

PROCUREMENT ACT 2023 SUMMARY

Abstract

The Commissioning Support Unit has highlighted in this document the key changes from the current Public Contract Regulations 2015 to the new Procurement Act 2023 due to go live 28th October 2024

Kay Springthorpe

The new legislation is The Procurement Act 2023 (hereafter referred to as the Act) and the current regulations which these replace are The Public Contract Regulations 2015 (hereafter referred to as PCR).

This document is a summary of some of the main changes under the Act and by no means details all the changes that are ahead. The Contract Procedure Rules (part 4G of the Constitution) will be rewritten and guidance will be released on the Procurement and Contracts Toolkit when the final government guidance is received.

The main changes under the Act compared to PCR are broken down within this document, but in brief are:

1. New tender procedures and below threshold requirements
2. Change to the tender evaluation criteria (MEAT vs. MAT).
3. Transparency requirements regarding information to be published.
4. Standstill period timeline and scope.
5. Mandatory and discretionary grounds for exclusion.
6. Central debarment list.

Leaving the EU provided the UK with the responsibility and opportunity to overhaul the public procurement regulations. The four existing sets of public regulations (The Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016, the Concession Contracts Regulations and the Defence and Security Public Contracts Regulations 2011) will be replaced by one set of regulations.

The Act aims to simplify procurement, reducing bureaucracy and creating a fairer system that works better for both buyers and suppliers. There will be more flexibility for the public sector to have the freedom to better-design their procurement procedures and allow public procurement to be opened up for new entrants such as small businesses and social enterprises so that they can compete for and win more public contracts. Transparency is to be embedded throughout the commercial lifecycle so that the spending of taxpayers' money can be properly scrutinised.

The Act introduces a new set of procurement objectives which contracting authorities must have regard to when carrying out their procurements:

- 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, and
- Acting, and being seen to act, with integrity.

Changes made to the procurement regime are not retroactive. Procurements started after the regime goes live must be awarded using the new Procurement Act. Any procurements awarded prior to go live (28th October 2024) or which are out to tender during transition will continue to be governed and follow the rules of PCR for the full life of the contract and the changes listed below will not apply to that contract (including the new transparency notices)

1. New Tender Processes

Currently under PCR there are 6 main procurement routes:

- Open procedure
- Restricted procedure
- Competitive procedure with negotiation
- Competitive dialogue
- Innovation partnership
- Negotiated procedure without prior publication

Under the new Act there will only be 3 procedures:

- Open procedure
- Competitive flexible procedure
- Direct award (the circumstances for these will be laid out in the refresh of our contract procedure rules and only apply to special circumstances).

The chosen procedure must be proportionate having regard to the nature, complexity and cost of the contract, and unlike some of the procedures under PCR there is no justification required for the use of either competitive tendering procedure.

Frameworks

The use of frameworks to procure goods and services will remain, the general principles of awards under a framework will still apply, i.e. a framework may provide for award without reopening for competition, but also allow a competitive selection process to take place with the suppliers on that framework.

The main difference to note is that there are now 'Open' and 'Closed' frameworks.

An Open framework allows for the framework to be reopened at predetermined points to allow new suppliers to apply to join (via a tender), the framework can be live for 8 years.

A Closed framework will continue to be used as they currently are where the maximum period of the framework is 4 years, and suppliers cannot join once the framework is live.

Dynamic Purchasing Systems (DPS)

A DPS is unlike a traditional framework as suppliers can join at any time, it only provides access to a pool of pre-qualified suppliers and does not conduct additional checks, documentation and assurances as per a standard framework.

The Act replaces dynamic purchasing systems and qualification systems with a single new 'commercial tool' called a dynamic market. Dynamic markets have many of the features of the current dynamic purchasing systems and qualification systems.

Below Threshold Requirements

The Act introduces "notifiable below threshold contracts".

This means that every contract with a value of £30,000 up to the relevant UK threshold will require us to advertise the opportunity, we must first publish a below-threshold tender notice on the central digital platform. The below-threshold tender notice is a lighter touch version of the tender notice for covered procurement (although it will be accessed on the central digital platform through the standard tender notice). It must set out how we intend to invite the submission of tenders and contain minimum information, once we have completed the procurement a contract details notice must be published.

2. Change to the tender evaluation criteria (MEAT vs. MAT).

Under PCR contract award should be based on the most economically advantageous tender (MEAT), whereas the Act moves to awarding to the most advantageous tender (MAT).

As under the PCR, we will still be required to use a weighting system to identify the successful bidder where there are multiple criterion. However, unlike the PCR, the Act does not refer to price in the context of the award criteria. Meaning we may use non-financial criteria when identifying the successful bidder.

19(1) of the Act states that a contracting authority "may award a public contract to the supplier that submits the most advantageous tender"

19(2) states:

The 'most advantageous tender' is the tender that the contracting authority considers:

- a) Satisfies the contracting authority's requirements, and
- b) Best satisfies the award criteria when assessed by reference to

The assessment methodology under section 23(3)(a)2, and

If there is more than one criterion, the relative importance of the criteria under section 23(3)(b)3

Initial considerations are that for Leicestershire County Council no procurement evaluations should take place by excluding price without the agreement of the Commissioning Support Unit and the Assistant Director for Finance. The reasons for not evaluating against price would need to be documented and justified.

3. Transparency requirements regarding information to be published.

Transparency notices are documents published online containing specific information as required to be made public.

Under PCR there are only 5 types of notices applicable to LCC currently:

- Prior Information notice
- Contract notice
- Contract award notice
- Contract Modification notice
- VEAT notice

The Act brings in many more notices, 14 in total detailed in the table below:

Notice	Details
Pipeline Notice	One notice per pipeline item to provide the market with advance notice of opportunities that the Council is proposing to enter in the forthcoming 18 months.
Planned Procurement Notice	We may choose to publish this notice to inform the market that we intend to publish a tender notice. If the notice is published for at least 40 days (and no longer than one year) we can benefit from a reduced tendering period.
Preliminary market engagement notice	A notice advising that we intend to carry out, or has conducted, preliminary market engagement.
Tender Notice	This remains an unchanged required notice when conducting a procurement procedure

	under the Open or Competitive flexible procedure.
Transparency Notice	For any Direct Award (in the context of the Act) a notice must be published advising that we intend to award a contract directly.
Procurement Termination Notice	If after publishing a tender or transparency notice we then decide not to award the contract a notice has to be published to that effect.
Contract Award Notice	Before entering into a contract a contract award notice must be published. This will in most cases start the standstill period (now 8 working days instead of 10 calendar days). This is a big change from PCR in that a contract award notice is not published until after the standstill period has successfully passed and the contracts are fully signed.
Contracts Details Notice	This notice follows the contract award notice and any associated standstill period.
Dynamic Markets Notice	This notice specifies the terms suppliers must satisfy in order to enter the Market.
Contract and KPIs Notice	This notice is for contracts over £5m where we must publish a copy of the contract (redacted) and the KPIs.
Payments Compliance Notice	We will be required to publish every 6 months specified information regarding the compliance with payment against 30 day terms. We will also be required to publish specified information about any payment of more than £30,000 made under a public contract. The information must be published before the end of the period of 30 days beginning with the last day of the quarter in which the payment was made.
Contract Performance Notice	This notice records the KPI information for those contracts with an estimated value of more than £5m where KPI's should be set. It is also to publish any serious breach of contract.
Contract Change Notice	Before modifying a contract, a notice must be published of that change if it modifies the contract value by 10% or more for goods or services, or 15% or more for works. Or the modification increases or decreases the term by 10% of the maximum term stated at award. It should also be noted that there will be a voluntary standstill period for the modification of contracts where the Act states the 'contracting authority may not modify a public contract before the end of any standstill period'.
Contract Termination Notice	Before the end of the period of 30 days beginning with the day on which a public

	contract is terminated a contract termination notice must be published. This will apply not only to contracts terminated before the end of their term, but also on natural expiry of a contract.
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It should be noted that the requirement to publish additional notices will have a resource impact in service areas which perform their own tender exercises and manage their own contracts.

4. Standstill period timeline and scope.

The mandatory standstill period will change to 8 working days instead of 10 calendar days.

The letters that we currently issue to trigger the standstill period list out the relative advantages and characteristics of the winning tender compared to the unsuccessful bidder, this will change to an 'assessment summary' of the unsuccessful tender and the winning tender.

Assessment summaries broadly fulfil the same function as notices of a decision to award a contract (commonly referred to as 'standstill letters') in the PCR but there are some important differences. Under the Act, it is the publication of the contract award notice that initiates the standstill period, rather than the issue of standstill letters to participating suppliers as under the previous legislation.

We are not required to include in an assessment summary a direct comparison between the successful supplier's assessed tender and an unsuccessful supplier's assessed tender. The assessment summary provided to unsuccessful suppliers must, however, include a copy of the information provided to the successful supplier (redacted for confidentiality where required) explaining how its tender scored against each of the criteria. A supplier reading the two sets of information alongside each other will be able to ascertain the relative advantages.

5. Mandatory and discretionary grounds for exclusion.

The Act sets out a list of mandatory and discretionary exclusion grounds and places a duty on us to consider both sets of grounds for each procurement, as well as whether the circumstances are continuing or likely to occur again. We must exclude an excluded supplier and may exclude an excludable supplier.

The high level changes to the exclusion's regime are:

- a. introducing new mandatory exclusion grounds to expand the circumstances in which we must exclude suppliers for convictions of certain offences and other certain serious misconduct;
- b. introducing new discretionary exclusion grounds in areas such as poor performance, labour misconduct and national security threats, enabling contracting authorities to take tougher action on underperforming suppliers and suppliers who pose unacceptable risks;

- c. making the exclusion grounds UK-specific but also ensuring they apply to certain events which occur overseas and equivalent non-UK offences, regulatory rulings and other decisions;
- d. creating a clearer set of rules outlining when a supplier must or may be excluded due to an exclusion ground applying to ‘connected persons’ (such as beneficial owners, directors, parent and subsidiary companies) or ‘associated persons’ (such as certain key sub-contractors) and making it clear that these apply to both mandatory and discretionary grounds;
- e. giving greater flexibility to consider a range of evidence of ‘self-cleaning’ by suppliers in order to assess whether the circumstances giving rise to an exclusion ground are continuing or are likely to occur again;
- f. extending the time limit for consideration of relevant events for discretionary exclusion grounds to 5 years to match that of mandatory exclusion grounds.

6. Central debarment list.

The debarment regime enables Ministers to put suppliers on a published debarment list.

Inclusion on the list means that the supplier’s past behaviour or circumstances mean that it is not, or may not be, allowed to participate in covered procurements or be awarded public contracts. Debarment aims to minimise supplier-related risk in public procurement and incentivise suppliers to achieve excellent corporate compliance and standards of behaviour.

Debarment is not intended to be a punishment for past misconduct but is a risk-based measure to ensure a supplier does not or may not participate in procurements or be awarded contracts where a Minister has put the supplier on the debarment list.

The debarment list will be published on gov.uk. It will set out:

- a. the supplier;
- b. the exclusion ground that applies (and whether this is mandatory or discretionary);
and
- c. the date the supplier’s name is expected to be removed from the debarment list.

We must check the debarment list before allowing any supplier to participate in a covered procurement and before deciding to award a public contract to a supplier.

We must check whether the supplier’s name or the names of any associated persons or intended sub-contractors are on the debarment list and should also check whether the names of any connected persons of the supplier are on the debarment list, as this may be grounds for considering exclusion of the supplier.