

Scope and Coverage



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Key Dates

19 June 2023 / 17 July 2023 – Part 1 / Part 2 consultation launched on secondary legislation

23 October 2023 – publication of draft Procurement Act 2023 (Miscellaneous Provisions) Regulations 2024

26 October 2023 – Procurement Act 2023 gains Royal Assent

22 March 2024 - publication of govt response to Part 1 and Part 2 on draft Regs

Late March 2024 (?) – anticipated publication of draft Regs

October 2024 – anticipated date for full coming into force of Procurement Act 2023



Principles

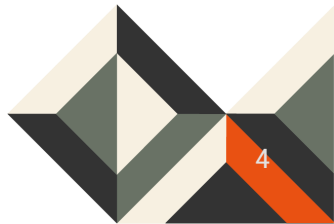
- Section 12(1): Authorities must 'have regard to the importance of':
 - Delivering value for money;
 - Maximising public benefit;
 - Transparency and the sharing of information;
 - Acting and being seen to act with integrity.
- Sections 12(2)-(3): Authorities must 'treat suppliers the same unless a difference between the suppliers justifies different treatment', in which case the authority must 'take all reasonable steps to ensure it does not put a supplier at an unfair advantage or disadvantage'.
- Section 12(4): Authorities must have regard to particular barriers faced by SMEs and must 'consider whether such barriers can be removed or reduced'.
- Section 13: Authorities must have regard to the National Procurement Policy Statement published from time to time by the government.



Scope

- The 2023 Act provides a single regime to replace:
 - Defence and Security Public Contracts Regulations 2011
 - Public Contract Regulations 2015;
 - Utilities Contracts Regulations 2016;
 - Concessions Contracts Regulations 2016.

- The Act applies to England and Wales, Scotland and Northern Ireland (though note that 'devolved Scottish authorities' are included in the definition of 'excluded authorities' and will continue to be governed by existing Scottish regulations).



Key terms

- **‘Contracting authority’** is more broadly defined to reflect the different regimes brought under the Act.
- **‘Public contract’** is also more broadly defined as a contract ‘for the supply, for pecuniary interest, of goods, services or works to a contracting authority’.
- **Financial thresholds** are set out in Schedule 1. Aside from specific thresholds for various types of defence and securities contracts, utilities contracts, ‘light touch’ contracts, concession contracts, and works contracts, the headline figures are:
 - £138,760 threshold for contract for the supply of goods, services, or works to a central government authority (not covered under any of the specific thresholds)
 - £213,477 threshold for contract for the supply of goods, services, or works to a sub-central government authority (not covered under any of the specific thresholds)
- Exemptions for **‘vertical’** and **‘horizontal’** relationships are largely preserved.



Exemptions

- Excluded authorities:
 - Devolved Scottish authorities;
 - The Security Service, Secret Intelligence Service, and GCHQ;
 - The Advanced Research and Innovation Agency.
- Exempted contracts including:
 - Certain contracts for the acquisition of land, buildings, and other complete works;
 - Certain defence and security contracts.
- Exceptional circumstances:
 - Section 41: Particular circumstances giving rise to 'direct award justification';
 - Section 42: Direct awards to 'protect life' (including human, animal, or plant life or health or to protect public order or safety.
 - Section 43: Direct awards to non-excluded suppliers where a competitive tender process is 'deemed' impossible.



Processes and procedures



James Neill



Processes and procedures: what are the main differences to the PCR regime?

- Greater emphasis on transparency, both prior to and after the actual procurement competition: lots more notices!
- Simplified competition procedures: greater flexibility
- Frameworks: longer and more flexible in admission processes
- Greater and more centralized management of excluded bidders: the new debarment list procedure
- Greater emphasis on how contract performance should be assessed and publicized
- Modifying public contracts: still a minefield but a bit more flexibility through the “known risk” exemption



Preliminary steps: more pre-competition notices

- Pipeline notices
- Planned procurement notices
- Preliminary market engagement



Pipeline notices – how do they differ from the old PINs under the PCRs?

- Applies to any contracting authority that considers that it will pay >£100m in the coming FY
- Must publish a notice before end of 56 days of FY start
- “A “pipeline notice” means a “notice setting out specified information about any public contract with an estimated value of more than £2 million in respect of which the contracting authority intends to publish a tender notice or transparency notice during the reporting period.”
- Unlike “planned procurement notice”, pipeline notices are compulsory and do not shorten the tender periods
- Preliminary engagement notices – not required before prelim engagement, only required prior to tender notice being issued.



Simplified competition procedures

- 5 procedures under the PCRs reduced to 2
- Single-stage “open procedure”
- Multi-stage “competitive flexible”
- Participation conditions may relate to experience but not prior contracting relationship with authority



Frameworks: what has changed?

- New concept of open frameworks: 8 years, and new suppliers can join during lifetime
- Change from current rules (max 4 years, new suppliers cannot join established framework)



Award criteria refinements under s.24: significantly more flexibility or greater risk?

(1) A contracting authority may refine an award criterion as part of a competitive flexible procedure if—

(a) the tender notice or associated tender documents provide for the refinement of the criterion, and

(b) the authority is yet to invite suppliers to submit tenders to be assessed under section 19 (award following competitive tendering procedure).

(2) A contracting authority may, in consequence of refining an award criterion under subsection (1), refine the indication of the relative importance of the award criteria under section 23(3)(b).

(3) A contracting authority may not make a refinement under this section if it would result in award criteria that would, had the refinement been made earlier, have allowed one or more suppliers that did not progress beyond an earlier round or selection process to have done so



Greater transparency at point of contract award/entry/abandonment

- Assessment summaries provided to bidders (see draft Reg 31 for contents)
- Contract award notices now have to be published BEFORE entry into contract (under PCRs only required 30 days after award)
- Contract details notice under section 53 applies when contract entered into
- Procurement termination notices now required



Exclusions and debarment lists

- Excluded supplier: mandatory exclusion ground applies to supplier or associated person AND circumstances giving rise to exclusion are continuing and likely to occur again OR supplier or associated person are on the debarment list (s.57(1))
- Excludable supplier: discretionary exclusion ground or on debarment list due to discretionary exclusion ground (s.57(2))
- Debarment lists: duty on contracting authorities to report within 30 days decisions to exclude. Decision to debar ultimately taken by Minister of the Crown following an investigation. Statutory process for debarred bidders to apply to the Court for suspension of entry onto the list (s.63) and for appeals against entry (s.64). Test is “material mistake of law”



Contract management and KPIs under Part 4 of the act: greater regulatory burden

- Payments compliance notices every six months (s.69)
- >30K payment information to be published every quarter (s.70)
- Contract performance assessment every 12 months (s.71).



Contract modifications under s.74: still a minefield!

- Permitted modifications, not substantial, or below threshold
- Substantial =
 - +/- 10% maximum term provided for on award
 - Material change to scope (no real change to definition from PCRs)
 - Material change to economic balance (no definition)
- Below threshold:
 - 10% (services), 15% (works) increase or decrease estimated value
 - Below contract threshold
- Known risk modification exemption – see para.5 of Schedule 5.



Modification contract change notices (s.75): VEATs/VTNs now mandatory





- Now mandatory before entering in all instances other than under 10%/15% change to value or term or unless novation/restructure
- Standstill is voluntary however – but in practice sensible to apply!
- 90 days to publish contract as modified or modification (s.77) for over £5m contracts (whether initial or as modified)



Thank you

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