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Comments on the UK Government’s “Green Paper” on *Transforming Public Procurement*

By [Professor Christopher R. Yukins](#)

George Washington University Law School, Washington D.C.

Email: cyukins@law.gwu.edu

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These comments are respectfully submitted in response to the United Kingdom’s [plan](#) for transforming its public procurement laws after Brexit, in the “green paper” entitled [Transforming Public Procurement](#). These comments respond to the [consultation questions](#) noted below, and provide a U.S. perspective on the proposed reforms. The comments will be republished on www.publicprocurementinternational.com.

Introduction

I am the Lynn David Research Professor in Government Procurement Law Program at the George Washington University Law School in Washington, D.C. Our program is internationally recognized as one of the world’s leading programs in public procurement law. These comments are submitted as part of our program’s regular interactions with the United Kingdom. We work closely with our colleagues at King’s College London, the University of Nottingham and Oxford University, and with other academic and public institutions across Europe.

While our UK-based colleagues [Sue Arrowsmith](#), [Anne Davies](#), [Jane Jenkins](#), [Michael Bowsher QC](#) and [Albert Sanchez-Graells](#), among others, have published very useful comments on the green paper, these comments focus on points of special interest and concern for the U.S. procurement community. The comments draw on my decades of experience in federal and state procurement in the United States, both as a professor and as a practicing lawyer, and on the extensive international work that we do as an academic program. The comments focus especially on points of potential cooperation and alignment between U.S. and UK procurement regulation. The United States and the United Kingdom have cooperated very effectively in other, related areas of legal regulation, such as corporate compliance; the green paper presents other areas of potential intergovernmental cooperation, which can improve procurement outcomes, open trade opportunities on both sides of the Atlantic, and enhance anti-corruption efforts in both nations.

The Green Paper – Transforming Public Procurement

Transforming Public Procurement is the Cabinet Office’s plan (or “green paper”) for a new public procurement legal regime in the United Kingdom after Brexit. Lord Agnew, the Minister of State for the Cabinet Office, called this “an historic opportunity to overhaul” the United Kingdom’s “outdated public procurement regime” – a “dividend,” as it were, “from the UK leaving the EU,” to rebuild the procurement system to make it easier for “innovative companies to win business” and to improve public goods and services by making it simpler “to exclude suppliers that have performed poorly in the past.” *Id.* at 5-6.

The Cabinet Office posed a number of questions for consultation regarding the green paper. The comments below deal with specific questions thematically, with reference (as appropriate) to parallel procedures in the U.S. government’s procurement system, and – most importantly – to how the United Kingdom’s proposed reforms may affect ongoing cooperation with the United States as our two nations reaffirm their special relationship.

Consolidation of Procurement Rules, Including Defense – and Their Impact on Trade

Q4. Do you agree with consolidating the current regulations into a single, uniform framework?

The United Kingdom’s proposed regulatory framework would consolidate all of the UK procurement regulations into a single, uniform framework, rather than the splintered framework under the prior European Union procurement directives. The UK government’s plan calls for consolidating the procurement rules that the UK previously issued under the European Union’s various procurement directives, including the [Public Contracts Regulations 2015](#) (PCR), the Utilities Contracts Regulations 2016 (UCR); the Concession Contracts Regulations 2016 (CCR); and the Defense and Security Public Contracts Regulations 2011 (DSPCR), to replace them with a single, uniform set of rules (subject to sector-specific supplements) for all types of contracts.

The proposed consolidation of the UK procurement regulations is consistent with U.S. practice. [Since 1984](#), the U.S. government has operated under a consolidated, uniform [Federal Acquisition Regulation](#) (FAR). While there are exceptions (concessions typically fall [outside](#) the FAR, for example), and agencies are allowed to [supplement](#) the FAR with their own consistent regulations (unless a [special deviation](#) is authorized), in the main all U.S. agencies follow the same rules across the [US\\$500 billion](#) procurement system. This [celebrated](#) uniformity makes it much easier for contractors to work across the federal government, and allows U.S. procurement officials to move readily from one agency to another – an important way to spread knowledge and experience across the government, and an elegant means of breaking opening hidden pockets of corruption.

By making regulations uniform across UK procurement, the proposed reform will facilitate cooperation with U.S. regulators, and will likely ease competition across the UK public procurement markets. Regulatory cooperation will grow increasingly important as the United Kingdom and the United States [tackle common problems](#) in procurement, such as cybersecurity and environmental sustainability. Opening competition will, in the words of the green procurement, deliver “inward investment and better value for UK taxpayers.”

The UK government clearly views these revised procurement rules as part of a broader international trade strategy. Enhanced competition across the UK public procurement markets may, for example, open the door to a long-unresolved issue in U.S. procurement trade policy: whether, since the UK sub-central markets are generally open, state and municipal procurement markets across the United States also should be open to UK firms, without discrimination.

At present, only two-thirds of the U.S. states (and only a handful of U.S. cities) have [opened](#) their markets under the World Trade Organization's Government Procurement Agreement ([GPA](#)), and actual foreign access to those markets is [statistically murky](#). While Washington, D.C. has long argued that state and local governments [cannot be compelled](#) to open their markets for constitutional reasons of federalism, that argument is untested and overlooks other ways the federal government might bring state and local governments to open their markets, such as through [federal grants](#). The new rules – and new openness to competition -- in the United Kingdom may reopen this question of access to U.S. state and local public procurement markets.

Accountability in the Cabinet Office – Bid Challenges and Debarment

Consultation Question 1. Do you agree there should be a new unit to oversee public procurement with new powers to review and, if necessary, intervene to improve the commercial capability of contracting authorities?

Q2. Where should the members of the proposed panel be drawn from and what sanctions do you think they should have access to in order to ensure the panel is effective?

Q30. Do you believe that the proposed Court reforms will deliver the required objective of a faster, cheaper and therefore more accessible review system? If you can identify any further changes to Court rules/processes which you believe would have a positive impact in this area, please set them out here.

Q31. Do you believe that a process of independent contracting authority review would be a useful addition to the review system?

In the green paper, the UK government proposes to establish a new unit to oversee public procurement, lodged in the Cabinet Office. The [Cabinet Office](#) supports the Prime Minister and ensures the effective running of the government; it is also the corporate headquarters for the government, acting in partnership with the Treasury, and the Cabinet Office takes the lead on certain critical policy areas. Under the proposal, the new unit within the Cabinet Office would be responsible for monitoring the procurement system to identify “systemic gaps” in agencies’ “commercial capability and understanding.” The new unit would have the power to issue “improvement notices” with “recommendations to drive up standards in individual contracting authorities”; if the recommendations were ignored, the unit “could have recourse to further action such as spending controls.”

The new unit would also oversee debarment, if debarment was established in the revamped UK procurement system. The current Procurement Regulation 2015, which can be traced to Article 57 of European Procurement Directive [2014/24/EU](#), calls only for *exclusion* for corruption, on a procurement-by-procurement basis. According to the green paper (Section 4), the UK government will consider establishing a debarment function which could

exclude corrupt or incompetent contractors, in a [debarment model](#) comparatively much closer to the [U.S. federal debarment system](#) than to the EU exclusion scheme.

Unlike the U.S. debarment model, however, debarment in the United Kingdom (if the proposal is adopted) could be centralized in the Cabinet Office. Centralization was rejected in the U.S. system when the proposed [SUSPEND Act](#) (which would have centralized procurement in a federal board) failed several years ago, because many in the U.S. procurement community believed that the debarment function (which depends on a calculated business assessment of risk) should remain in the customer agencies.

With regard to protests (remedies) and debarment, the green paper would raise several issues directly relevant to the U.S. procurement community:

- **Bid protests (remedies) should be independent and effective.** Rather than creating a clear remedies mechanism in the government, akin to [agency-level bid protests](#) in the U.S. system, the green paper would create a Cabinet Office committee charged with overseeing systemic irregularities. This misses half of the bid remedies equation. While the remedies (or “protest”) process is primarily intended to protect the government from procurement failures – it is a risk-mitigation tool – what drives that tool is the disappointed bidders’ desire for vindication. (Notably, the green paper itself recognizes these dual purposes of bid remedies, at paragraph 188.) If the remedies process is folded into an unseen committee, the disappointed bidders – the whistleblowers who make the remedies system effective – may not come forward. That, in turn, would hurt competition, because an effective and independent bid remedies system is an [essential safeguard](#) for prospective bidders. Although the green paper suggests reforms to *judicial* challenges in the United Kingdom, the U.S. experience is that court-based challenges can be [slow and expensive](#) (a problem confirmed by the green paper itself, when it discusses the costs and delays of the UK court-based bid remedies). The [international experience](#) has been that an independent agency (in the U.S. system, the [Government Accountability Office](#)) can offer a very sound solution, as the source of independent, informed reviews of agency procurement decisions through what is, in essence, a streamlined administrative adjudication. The green paper suggests that reforms in the UK Technology and Construction Court (TCC) (which hears many bid challenges) could streamline that court’s proceedings; the proposed reforms would make those TCC proceedings more like GAO protests in the U.S. system, but the green paper leaves open the possibility of shifting some remedies proceedings to administrative tribunals. In the United States, [serious consideration](#) is being given to encouraging vendors to protest before the agencies themselves, rather than before the courts or GAO.
- **Debarment may be handled through the Cabinet Office.** By centering the debarment function in the Cabinet Office, rather than in the customer agencies, the green paper might make debarment more “political” and thus prejudice foreign competitors. Debarment, as with all questions of contractor disqualification, turns on the *reputational* and *performance* risks presented by a particular vendor. Senior officials in the Cabinet Office could be more sensitive than line agency officials to the government’s reputational risk, and

might also be less attuned to the performance risks posed by a given vendor. Foreign vendors could face more acute risk when debarment was centralized and elevated, because at a high level of government there might be less appetite for suffering a foreign vendor's failings, even if that vendor offered superior performance. While the green paper promises vendors due process before they would be debarred (as in the U.S. system), foreign vendors (including U.S. vendors) could face a harsher hearing in a centralized debarment function. One way to help resolve this problem would be to ensure that debarment decisions are subject to judicial review, much as they are in the U.S. system (see [overview](#), forthcoming per Cambridge University Press).

Corporate compliance systems should always be encouraged -- they should not await error. A final point, regarding corporate "self-cleaning." As with the European procurement directive, the green paper contemplates "self-cleaning" (from the German, "*selbstreinigung*") only *after* a contractor runs afoul of the procurement rules (only after the contractor is "dirty"). This European approach conflicts with the [UK Bribery Act](#), and the Ministry of Justice [guidance](#) under the Act, which proceed on the assumption that *all* corporations (good or bad) should have corporate control systems in place to stem corruption. Compliance systems curb contractor misconduct, and every substantial contractor in the U.S. system [must have](#) a compliance system. To match international norms (in France, for example, the Sapin II law [anticipates](#) that all large corporations will have compliance systems in place), under the new procurement rules the UK government may wish to require that all larger contractors have compliance systems (which are [increasingly affordable](#)) in place – whether they've done wrong or not.

Streamlined Procurement to Spur Innovation

Q6. Do you agree with the proposed changes to the procurement procedures?

The UK regulators propose to overhaul the "complex and inflexible procurement procedures" inherited from the European Union, and to replace those old procedures "with three simple, modern procedures": (1) a "new flexible procedure that gives buyers freedom to negotiate and innovate" to gain best value; (2) an "open procedure that buyers can use for simpler, 'off the shelf' competitions," and (3) a "limited tendering procedure that buyers can use in certain circumstances, such as crisis or extreme urgency."

The "flexible procedure" would allow multilateral competitive negotiations, which (under Federal Acquisition Regulation (FAR) [Part 15](#)) is the most commonly used procurement method used in the U.S. federal government. But the U.S. competitive negotiations are hardly marked by "freedom"; they are [highly regimented](#), in part because of officials' fear of bid challenges and in part because competitive negotiations, which almost always call for subjective decision-making by officials, present much more corruption risk. Nevertheless, the U.S. procurement system relies heavily on competitive negotiations for a simple reason (one not called out in the UK green paper): competitive negotiations typically begin from a relatively brief statement of the government's requirements, and leave it to private sector offerors to present their best technical solutions. In other words, the private sector, not the government, is crafting the solution – and this consistently leads to better outcomes, because private firms are immersed in new technologies in ways that the government almost never can be.

Simplifying competitive negotiations to award on low price can be a mistake.

There is an ancillary point worth making, at the intersection between competitive negotiations and open procedures. The green paper suggests that, while “it would be possible to undertake a process akin to the open procedure through the new competitive flexible procedure,” there is “merit in retaining the open procedure in its own right.” The U.S. experience certainly bears that out. While only [roughly 2%](#) of U.S. federal procurements are done using “open” procedures (“sealed bids” under [FAR Part 14](#) in the U.S. system), a large portion of competitive negotiations are awarded on the basis of low price. This method is called “[lowest-price technically acceptable](#)” (LPTA); under this method, technical requirements are often very broadly stated (because the agency has not yet engaged with the market), and once the technically acceptable proposals have been identified, award is made to the lowest-price offer. While this method is simple and so reduces the risk of a bid protest, it too often yields shoddy outcomes, based on low price alone. [Congress](#) and the [Government Accountability Office](#) have roundly criticized the LPTA method, but it persists, probably because of what economists call “[agency](#)” [problems](#) – the tendency for agents/officials to take the easiest path, even if it leads to inferior outcomes. On balance, this is a procurement method better *not* taken up by HMG.

The “open procedure” contemplated by the green paper contrasts with the benefits of the flexible (negotiated) procedure. The open procedure would be analogous to sealed bidding under FAR Part 14 in the U.S. system: low-price bidding against detailed government specifications. The green paper suggests that the open procedure should be the default procedure, and should be used for “simple” requirements. This contrasts with U.S. practice; in the U.S. system, neither open tendering nor competitive negotiations is the “default” procedure – they stand in [equipoise](#). And the guiding criterion to choose between the procedures should not be whether the procurement is “simple,” but instead whether a more flexible negotiation could bring forth new solutions from the private sector.

Limited tendering would be bound. Under the green paper, limited tendering (what is called “[other than full and open competition](#)” in the U.S. system) would be restricted to a narrow set of circumstances, which are compared in the following table.

UK: Proposed Ground for Limited Tendering	U.S. Grounds for Other-than-Full-and-Open Procurement
Absence of tenders or suitable tenders in an advertised procurement;	FAR 6.302-1
Artistic reasons, technical reasons or exclusive rights;	FAR 6.302-1
Extreme urgency;	FAR 6.302-1
For the purchase of research and development goods;	FAR 6.302-1
Additional purchase of goods where a change in supplier would result in technical difficulties;	FAR 6.302-1

Purchase of goods on commodity markets;	
Purchase of goods on advantageous terms due to winding up or bankruptcy;	U.S. rules solicitous of bankrupt's estate. FAR Subpart 42.9
Design contests (will be removed as the procedure will cease to exist);	FAR Subpart 36.6 - Brooks Act allows limited competition for architect and engineering services. FAR
Repetition of works and services in limited circumstances.	FAR 6.302-1
Crisis or emergency	FAR 6.302-1

As in the U.S. system, published notice of limited tendering would have to be given.

Need for regulatory cooperation. Unlike the UK regime, there is no provision in the U.S. rules for a sole-source exception for goods on commodity markets. Indeed, commodity purchases could well be subject to full competition on reverse auctions, a topic which the green paper does *not* address in detail but which is the subject of a [pending rule](#) in the U.S. system. The gap illustrates a common issue here, as the UK system unfolds in parallel to the U.S. system: there are enormous similarities between the two systems, sometimes because of shared insights but more often, it seems, because the two rules systems are shaped to meet common problems. This commonality eases competition across the Atlantic, but also means that a disjuncture – here, for example, the absence of a U.S. exception for commodities – is more likely to trigger a pronounced anti-competitive effect (here, in commodity procurements). This could violate the requirements of the GPA, and (equally seriously) the two nations' commitments to open trade under their [reciprocal defense procurement agreement](#), which accounts for billions of dollars in defense trade every year. What this suggests, in sum, is that while the regulatory conflicts between the two systems may be relatively minor, because of the high stakes between them the United States and the United Kingdom should establish ready means of resolving conflicts in the rules through regulatory cooperation, either formal or informal. A paper outlining the forms of potential regulatory cooperation is [here](#).

Assessing Contractor Performance for Qualification and Award

Q22. Do you agree with the proposal to make past performance easier to consider?

The green paper proposes assessing contractor performance, both for qualification purposes and for award. This would be an important step beyond the EU procurement directives, for regulators in the European Union traditionally have been concerned that member states might misuse past performance information to discriminate against vendors from other states. The UK green paper would follow the U.S. model, and use past performance information both to assess bidder qualification (to exclude poor-performing vendors) and as an evaluation factor for award (see [FAR Subpart 42.15](#)). A few points bear emphasis here.

Q27. Do you agree that transparency should be embedded throughout the commercial lifecycle from planning through procurement, contract award, performance and completion?

Q28. Do you agree that contracting authorities should be required to implement the Open Contracting Data Standard?

Unlike the UK proposal, in the U.S. system much contractor past performance information is not publicly available. In the U.S. system, contractor performance data is available to contracting officials and the subject contractors, but often [not to the public](#) at large. This situation may change over time, as open data (and its corollary, open contracting) gain popularity. It is important to stress, however, that using data standards for contracting (such as the Open Contracting Data Standards developed by the Open Contract Partnership) does *not* necessarily mean that all contractor data must be made public. Open contracting has [two goals](#): (1) that procurement information be readily accessible, unless protected by law; and (2) that procurement information be machine-readable. Conforming procurement data to data standards will make the data machine-readable; that does not resolve, however, what commercial data may still be protected from disclosure by law.

Q29. Do you agree that a central digital platform should be established for commercial data, including supplier registration information?

Debarment, qualification and performance information is being gathered in central digital databases in the U.S. government. What tends to get lost in the discussion over reform is the sheer diversity of information that governments hold on contractors. The information may related to disqualification, debarment and performance, and it can be extensive. In the U.S. system, that contractor information is being compiled in a System for Award Management (www.sam.gov), though as noted much of the information is not available to those outside the U.S. government, and the compiled information is notoriously difficult to access if one is not trained in the data repositories and the byzantine federal requirements. An important area of potential cooperation between the United States and the United Kingdom, therefore, could be in making contractor information more readily accessible on both sides of the Atlantic.

Conclusion

The comments above focus on areas of possible divergence, and cooperation, between the United States and the United Kingdom. There is less focus on *convergence* – where the two procurement systems already overlap. There is also little discussion of provisions that are missing entirely from the green paper, such as cost principles (for cost-reimbursement contracting) or abnormally low tenders, all of which are important emerging issues in public procurement. What the analysis instead suggests is that UK regulators should be mindful of these gaps and differences in the regulatory regimes as they develop a more complete tapestry of rules, and that (equally importantly) regulators, officials, attorneys and academics on both sides of the Atlantic should be prepared to share insights and lessons learned, as the UK procurement system embarks on this next step in its history.