

Welcome to Landmark Chambers'

Procurement Act 2023 webinar: Key Update



Your speakers today...



Tim Buley KC (Chair)



James Neill

Topic:
Processes and procedures



Siân McGibbon

Topic:
Coverage and scope



Barney McCay

Topic:
Remedies



Scope and Coverage



Siân McGibbon



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



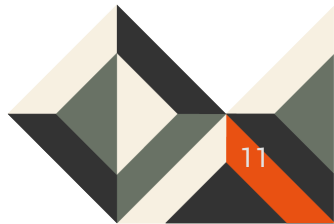
Processes and procedures: what are the main differences to the PCR regime?

- 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)



Remedies



Barney McCay



Remedies

- Largely the same as under the previous regime.
- No new tribunal system – procurement challenges must be brought before the Courts.
- Automatic suspension – triggered if claim is issued and authority is notified of the claim during the standstill period. New statutory criteria for lifting suspension.
- Ineffectiveness = “set aside”.
- Standstill letter = “assessment summary”.



Contract award notices and “assessment summaries” – s50

- Before entering into a contract, the contracting authority must publish a contract award notice – s50(1).
- The award notice must set out (a) that the authority intends to enter into a contract and (b) any other information specified in regulations – s50(2).
- Before publishing the notice (for an award of a contract following a competitive tendering procedure), the authority must provide an “assessment summary” to suppliers that submitted an “assessed tender” – s50(3).
- “Assessment summary” - standstill letter.



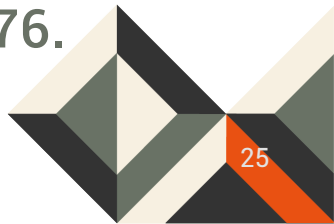
Contract change notices – s75

- Before modifying a contract, the authority must publish a “contract change notice” – s75(1).
- Unless the modification is a “permitted modification”, there is no need to publish a notice if the modification increases/decreases (a) the estimated value of the contract by 10% for goods/services or by 15% for works or (b) the term of the contract by 10% of the maximum term provided for on award – s75(2).
- A “contract change notice” must set out (a) that the authority intends to modify the contract and (b) any other information specified in regulations – s75(3).
- NB exemptions for modifications to certain contracts – s75(6).



Standstill periods on the award of contracts and modification of contracts – s51 and s76

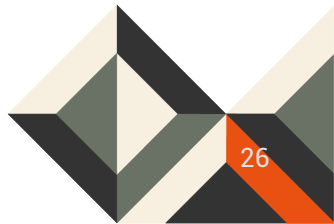
- Authority cannot enter into a contract before (a) the end of the mandatory standstill period or (b) if later, the end of another standstill period provided for in the award notice – s51(1).
- “Mandatory standstill period” = 8 working days from publication of the award notice – s51(2).
- Certain contracts (e.g. direct awards) are exempt, but cannot be entered into until the end of any “voluntary standstill period” provided for in the award notice – s51(3)-(4).
- “Voluntary standstill period” cannot be less than 8 working days from publication of award notice – s51(4).
- Modifications have similar provisions in relation to voluntary standstill periods – s76.



Contract details notices and publication of contracts

– s53

- Contracting authority must publish a “contract details notice” (a) within 120 days if contract is a light touch contract or (b) within 30 days for other contracts – s53(1).
- “Contract details notice” must set out (a) that the authority has entered into a contract and (b) any other information specified in regulations – s53(2).
- If contract's value is more than £5m, copy of contract must be published (a) within 180 days if contract is light touch contract or (b) within 90 days for other contracts – s53(3).
- NB exceptions – s53(4) and (6).



Publication of modifications – s77

- Contracting authority must publish a copy of the contract as modified or the modification within 90 days from the date of the “qualifying modification” – s77(1).
- “Qualifying modification” = modification (a) for which authority was required to publish a “contract change notice” under s75 and (b) which modifies or results in a contract worth more than £5m – s77(2).
- NB exceptions – s77(3).



Actionable breaches and standing – s100

- Contracting authority's duty to comply with Parts 1-5, 7 and 8 is enforceable in civil proceedings – s100(1).
- This does not extend to authority's duty to comply with s12(3), s13(9) or s14(8) – s100(5).
- An authority's duty is owed to any supplier that is a UK supplier or a "treaty state" supplier – s100(2).
- Proceedings can be brought by a UK or treaty state supplier which "has suffered, or is at risk of suffering, loss or damage in consequence of a breach of the duty" – s100(3).
- Similar statutory test to previous regime – see *IGT v Gambling Commission* [2023] EWHC 1961 for detailed consideration of standing under the CCR16.



Automatic suspension – s101

- Contracting authority cannot enter in a public contract – “or modify a public contract or convertible contract” – if “during any applicable standstill period”:
 - (a) proceedings are commenced in relation to the contract – and
 - (b) the authority “is notified of that fact”.

- Automatic suspension can be lifted by the Court by an order under s102 – s101(2).



Interim remedies – s102

- Court can make various orders including lifting an automatic suspension – s102(1).
- In doing so, Court must have regard to – s102(2):
 - (a) the public interest – see definition in s102(2)(a)
 - (b) the interests of suppliers – see s102(2)(b)
 - (c) any other matters that the Court considers appropriate – see 102(2)(c)



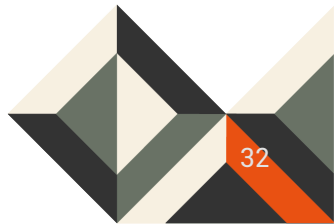
Pre-contractual remedies – s103

- If the Court is satisfied that an authority has breached the duty in s100(1) and the relevant contract/modification has not been entered into/made, then Court can make an order - s103(1)-(2):
 - (a) setting aside the decision or action;
 - (b) requiring the contracting authority to take any action;
 - (c) for the award of damages;
 - (d) that the court considers appropriate.



Post-contractual remedies and set aside conditions – s104 and s105

- If the Court is satisfied that an authority has breached the duty in s100(1) and the relevant contract/modification has been entered into/made, then Court – s104(1)-(2):
 - (a) must set aside the contract/modification if a “set aside condition in s105 is met” - and
 - (b) may make an award of damages.
- Obligation to make a set aside order does not apply if there is an “overriding public interest” in not doing so – s104(3). See considerations that apply in determining whether there is an “overriding public interest” - s104(5).
- If contract/modification is set aside, it is “without effect from the date of the order” – s104(6).
- Set aside conditions are contained in s105.



Time limits on claims – s106





- “Specified set aside proceedings” (defined in s106(5)) must be commenced before the earlier of – s106(1):
 - (a) the end of the period of 30 days beginning with the day on which the supplier first knew, or ought to have known, about the circumstances giving rise to the claim;
 - (b) the end of the period of six months beginning with the day the contract was entered into or modified.
- Other proceedings must be commenced before the end of the period of 30 days beginning with the day on which the supplier first knew, or ought to have known, about the circumstances giving rise to the claim – s106(2).
- Court can extend 30-day period if there is a “good reason” – s106(3). Though see longstop in s106(4)(b).



Thank you

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