
Changes to public procurement – The Procurement Act 2023

12 November 2024

Status of the Procurement Act

Key Timescales and dates

- Procurement Act 2023 received Royal Assent on 26 October 2023
- Confirmed go live date 24 February 2025
- Government “Knowledge Drops”- November 2023 onwards
- Government Training modules - March 2024 onwards (Sessions became available 22/04)
- Government Advance Courses - May 2024
- Secondary legislation
- Guidance

New Implementation Date

Reasons for the Delay

Ministerial Statement (Statement made on 12 September 2024 by Georgia Gould the Parliamentary Secretary for the Cabinet Office)

- Four-month delay to allow time for updating the National Procurement Policy Statement (NPPS).
- Current NPPS does not align with the new government's priorities like economic growth, value for money, and social value.

Guidance Documents

What has been provided?

- Guidance documents first published 11 July 2024 and Last updated 29th October 2024. These guidance documents cover aspects of the Procurement Act 2023 and provide help with interpretation and understanding:
- Split into:
 - Plan
 - Define
 - Procure
 - Manage
- <https://www.gov.uk/government/collections/procurement-act-2023-guidance-documents>

Latest update

29th October the Cabinet Office published further guidance

- **Devolved Authorities:** New guidance clarifies PA 2023's application to Welsh, Scottish, and Northern Irish procurement, aligning with the national procurement policy.
- **Central Digital Platform (CDP):** Guidance on the unified platform for all procurement activities, including registration, notice publication, and submission of organisational information. Ensures centralised publication and streamlined information management under PA 2023.
- **Additional Resources:** Government Commercial Function released a factsheet on CDP for quick reference.
- **Remedies:** updated guidance, useful clarity on extension of standstill period

Further Support provided by GCF

- <https://www.procurementpathway.civilservice.gov.uk/>
- First, batch of templates have been published these include Assessment Summary, Direct Award justification report and premarket engagement checklist
- Still to come are: 1. Competitive flexible proc pack, 2. conflicts of interest declaration form, 3. conflicts assessment, 4. commercial sourcing strategy 5. contract award and recommendation report

The Competitive Flexible

Procedure

How can we use the flexibility in practice?

Current procurement procedures

- Across current regimes in the PCR, UCR and CCR, there are eight identifiable procurement procedures
 - Open procedure
 - Restricted procedure
 - Competitive dialogue procedure
 - Competitive procedure with negotiation
 - Innovation partnerships
 - Design contests
 - Negotiated procedure without prior publication
 - Light touch regime
- Many procedures are not really used and significant overlap between some of these procedures (e.g. CD and CPN)

New Procedures

- Two competitive procedures (section 20(2)):
 - Single-stage tendering procedure without a restriction on who can submit tenders (open procedure)
 - Such other competitive tendering procedure as the contracting authority considers appropriate for the purpose of awarding the public contract (competitive flexible procedure)
- No default procedure, but choice of procedure must be proportionate
- No justification required for competitive flexible procedure
- Must use competitive flexible in a Dynamic Market procurement
- See also Light Touch Regime

What are the rules governing it?

- s 20(3): Must ensure the procedure is proportionate to the nature, complexity and cost of the contract.
- s.20s(4): may limit suppliers
 - may provide for refinement of award criteria
 - may not permit participation of suppliers that did not submit a tender, or were excluded, in an earlier round of the procurement.

***Key Issue* – Compliance with principles rather than detailed rules**

- In the absence of a detailed set of rules, adherence to the process set out in the procurement documents (and the objectives at s.12) will be the linchpin of a successful CFP
- Challenge to award decisions in a CFP are likely to be based around non-adherence
- EU freedoms no longer relevant
- No equivalent to Regulation 18 PCR as s.12 “have regard” to objectives

Procurement Objectives (section 12)

- Must **have regard to** the importance of:
 - delivering value for money
 - maximising public benefit
 - sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions
 - acting, and being seen to act, with integrity
- In carrying out a procurement, a contracting authority **must** treat suppliers the same unless a difference between the suppliers justifies different treatment
- If a contracting authority considers that different treatment is justified in a particular case, the authority must take all reasonable steps to ensure it does not put a supplier at an unfair advantage or disadvantage
- Removal or reduction of barriers to participation for SMEs (also a “have regard to” obligation)

Possible guidance from the old LTR (PCR 2015 - Regulation 76)

- Procedures shall be at least sufficient to ensure compliance with the principles of transparency and equal treatment
- Obligation to conduct the procurement in conformity with the published proposals – but possible to depart from the script if this doesn't amount to breach of the aforesaid principles
- Time limits simply required to be reasonable and proportionate
- May conduct in a way corresponding to other procedures

Successive Stages

- Opting for successive stages – should be clear in the procurement documents
- Allows for reduction in numbers of bidders
- Enables more focused engagement as the procurement progresses
- No minimum number of bidders required initially
- Intermediate Assessment of Tenders
 - Reduction must be by application of the evaluation criteria
 - Refining award criteria

Refinement of award criteria and process (Sections 24 and 31)

- Tender Notice or associated tender documents must provide for the refinement of any criterion
- Refinement can be in relation to the criteria or the relative importance (weighting)
- Refinement cannot happen once tenders submitted
- Effect of refinement cannot be such as would have altered any earlier assessment
- Necessary to republish tender notice and any associated tender documents affected by the refinement

Contract Management

Key Performance Indicators

Measuring and reporting on contract performance

- The Procurement Act 2023 places a greater emphasis on contract management, including new rights to terminate existing contracts based on supplier performance.
- Requirement to include minimum of three KPIs in contracts, unless:
 - Contract value is less than £5 million; or
 - Contract cannot be appropriately assessed by KPI (unlikely to apply to most contracts due to value)
- Required to annually (at least) assess and publicly report on KPIs
- To comply with obligation Authorities must proactively monitor its contracts against these KPIs
- Consequences for supplier, this information could be used to exclude for poor performance. So it is important to get it right! Expect disagreements!

When should you start thinking about it?

Market engagement?

- An opportunity to ask for their views on effective contract management
- Perfect time to start to introduce potential KPIs and see how market reacts
- Better to have suppliers on board but you can't be entirely led by them, you have to do what's right for your organisation

KPIs/ Contract Management

But is this a procurement issue?

- Not helpful to look at Procurement and Contract Management in isolation
- A difficult balancing act - inappropriate and burdensome KPIs could have significant impact on procurement process and contract delivery:
 - Due to monitoring and publishing requirements, Suppliers likely to push back if not reasonable
 - Potential delays to process
 - Could lead to post award negotiations with successful supplier at a risk to the Authority
 - Potential for “in term” modifications to correct problems

Key Performance Indicators

Measuring and reporting on contract performance

When is it not required? Doesn't apply to:

- Framework agreements
- Utilities contracts awarded by private utilities
- Concession contracts
- Light touch regime contracts

Framework agreements – this doesn't mean that call-off contracts don't need to include them, they are a public contract in their own right, but query what needs to go into the call-off contract at the point of establishing the framework?

Contract Performance Notices

- Annual reporting against the relevant KPIs – section 71(2)
- Transparency regulations – regulation 29 (Contract performance notices)
 - Assessment of performance against KPIs
 - Breach of public contract or failure to perform
 - Sets out information that must be shared – assume that most of this will be in standard notices, you won't have to remember it!

Contract Performance Notices

How do you rate performance?

- Good - Performance is meeting or exceeding the key performance indicators
- Approaching target - Performance is close to meeting the key performance indicators
- Requires Improvement - Performance is below the key performance indicators
- Inadequate - Performance is significantly below the key performance indicators
- Other - Performance cannot be described as good, approaching target, requires improvement or inadequate

Where not performing to the KPIs the contracting authority must set this information out – regulation 29(6)

Not required when under performance results in full termination (note some confusion on that)

Consequences of Poor Performance

- Under PCR it is difficult to exclude due to “poor past performance”
- The Act widens the scope beyond termination of a contract to include situations where a supplier has “failed to remedy”
- Schedule 7 (12)(3)- Discretionary Ground, gives Authority a wide margin of discretion – if “sufficiently serious” (see schedule for definition)
- Authority must comply with procurement objectives- must be fair and proportionate
- Publishing performance data makes poor performance more visible!

What key changes will you need to consider?

- You will need to ensure your ITT is clear about how KPIs will be settled in process and at award stage. Bidders will want to push you on this
- Note that you will need to ensure compliance with the procurement objectives eg Same Treatment
- The Contract will need to have a very clear process for monitoring, agreeing and reporting
- Contract officers will need to be able to have robust discussions with suppliers.

Contract Modifications

Key changes

Contract Modifications

Has much changed?

- Current position under existing regime:
 - Under the PCR, the current rules on modification of public contracts are set out under Regulation 72
 - Specific grounds are set out at 72 (1) (a-f)
 - Following the award of a public contract, if modifications are made which amount to what is in effect a new contract, a new procurement process is required
 - Risk exposure if modification falls outside of “safe harbours”
- Has position changed under the Procurement Act?

Contract Modifications

Has much changed?

- Section 74 of the Procurement Act, Largely mirrors the “spirit” of Regulation 72 in the PCR
- CA’s may modify a public contract or a contract that, as a result of the modification, will become a public contract (a “convertible contract”) if the modification:
 - (a) is a permitted modification under Schedule 8 (permitted modifications),
 - (b) is not a substantial modification, or
 - (c) is a below-threshold modification.

Contract Modifications

What are the permitted modifications?

- Permitted Modifications (See Schedule 8)
 - Mostly correspond with the current safe harbours under Regulation 72 of the PCR
- Introduction of additional permitted grounds
 - Urgency and protection of life, etc
 - Materialisation of a known risk
 - Defence authority contracts
- Insolvency ground retained- no requirement for succeeding supplier to meet original selection criteria

Contract Modifications

Definition of below threshold

- Below-threshold modification
 - Provides clarity on when a modification is to be considered as a below-threshold modification (See Section 74 (4))
 - Modification would not increase or **decrease** the estimated value by more than:
 - in the case of a contract for goods or services, 10 per cent;
 - in the case of a contract for works, 15 per cent,
 - The aggregated value of below-threshold modifications' is the amount of the estimate value of the contract after modification that is attributable to below-threshold modifications
 - The modification should not materially change the scope of the contract

Contract Modifications

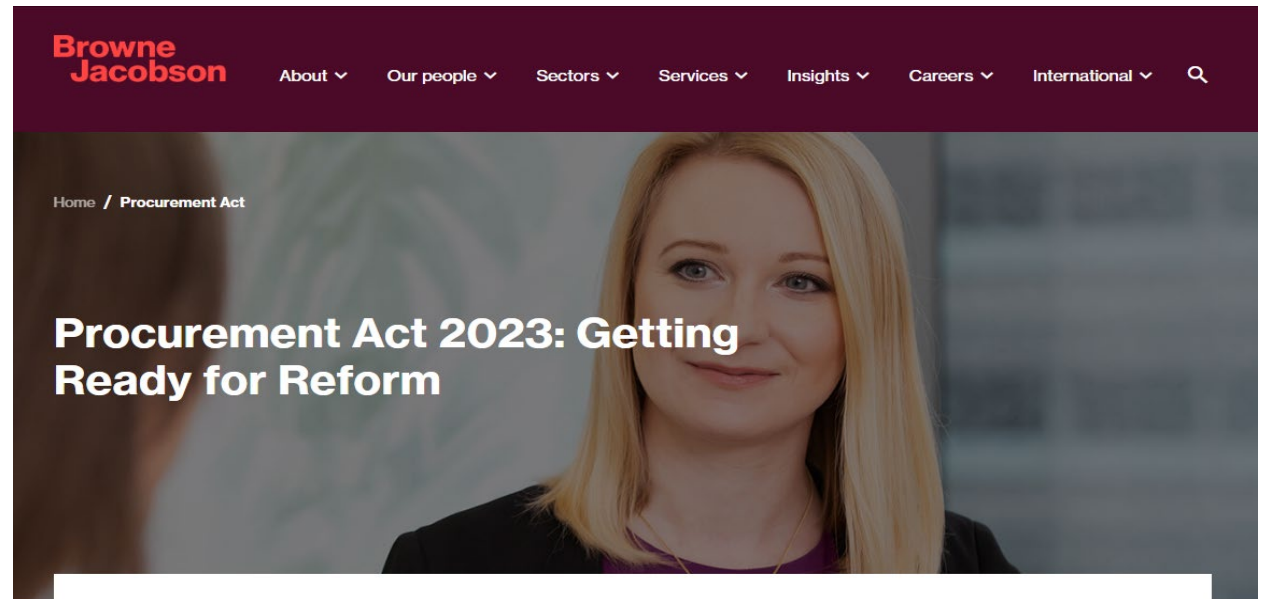
Will they be more visible?

- New Notification Requirements
 - Under the PCR, only required to give notice that a contract has been modified i.e. after the event and only for limited grounds (technical and unforeseen)
 - The Act now provides that a contract change notice must be published before modifying a public contract (See Section 75)
 - There are a number of exclusions (See Section 75 (6))
- Voluntary standstill period (8 days)
- Publication of modification requirements when there is a “qualifying modification”- over £5 million

Questions

Sign up for further updates and insights

- <https://www.brownejacobson.com/procurement-reform>



The public procurement law landscape is changing and the transformation could be a significant shift for public sector bodies and suppliers. The Procurement Bill received Royal Assent on 26 October 2023 and now is the time to get ready for the new Procurement Act 2023.

Product
Managing procurement risks and →

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