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*“For information on the Public Procurement Act 2023, please see the attached article by Anthony Woolich, Partner, HFW LLP and a longstanding member of the Steering Committee of the Procurement Lawyers Association :*

[\*UK Procurement Act 2023: Major Reform of Regime for Public Sector and Utilities Contracts - HFW”\*](#)

# **UK Procurement Act 2023: Major Reform of Regime for Public Sector and Utilities Contracts**

**The Procurement Act 2023 (the Act) received Royal Assent on 26 October 2023. The Act will make the UK’s public procurement regime “quicker, simpler, more transparent and better able to meet the UK’s needs while remaining compliant with [its] international obligations”. The reforms aim to ensure that the £300 billion spent a year on public procurement goes further for the UK’s communities and public services.<sup>1</sup>**

## **The Act and its objectives**

The Act is “*one of the largest shake ups to procurement rules*” in the UK’s history,<sup>2</sup> creating a single regime for public procurement in England, Wales and Northern Ireland. Devolved Scottish authorities are excluded from the Act’s application as the Scottish Government has decided to retain its own procurement regulations for devolved Scottish authorities.<sup>3</sup>

The Act simplifies the existing public procurement rules by repealing “*over 350 individual regulations derived from EU Directives (contained in the Public Contracts Regulations 2015, Utilities Contracts Regulations 2016, Concession Contracts Regulations 2016 and the Defence and Security Public Contracts Regulations 2011)*”.<sup>4</sup> The existing rules will continue to apply until the Act ‘goes live’ which is expected to be in October 2024, and will also continue to apply to procurements which started under the old rules.<sup>5</sup>

- According to the government, the Act will:
- simplify the UK’s public procurement regime;
- increase transparency throughout the procurement lifecycle;
- open up public procurement to new entrants such as small businesses so that they can compete for and win more public contracts; and
- strengthen the ability to exclude suppliers where there is evidence of their involvement in Modern Slavery practices.<sup>6</sup>

The Act covers contracts awarded by: (1) most central government departments and their arm’s length bodies; (2) the wider public sector including local government and health authorities; and (3) utilities companies operating in the water, energy (including extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels) and transport

(including ports and airports) sectors. The Act also covers concession contracts and sets out a smaller number of simpler rules which apply to lower value contracts.<sup>7</sup>

The current public procurement rules that apply to utilities contracts are generally more flexible than the current general public procurement rules. The single regime for public procurement will “*generally apply to the award of utilities contracts, with some limited differences, for example, in relation to “utilities dynamic markets” and the duration of “closed frameworks”.*”<sup>8</sup>

## **Key Changes**

### **Objectives**

The Act introduces objectives that a contracting authority must have regard to when carrying out a covered procurement. The objectives include: (a) delivering value for money; (b) maximising public benefit; (c) sharing information for the purpose of allowing suppliers and others to understand the authority’s procurement policies and decisions; and (d) acting, and being seen to act, with integrity.<sup>9</sup>

The Act requires that contracting authorities “*have regard to the fact that small and medium-sized enterprises may face particular barriers to participation*” and “*consider whether such barriers can be removed or reduced*”.<sup>10</sup> In addition, certain contracting authorities<sup>11</sup> must have regard to a published national procurement policy statement which sets out the government’s strategic priorities in relation to procurement.<sup>12</sup>

### **Competitive tendering procedure**

The Act specifies that “*a contracting authority must carry out a competitive tendering procedure*”<sup>13</sup> before awarding a public contract. A competitive tendering procedure is either:

- an open procedure – a single – stage tendering procedure without a restriction on who can submit tenders; or
- a competitive flexible procedure – a competitive tendering procedure formulated as the contracting authority considers appropriate for the purpose of awarding the public contract.<sup>14</sup>

The competitive flexible procedure aims to enable contracting authorities to design a procedure that best suits the needs of the relevant public contract and the market.<sup>15</sup> This is a major change from the current prescriptive regime.

### **Awarding contracts**

Section 19(1) states that a public contract may be awarded to “*the supplier that submits the most advantageous tender in a competitive tendering procedure*” (emphasis added). The most advantageous tender (**MAT**) is the tender that the contracting authority considers (a) satisfies their requirements and (b) best satisfies the award criteria by reference to the assessment methodology and the relative importance of the criteria.<sup>16</sup> The Act amends the existing standard to be considered when evaluating public contracts under the Public Contracts Regulations 2015, which is the ‘most economically advantageous tender’ (**MEAT**). In its green paper, the Cabinet Office stated that adopting MAT “*should provide greater*

*reassurance to contracting authorities that they can take a broader view of what can be included in the evaluation of tenders*". The Cabinet Office notes that this change is about *"reinforcing and adding clarity rather than changing scope"*.<sup>17</sup>

The Act also introduces a new ground for a Minister to directly award a public contract, i.e. without a prior competitive tendering procedure. Section 42(1) asserts that a *"If a Minister of the Crown considers it necessary, the Minister may by regulations provide that specified public contracts may be awarded under section 41 as if a direct award justification applies"*. Section 42(2) clarifies that *"necessary" means necessary to – (a) protect human, animal or plant life or health, or (b) protect public order or safety*". This new ground for a direct award appears to be in response to the Covid-19 pandemic. For example, the government stated that the Act creates a procurement system *"with clearer and faster competition processes in emergency situations, such as during health pandemics, ensuring that contracting authorities can act quickly and transparently to buy vital goods"*.<sup>18</sup>

### **Exclusions and debarments**

The Act introduces new terminology for excluded and excludable suppliers,<sup>19</sup> and introduces a central debarment list on which a Minister may record the names of excluded or excludable suppliers.<sup>20</sup> A contracting authority must disregard any tender from an excluded supplier, and may disregard a tender from an excludable supplier.<sup>21</sup> Private utilities should regard an excluded supplier as an excludable supplier.<sup>22</sup>

The Act also expands the mandatory and discretionary exclusion grounds.

- Schedule 6, paragraph 41 introduces a mandatory exclusion ground for competition law infringements. This exclusion ground applies where the Competition and Markets Authority has made a decision that the prohibition on anti-competitive agreements has been infringed by an agreement or concerted practice (a) to which the supplier or a connected supplier was party, and (b) which was a cartel.<sup>23</sup>
- Schedule 6, paragraph 23 introduces a mandatory exclusion ground which applies to a supplier if the supplier or a connected person has been convicted of certain offences under the Modern Slavery Act 2015.
- Schedule 7, paragraph 12(3) introduces a discretionary exclusion ground for poor performance where the supplier was given the opportunity to improve performance and failed to do so.

### **National security**

The Act seeks to strengthen the UK's national security. Ministers Jeremy Quin and Alex Burghart state that *"dangerous actors infiltrate states by giving their operations the camouflage of a company"* which allows them to have access to and potentially interfere with public services information. They comment that an *"important way of keeping public services safe from foreign spies is by securing how they are procured for"*.<sup>24</sup> Therefore, the Act seeks to increase scrutiny of companies that bid for public contracts. For example, section 60(2) requires that Ministers (a) have regard to the fact that contracting authorities may unknowingly award public contracts to suppliers that are potentially excludable because they pose a threat to national security, and (b) keep under review whether such suppliers should be investigated.

However, if a supplier is on the debarment list because it poses a threat to national security, it will still be allowed to continue to win procurements in areas not related to national security.<sup>25</sup>

## Transparency

In order to achieve world-leading transparency standards in public procurement, the Act introduces requirements to publish notices throughout the procurement lifecycle. The purpose of notices is to ensure that procurement information is publicly available to support effective competition and give the public insight into how their money is being spent.<sup>26</sup>

Section 95(1) provides that regulations may be issued on the form and content of notices, and how such notices are to be published.

Some examples of notices are:

- If a contracting authority carries out preliminary market engagement, the authority must publish a preliminary market engagement notice before publishing a tender notice, or provide reasons for not doing so in the tender notice.<sup>27</sup>
- A contracting authority must publish a tender notice for the purpose of inviting suppliers to submit a tender as part of an open procedure. In regard to a competitive flexible procedure, the contracting authority must publish a tender notice for the purpose of (a) inviting suppliers to submit a request to participate in the procedure, or (b) where no such invitation is made, inviting suppliers to submit their first, or only, tender as part of the procedure.<sup>28</sup>
- A contracting authority must publish a transparency notice that it intends to award a contract directly, which is a major change which could result in increased challenges.<sup>29</sup>
- If a contracting authority publishes a tender or transparency notice in respect of a public contract and decides not to award the contract, the authority must give notice to that effect as soon as reasonably practicable.<sup>30</sup>
- A contracting authority must publish a contract award notice before entering into a public contract.<sup>31</sup>
- A contracting authority that enters into a public contract must publish a contract details notice, which is a significant change from the current regime.<sup>32</sup> According to section 53(2), a contract details notice is a notice which sets out: (a) that the contracting authority has entered into a contract; and (b) certain information which will be specified in future regulations. Section 53(3) provides that a contracting authority that enters into a public contract with an estimated value of more than £5 million must publish a copy of the contract, subject to limited scope for redactions on grounds of national security or commercial sensitivity. The contracting authority must do this before the end of the period of 90 days (or 180 days for light touch contracts) beginning with the day on which the contract is entered into.
- In another significant change to the current legislation, a contracting authority must publish a contract change notice before modifying a public contract, potentially leading to increased challenges to contractual changes.<sup>33</sup> This requirement does not apply where the modification is *de minimis* and the modification does not relate to a transfer on corporate restructuring. A modification is *de minimis* if it increases or decreases the estimated value of the contract by (a) 10% or less in the case of contracts for goods or services, or (b) 15% or less in the case of contracts for works.

A modification is also *de minimis* if it increases or decreases the term of the contract by 10% or less of the maximum term provided for on award.<sup>34</sup> However, a contracting authority must publish a contract change notice where the modification is *de minimis* but could reasonably have been made together with an earlier modification and a contract change notice would have been required for that single modification.<sup>35</sup>

- A contracting authority must publish a contract termination notice before the end of the 30-day period beginning with the day on which the public contract is terminated.<sup>36</sup>
- A contracting authority must publish a pipeline notice if it considers that it will pay more than £100 million under relevant contracts in the coming year. A pipeline notice is 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*”.<sup>37</sup>

## Other changes

Under section 52(1), before entering into a public contract with an estimated value of more than £5 million, a contracting authority must set and publish at least three key performance indicators (**KPIs**) in respect of that contract. This requirement does not apply if the contracting authority considers that the supplier’s performance could not appropriately be assessed by reference to KPIs.<sup>38</sup> This requirement also does not apply to utilities contracts awarded by private utilities.<sup>39</sup>

Where a contracting authority has set KPIs under section 52(1), it must (a) assess performance against the KPIs and (b) publish information to be specified in regulations in relation to that assessment. The authority must do this at least once in every period of 12 months during the lifecycle of the contract and on termination of the contract.<sup>40</sup>

Section 51(1) provides that a contracting authority may not enter into a public contract before the end of the mandatory standstill period, or, if later, the end of another standstill period provided for in the contract award notice. The Act changes the minimum mandatory standstill period from 10 days to eight working days beginning with the day on which a contract notice is published for the contract.<sup>41</sup>

## Next steps

The UK government will give a minimum of six months’ notice before the regime ‘goes live’, which it anticipates will be in October 2024. Secondary legislation (regulations) will be introduced in early 2024 in order to give effect to some elements of the Act.<sup>42</sup>

The Act represents a significant simplification of the EU public procurement and utilities procurement rules which the UK retained after its exit from the EU. However, the UK’s scope for change was restricted by its commitments under international treaties, such as the WTO’s Agreement on Government Procurement.<sup>43</sup> Even within the available scope for change, some opportunities were missed, for example on establishing a specialist Procurement Tribunal to deal more informally and swiftly with claims, especially more straightforward and lower value claims, than the more formal procedure through the courts, as is available in some other jurisdictions.

The government has published various guidance on its [Transforming Public Procurement webpage](#). Contracting authorities and bidders should familiarise themselves with this guidance and the changes introduced by the Act.

## Footnotes

1. [The Procurement Act – a summary guide to the provisions – GOV.UK \(www.gov.uk\)](#)
2. [Small businesses to benefit from one of the largest shake ups to procurement regulations in UK history – GOV.UK \(www.gov.uk\)](#)
3. Procurement Act 2023, section 2(5)(a); [The Procurement Act – a summary guide to the provisions – GOV.UK \(www.gov.uk\)](#)
4. Procurement Bill Explanatory Notes (14 December 2022), [Procurement \(parliament.uk\)](#)
5. [Transforming Public Procurement – GOV.UK \(www.gov.uk\)](#)
6. [The Procurement Act – a summary guide to the provisions – GOV.UK \(www.gov.uk\)](#)
7. [The Procurement Act – a summary guide to the provisions – GOV.UK \(www.gov.uk\)](#)
8. Procurement Bill Explanatory Notes (14 December 2022), [Procurement \(parliament.uk\)](#)
9. Procurement Act 2023, section 12(1)
10. Procurement Act 2023, section 12(4)
11. Procurement Act 2023, sections 13(1), (9) and (10). Section 13(9) contains the obligation for contracting authorities to have regard to the national procurement policy statement. Section 13(10) limits the application of section 13(9), for example, it provides that section 13(9) does not apply to private utilities.
12. [National Procurement Policy Statement.pdf \(publishing.service.gov.uk\)](#)
13. Procurement Act 2023, section 20(1)
14. Procurement Act 2023, section 20(2)
15. [The Procurement Act – a summary guide to the provisions – GOV.UK \(www.gov.uk\)](#)
16. Procurement Act 2023, section 19(2)
17. [Transforming Public Procurement \(publishing.service.gov.uk\)](#)
18. [Small businesses to benefit from one of the largest shake ups to procurement regulations in UK history – GOV.UK \(www.gov.uk\)](#)
19. Procurement Act 2023, section 57(1) contains the definition of ‘excluded supplier’ and section 57(2) contains the definition of ‘excludable supplier’.
20. Procurement Act 2023, section 62
21. Procurement Act 2023, section 26(1)-(2)
22. Procurement Act 2023, section 57(4)(a)
23. Procurement Act 2023, Schedule 6, paragraph 41(1)(b) defines ‘cartel’ by reference to the meaning given in the Competition Act 1998, Schedule 8A, paragraph 4(1).
24. [Op-ed: New procurement rules will strengthen our national security – GOV.UK \(www.gov.uk\)](#)
25. Procurement Act 2023, section 57(3)
26. [The Procurement Act – a summary guide to the provisions – GOV.UK \(www.gov.uk\)](#)
27. Procurement Act 2023, section 17(1)
28. Procurement Act 2023, section 21(1)
29. Procurement Act 2023, section 44(1)-(2)
30. Procurement Act 2023, section 55(1)-(2). This requirement does not apply to private utilities: section 55(3).

31. Procurement Act 2023, section 50(1). This requirement does not apply in relation to a defence and security contract awarded under a defence and security framework: section 50(6)(a).
32. Procurement Act 2023, section 53(1). This section does not apply to private utilities: section 53(6)(a).
33. Procurement Act 2023, section 75(1). This requirement does not apply in relation to modifications of: (1) defence and security contracts; (2) light touch contracts; or (3) contracts awarded by a private utility (section 75(6)(a)-(c)).
34. Procurement Act 2023, section 75(2)
35. Procurement Act 2023, sections 75(4)-(5)
36. Procurement Act 2023, section 80(1). This requirement does not apply to private utilities: section 80(4)(a).
37. Procurement Act 2023, section 93(1)-(3). This requirement does not apply to private utilities: section 93(6)(a).
38. Procurement Act 2023, section 52(1)-(3)
39. Procurement Act 2023, section 52(6)(b)
40. Procurement Act 2023, section 71(1)-(2)
41. Procurement Act 2023, section 51(2). The requirement to observe a standstill period does not apply to private utilities when awarding a section 41 direct award (direct award in special cases): section 51(3)(c).
42. [Transforming Public Procurement – GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/114142/transforming-public-procurement-2023.pdf)
43. [rev-gpr-94\\_01\\_e.pdf \(wto.org\)](https://www.wto.org/Trade_Environment/Trade/rev-gpr-94_01_e.pdf)