amendments 44 and 45

- 37 Amendments 44 and 45 would replace a power in clause 64 to make provision about appeals with detailed provision for their operation. It would also include permitting suppliers to challenge their being made an excluded supplier in relation to particular contracts by virtue of the ground to be added by Amendment 100 (instead of having to challenge the whole entry) and makes consequential amendments to this effect and amendments consequential on Amendment 34.

Commons Amendment 46

- 38 Amendment 46, to be inserted after clause 64, would allow the Minister for the Cabinet Office to apply in place of the Secretary of State to allow closed material applications to be made to the court in proceedings for interim relief or an appeal against a debarment decision.

Commons Amendment to Clause 65: Timeline for removal of suppliers

Commons Amendment 47

- 39 Amendment 47 would delete clause 65.

Part 4: Management of public contracts

Commons Amendment to Clause 66: Electronic invoicing: implied term

Commons Amendment 48

- 40 Amendment 48 would ensure that a contracting authority can require the use of a particular system in relation to electronic invoices, and that a contracting authority that is a defence authority can require that the system is one that requires the payment of fees by the supplier.

Commons Amendments to Clause 67: Implied payment terms in public contracts

Commons Amendment 49

- 41 Amendment 49 would clarify that “electronic invoice” and “required electronic form” in clause 67(8) have the same meanings as in clause 66(3).

Commons Amendment 50

- 42 Amendment 50 would clarify that a reference to a contracting authority receiving an invoice for the purposes of clause 67 (implied payment terms in public contracts) includes receiving an electronic invoice through a system specified in the contract.

Commons Amendment to Clause 68: Payments compliance notices

Commons Amendment 51

- 43 Amendment 51 would exempt contracting authorities from the requirement to publish a payments compliance notice in relation to a concession contract.

Commons Amendment to Clause 74: Contract change notices

Commons Amendment 52

- 44 Amendment 52 would remove unnecessary provision, as light touch contracts are excluded from the whole clause under subsection (6)(b).

Commons Amendments to Clause 76: Publication of modifications

Commons Amendments 53-56

- 45 Amendments 53 to 56 would limit the requirement to publish a copy of a contract as modified or a modification to those modifications in respect of which the contracting authority was required to publish a contract change notice.

Commons Amendment to Clause 78: Terminating public contracts: national security

Commons Amendment 57

- 46 Amendment 57 would mean that, as with the existing national security exclusion ground in paragraph 14 of Schedule 7, a relevant contracting authority would need to notify a Minister before terminating a contract in reliance on the new exclusion ground to be added by Amendment 100.

Part 7: Implementation of international obligations

Commons Amendments to Clause 90: Treaty state suppliers: non-discrimination in Scotland

Commons Amendment 58

- 47 Amendment 58 would mean that a Minister of the Crown or Scottish Ministers, in making regulations to ensure treaty state suppliers are not discriminated against in devolved Scottish procurement, may only make provision that is equivalent to provision in Part 7 and where the Minister considers, or Scottish Ministers consider, it necessary in order to ratify or comply with an international agreement.

Commons Amendment 59

- 48 Amendment 59 would make clear that “discrimination” has the same meaning as in clause 89 (Treaty state suppliers: non-discrimination).

Commons Amendment after Clause 90

Commons Amendment 60

- 49 Amendment 60 would insert a new clause after clause 90 which would provide that an appropriate authority or the Scottish Ministers could make provision to deal with the procurement consequences of a trade dispute under a treaty implemented by way of Schedule 9 (other than the Trade and Cooperation Agreement with the European Union, which is dealt with under existing legislation).

Part 8: Information and notices: General provision

Commons Amendments to Clause 94: Electronic communications

Commons Amendment 61

- 50 Amendment 61 would restrict the requirements in respect of electronic communications systems to covered procurements.

Commons Amendment 62

- 51 Amendment 62 would create an exception to the requirement for electronic communications systems to be free of charge and readily accessible to suppliers where those systems are used after award of a public contract or in relation to a utilities dynamic market.

Commons Amendments 63 and 64

- 52 Amendments 63 and 64 would extend the exception in subsection (3) to any requirement in clause 94 (electronic communications) that the contracting authority considers poses a security

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risk.

Commons Amendment to Clause 95: Information relating to a procurement

Commons Amendment 65

53 Amendment 65 is consequential on similar provision being made in Amendment 67.

Commons Amendment after Clause 95

Commons Amendment 66

54 Amendment 66 would insert a new clause after clause 95 which would require contracting authorities to keep records to explain decisions made for the purpose of awarding or entering into a public contract and records of communications with suppliers made before the contract is entered into, in each case subject to time limits.

Part 9: Remedies for breach of statutory duty

Commons Amendment to Clause 97: Duties under this Act enforceable in civil proceedings

Commons Amendment 67

55 Amendment 67 would ensure that challenges to debarment decisions are all dealt with under clause 64 (debarment decisions: appeals).

Commons Amendment after Clause 103

Commons Amendment 68

56 Amendment 68 would insert a new clause after clause 103 which would allow the Minister for the Cabinet Office to apply in place of the Secretary of State to allow closed material applications to be made to the court in proceedings under Part 9.

Part 11: Appropriate authorities and cross-border procurement

Commons Amendments to Clause 107: Welsh Ministers: restrictions on the exercise of powers

Commons Amendment 69

57 Amendment 69 would mean that a public undertaking or private utility that operates “wholly or mainly in relation to Wales” will be treated as a devolved Welsh authority.

Commons Amendment 70

58 Amendment 70 would mean that a contracting authority whose functions are exercisable “wholly or mainly in relation to Wales” will be treated as a devolved Welsh authority regardless of the subject-matter of a particular procurement.

Commons Amendment 71

59 Amendment 71 is a consequential on Amendment 94.

Commons Amendment 72

- 60 Amendment 72 would ensure that the Welsh Ministers can conduct debarment investigations otherwise than for the purpose of regulating devolved Welsh authorities.

Commons Amendment to Clause 108: Northern Ireland department: restrictions on the exercise of powers

Commons Amendment 73

- 61 Amendment 73 would ensure that a Northern Ireland department can conduct debarment investigations otherwise than for the purpose of regulating transferred Northern Ireland authorities.

Commons Amendments to Clause 109: Minister of the Crown: restrictions on the exercise of powers

Commons Amendment 74

- 62 Amendment 74 would mean that a Minister of the Crown could not make consequential provision for the purpose of regulating a devolved Welsh authority without the consent of Welsh Ministers.

Commons Amendment 75

- 63 Amendment 75 would ensure that a Minister of the Crown can conduct debarment investigations and put suppliers on the debarment list for the purpose of regulating devolved and transferred authorities.

Commons Amendment 76

- 64 Amendment 76 would allow a Minister of the Crown to exercise the trade dispute power under the new clause in Amendment 60 in relation to devolved Welsh authorities and transferred Northern Ireland authorities.

Commons Amendments to Clause 111: Powers relating to procurement arrangements

Commons Amendment 77

- 65 Amendment 77 would remove the power of a Minister of the Crown to amend Scottish procurement legislation to apply it to procurement under devolved Scottish procurement arrangements by contracting authorities.

Commons Amendment 78

- 66 Amendment 78 would give the Scottish Ministers power to amend Scottish procurement legislation to disapply that legislation where procurement by devolved Scottish authorities may be regulated by provision made by a Minister of the Crown under subsection (1).

Commons Amendments 79 and 80

- 67 Amendments 79 and 80 would extend the definition of “Scottish procurement legislation” to the Procurement Reform (Scotland) Act 2014.

Part 13: General

Commons Amendment to Clause 116: Application of this Act to procurement by NHS England

Commons Amendment 81

68 Amendment 81 would delete clause 116, which would be replaced by Amendment 82.

Commons Amendment after Clause 116

Commons Amendment 82

69 Amendment 82 would insert a new clause as a substitute for clause 116 and allow a Minister of the Crown to make provision excluding from the scope of this Bill procurement that is within the scope of regulations under section 12ZB of the National Health Service Act 2006.

Commons Amendments to Clause 118: Regulations

Commons Amendment 83

70 Amendment 83 would apply the affirmative procedure to an exercise of powers by a Minister of the Crown under clause 52.

Commons Amendment 84

71 Amendment 84 is consequential on Amendment 44 removing the power referred to in this paragraph.

Commons Amendment 85

72 Amendment 85 would apply the affirmative procedure to an exercise of powers by a Minister of the Crown under the new trade disputes clause in Amendment 60.

Commons Amendment 86

73 Amendment 86 would subject the power added by Amendment 93 to the affirmative procedure.

Commons Amendment 87

74 Amendment 87 would apply the affirmative procedure to an exercise of powers by the Welsh Ministers under clause 52.

Commons Amendment 88

75 Amendment 88 would apply the affirmative procedure to an exercise of powers by the Welsh Ministers under the new trade disputes clause in Amendment 60.

Commons Amendment 89

76 Amendment 89 would apply the affirmative procedure to an exercise of powers by a Northern Ireland department under clause 52.

Commons Amendment 90

77 Amendment 90 would apply the affirmative procedure to an exercise of powers by a Northern Ireland department under the new trade disputes clause in Amendment 60.

Commons Amendments 91 and 92

- 78 Amendments 91 and 92 would apply the affirmative procedure to an exercise of powers by Scottish Ministers under the new trade disputes clause in amendment 60.

Commons Amendment to Clause 123: Commencement

Commons Amendment 93

- 79 Amendment 93 would make commencement of devolved Welsh aspects of the Bill subject to the consent of the Welsh Ministers, and would allow UK Ministers to amend the Act resulting from this Bill so that the Act no longer applies in respect of devolved Welsh procurement and could be commenced without consent.

Commons Amendment to Clause 124: Short title

Commons Amendment 94

- 80 Amendment 94 would remove the technical amendment made by the House of Lords in respect of the financial privileges of the House of Commons.

Schedule 2: Exempted contracts

Commons Amendment to Part 1: Counterparty Exempted Contracts

Commons Amendment 95

- 81 Amendment 95 would ensure that contracts within the new Part 1 of Schedule 2 (which will comprise paragraphs 2, 3, 25, 31 and 32) are always exempted from being public contracts.

Commons Amendments to Part 2: Subject-matter exempted contracts

Commons Amendment 96

- 82 Amendment 96 would apply the exception to contracts being exempted contracts only to contracts within the new Part 2 of Schedule 2, clarify that the application of the exception for contracts is to be determined on award in the view of the contracting authority, and clarify that the authority may have regard to the practical and financial consequences of awarding more than one contract.

Commons Amendment 97

- 83 Amendment 97 would transfer paragraph 25 of Schedule 2 to the end of line 39 on page 85.

Commons Amendment 98

- 84 Amendment 98 would transfer paragraphs 31 and 32 of Schedule 2 to the end of line 39 on page 85.

Commons Amendment 99

- 85 Amendment 99 would exempt from the Bill those contracts entered into by the City of London other than for the purposes of its functions as a local authority, police authority or port health authority (for example, operating independent schools).

Schedule 6: Mandatory exclusion grounds

Commons Amendments to Schedule 6: Mandatory exclusion grounds

Commons Amendments 100 and 101

- 86 Amendments 100 and 101 would allow the Minister to put a supplier on the debarment list as an excluded supplier in relation to contracts of a particular description if satisfied that the supplier would pose a threat to national security in relation to those contracts.

Schedule 7: Discretionary exclusion grounds

Commons Amendments to Schedule 7: Discretionary exclusion grounds

Commons Amendment 102

- 87 Amendment 102 would leave out the discretionary exclusion ground relating to forced organ harvesting.

Commons Amendment 103

- 88 Amendment 103 would insert a definition of “event” for the purposes of paragraph 16 of Schedule 7.

Schedule 10: Single source defence contracts

Commons Amendment to Schedule 10: Single source defence contracts

Commons Amendment 104

- 89 Amendment 104 would allow single source contract regulations to make provision as to whether a contract is or is not an amendment of an existing contract for any purpose under section 14 of the Defence Reform Act 2014, not simply for the purposes of subsections (4) and (5).

PROCUREMENT BILL [HL]

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These Explanatory Notes relate to the Commons Amendments to the Procurement Bill [HL] as brought from the House of Commons on 14 June 2023 (HL Bill 147).

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