

Client briefing

A review of the Procurement Act 2023

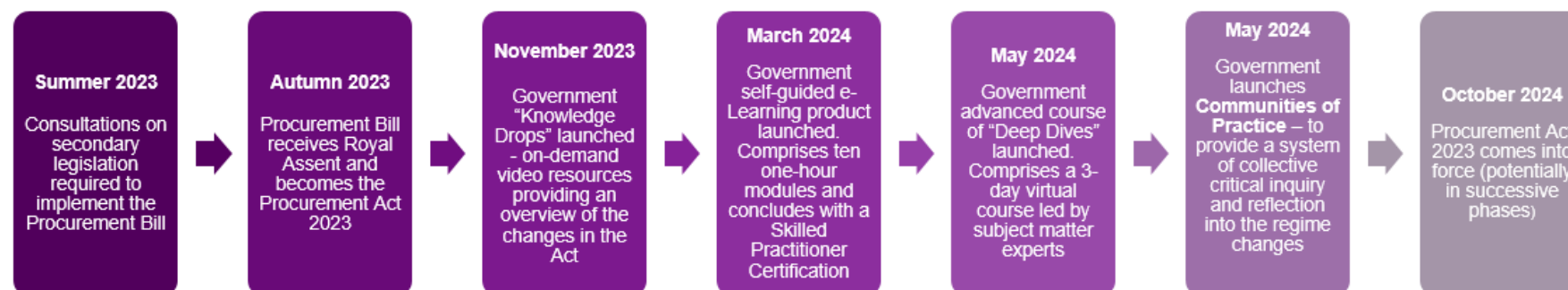


The Procurement Act 2023 is now on the statute books and expected to come into force in towards the end of 2024

Once implemented, the Procurement Act 2023 will replace the Public Contracts Regulations 2015, the Concessions Contracts Regulations 2016 and the Utilities Contracts Regulations 2016 to become the law that regulates procurement in England, Wales and Northern Ireland. Scotland will, continue to have a separate regime, but, as now, this is likely to be closely aligned to the position in England and Wales.

This briefing note follows the structure of the Act itself and analyses the key points to note.

Route to commencement



Transition

The approach to transition is not yet fully settled as we await the results of a consultation on this area. However, it seems likely that the approach will mirror that taken when the Public Contracts Regulations 2015 (PCRs) came into force; that is, that any procurement “commenced” prior to the relevant go live date will continue to be governed by the PCRs. Procurements that are commenced on or after the go live date, will be regulated by the Procurement Act 2023.

Secondary legislation

The Procurement Act 2023 contains powers in numerous parts for the government for the government to make further secondary legislation (i.e., “regulations”) to cover the detail of how the provisions of the Act are to work in practice. For example, the detail of the required content of all the new notices required under the Act is set out in the draft Procurement (Transparency) Regulations 202X – which are currently being finalised following consultation. We

expect further draft regulations to be issued in due course. This means that the Procurement Act 2023 does not stand alone as a definite statement of the new law – we will also need to consult the various new sets of regulations once these are settled.

How can we prepare?

Authorities and suppliers are advised to begin to familiarise themselves with the new regime and to consider the new internal processes that may need to be established to comply. The most significant areas of change are likely to be:

- Transparency: a real expansion in the number of notices that an authority will need to publish about the procurement and lifetime of the contract
- Procurement processes: new flexibilities, subject to limits, to design bespoke procurement processes
- Contract performance: a new requirement for all authorities to set and publicly report on KPIs for larger contracts valued at over £5 million
- Supplier debarment list: the possibility of supplier debarment where mandatory or discretionary exclusion criteria are triggered
- New language: the Act uses new language to describe familiar concepts (for example, “selection criteria” will be known as “conditions of participation” under the Act)

Authorities should ensure they take advantage of the training and education opportunities offered by the government and that they are signed up to the relevant email alerts. [This page](#) allows you to sign up.

Mills & Reeve support

Here in the M&R procurement team, we are really excited about this new chapter in procurement law and to be able to work collaboratively with all our clients and contacts to help you best prepare for implementation.

Do look out for our highly-regarded [5 in 25 Countdown webinar series](#) – which we hold every couple of months and which regularly attracts over 2000 attendees. Each webinar focusses on the impact of the Procurement Act 2023 on a different stage of the procurement lifecycle. You can sign up [here](#). If you are not able to attend, it is still well worth registering as all registrants receive a copy of the slides, the recording and details of the Q&A following the webinar. If you have missed any of our webinars, you can find them all here www.procurementportal.com/resources/webinars

You could also bookmark our Reform page on our Procurement Portal – www.procurementportal.com/reform which we will keep up to date with all the latest news and our materials on the Act.

Get in touch!

We are always delighted to hear from clients and contacts with any queries or observations you may have as we approach implementation. Please do contact [Jenny Beresford-Jones](#) if you would like to discuss preparation for the new Act; we are always interested to learn about our clients' and contacts' experiences on the ground.

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Analysis of proposals

	Position under current regime	Position under the Procurement Act 2023
Part 1: Key Definitions (sections 1 to 10)		
Definition of “procurement” and “covered procurement”	The current regime does not define what is meant by “procurement” as a concept.	The new definitions make it clear that for the purposes of the Act, “procurement” is to be understood in its widest sense. The term means not only the procurement process itself, but also pre-market steps in the route to award, the operation and management of a public contract once the procurement process itself is completed and the exit of the contract whether by termination or expiry.
Definition of “Contracting Authority”	<p>A list of central government authorities is set out in Schedule 1 of the PCR 2015.</p> <p>A "body governed by public law" is also contracting authority to which the PCR 2015 apply. The PCR 2015 contains a test that considers the purpose of the entity concerned as well as its finance, management supervision and board composition.</p> <p>The PCR 2015 contains a definition of “central purchasing bodies” that can arguably include private sector entities.</p>	<p>The Act does not make any core conceptual changes to the definition of “contracting authority” or “public contract”, even though the language has been changed; it does not extend the reach of the procurement rules to organisations or contracts which are not currently in scope under the PCR 2015.</p> <p>The wording of the new definition has been tweaked and the old concept of a “body governed by public law” has been removed. A contracting authority is defined as a “public authority”, and the definition goes on to consider whether the entity has “functions of a public nature” and is either wholly or mainly funded from public funds or subject to oversight by another contracting authority, and whether or not the public authority operates on a commercial basis or not. Section 2(4) goes on to provide examples to guide the assessment of whether a body operates commercially or not; a steer not provided in the PCR 2015</p> <p>Schedule 1 makes it clear that the definition of “central government authority” is to be set from time to time via secondary legislation (rather than listed in the new Act).</p> <p>It is confirmed at section 1(4) that only contracting authorities may act as centralised procurement authorities; private sector bodies may not do so</p>
Exempted contracts	Regulations 10 to 17 cover various contract types which are wholly or partially exempt from the application of the PCR 2015.	<p>Exempted contracts are now listed out in Schedule 2 to the Act.</p> <p>The Schedule is organised to group the available exemptions by type, as follows:</p> <ol style="list-style-type: none"> <i>Contracts which are exempt by virtue of the identity of the counterparty</i>

Position under current regime	Position under the Procurement Act 2023
<p>Regulation 12 exempts in-house (<i>Teckal</i>) arrangements and joint collaboration (<i>Hamburg</i>) arrangements.</p>	<p>This section covers “vertical” (<i>Teckal</i>) arrangements and “horizontal” (<i>Hamburg</i>) arrangements. These largely mirror the current exemptions at Regulation 12 PCR for in-house companies and joint collaborations.</p> <p>A consultation has promised further guidance on the detail of the exemption and draft secondary legislation will provide further rules and detail on the appropriate calculation of the 80% “activity test” (by reference to the average turnover amount in a “relevant period”, with various caveats). When these regulations are finalized, they will provide clearer guidance than at present on how to assess whether the activity test is met.</p> <p>This section also exempts defence contracts where the supplier is the government of another country, as well as certain utility contracts.</p> <p><i>2. Contracts that are exempt due to their subject-matter</i></p> <p>This section broadly mirrors the list of exemptions in the PCR 2015 for e.g., land and building contracts, broadcasting, electronic communications services, ADR services, certain legal services, certain financial services, employment contracts, emergency services, certain R&D services, certain international agreements.</p> <p>A new addition in the Act is an exemption for a contract which a contracting authority considers necessary to national security.</p> <p>The exemptions have largely carried over from the PCR 2015 with a small number of changes in scope as to which contract types are excluded. For example, contracts awarded to not-for-profit organisations for defined emergency services are no longer defined by CPV code. Therefore, there may be a possibly unintended divergence between the current exemptions and the Act.</p>
<p>One set of rules</p> <p>There are currently four sets of regulations covering procurement:</p> <ul style="list-style-type: none"> • Public Contracts Regulations 2015 • Utilities Contracts Regulations 2016 • Concession Contracts Regulations 2016 	<p>Section 10(6) creates a concept of “special regime contracts” for the purpose of referring to (a) concession contracts; (b) defence and security contracts; (c) light touch contracts; and (d) utilities contracts. Each type of special regime contract has its own dedicated section within the Act, containing bespoke provisions in addition to the general provisions.</p> <p>In some areas, the Act addresses its relationship with other legislation that touches on public procurement – for example, section 116 creates a power to disapply section 17 of the Local Government Act 1988 and section 120 a power to disapply the Act in relation to the procurement of NHS healthcare services. However the Act is silent on its relationship to other pieces of legislation such as The Public Services (Social Value) Act 2012.</p>

	Position under current regime	Position under the Procurement Act 2023
	<ul style="list-style-type: none"> Defence and Security Public Contracts Regulations 2011 <p>Plus, there are related laws that impose procurement-related obligations e.g. The Public Services (Social Value) Act 2012, The Local Government Act 1988.</p>	
Special regime contracts	<p>Currently there are separate regimes for defence, concessions and utilities, as well as a “light touch regime” within the PCR 2015 for health and social services.</p>	<p>The Act covers concessions, utilities, defence, and light touch regime contracts via sections 6 to 10; these are “special regime” contracts under the Act.</p> <p>Generally, the rules in the new Act apply to concessions, utilities, and defence contracts, with some limited exceptions. At first sight this looks to have achieved the goal of simplification by making all contracts, including “special regime” contracts, subject to the same overall set of rules.</p> <p>In some areas, special regime contracts are treated differently.. For example, for utilities and defence contracts, greater flexibility is offered around the duration of “closed frameworks”. Utilities will also have some limited differences in how dynamic markets are to work and defence contracts will enjoy a greater flexibility to amend contracts as required by the sector.</p> <p>Concession contracts are broadly subject to the standard new regime, albeit that the sector specific features are provided for via the definition of “concession contract” and the specific rules around the valuation of concession contracts.</p> <p>In relation to the Light Touch Regime, several parts of the Act do not apply. The detail of which services will fall under the Light Touch Regime will be confirmed in regulations, which are currently being finalised following consultation.</p> <p>Section 10 deals with the situation where a contract could be regarded as “mixed” – i.e., part “ordinary” public contract and part “special regime” contract and sets out the factors that should be considered when assessing whether a special regime contract should be treated as an “ordinary” public contract.</p>

	Position under current regime	Position under the Procurement Act 2023
<p>Part 2: Principles and Objectives (sections 11-14)</p>	<p>Principles</p> <p>EC Treaty Principles as set out in our procurement regulations:</p> <ul style="list-style-type: none"> • transparency • equal treatment • non-discrimination • proportionality <p>At present there is little guidance in the PCR 2015 as to how to apply these and interpretation is guided by case law.</p> <p>Strategic procurement policy is currently communicated via ad hoc Procurement Policy Notes.</p>	<p>Section 12 sets out the “Procurement Objectives”</p> <ul style="list-style-type: none"> • 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 <p>There remains no reference to “proportionality” as an objective, although many individual sections of the Act do require an authority to ensure discretion and flexibility are exercised in a manner proportionate to the nature, cost and complexity of the contract.</p> <p>The section sets out an express requirement to treat suppliers the same unless a difference between them justifies different treatment (which must not put one supplier at an unfair advantage).</p> <p>It also confirms that when applying the principles to a procurement, the phrase “a procurement” refers to ALL steps involved in both procuring <i>and managing</i> the contract – thus covering all steps through to contract exit.</p> <p>This section includes a specific obligation to “have regard” to barriers to SME participation and to consider how such barriers can be removed/reduced.</p>
<p>National Procurement Policy Statement</p>	<p>The National Procurement Policy Statement (NPPS) was published in June 2021 in PPN 05/21 but not incorporated into PCR 2015. This is a statutory statement summarising the government’s strategic procurement policy objectives (local objectives may also be considered).</p>	<p>Section 13 covers the National Procurement Policy Statement (NPPS) and states that a contracting authority must “have regard” to the NPPS that is current from time to time. This duty to have regard to the NPPS does not apply where awarding contracts under a framework or dynamic market. Private utilities are not required to have regard to the NPPS.</p> <p>The Act does not expand on what “have regard to” means in this context, although “have regard” duties will of course be familiar to public bodies in other areas of law (e.g., the public sector equality duty).</p> <p>The Act puts the NPPS onto a statutory footing, which raises the question around whether this may mean we start to see procurement challenges based on a breach of a statutory duty to have regard to the NPPS.</p>

	Position under current regime	Position under the Procurement Act 2023
Part 3 – Award of public contracts and procedures (sections 15-66)		
Chapter 1 – Preliminary Steps (sections 15-18)		
Pre-market engagement	<p>Pre-market engagement is permitted by Regulation 40 PCR 2015 although no express notice exists to cover this.</p> <p>Prior Information Notices can be published under Regulation 48 to alert the market to a future opportunity.</p>	<p>Sections 15 to 17 introduce a couple of new notices - (1) Planned Procurement Notices and (2) Preliminary Market Engagement Notices.</p> <p>A planned procurement notice is not mandatory. It will operate to alert the market to a particular procurement coming up and to reduce the time limit for tenders to 10 days in “qualifying” circumstances.</p> <p>A preliminary market engagement notice is published to communicate to suppliers that the authority either (a) intends to carry out a market engagement exercise or (b) has carried out a market engagement exercise. Where preliminary market engagement has been used, it is mandatory to publish one ahead of publishing the tender notice (unless the authority can justify a decision not to publish one).</p> <p>The detail and content of these notices are set out in secondary legislation which is currently in consultation and being finalised.</p>
Duty to consider Lots	Regulation 46 requires authorities to provide details of any decision not to divide a contract into Lots.	Similarly, section 18 imposes a duty on authorities to consider division into Lots. This duty should also be read in the light of the new express obligation at section 12 to consider and attempt to reduce barriers to SME participation in a procurement.
Chapter 2 – Competitive Award (sections 19-40)		
MEAT to MAT	Currently, the contract must be awarded to the Most Economically Advantageous Tender (MEAT). The authority can apply quality/price weightings and may award on the basis of price alone, if desired/appropriate. Quality may be assessed and weighted heavily if desired.	<p>Section 19(1) sets out the core obligation to award a contract to the supplier that submits the “<i>Most Advantageous Tender</i>” and confirms that this is the tender that best satisfies the award criteria in accordance with the published assessment methodology and weightings.</p> <p>The new regime shifts from the existing Most <i>Economically Advantageous Tender</i> and thus will allow contracts to be awarded to the Most <u><i>Advantageous</i></u> Tender, widening the possibility of award to contracts that best further general procurement policies, including social value. This flexibility is set within a general requirement to set criteria in a way which is proportionate to the contract, as mentioned above.</p>

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	<p>However, the overall emphasis is economic – to award the contract to the tender that represents the best value for money to the authority.</p>	
Competitive Tendering Procedures	<p>Currently, there are six procedures:</p> <ul style="list-style-type: none"> • open • restricted • competitive with negotiation • competitive dialogue • innovation partnership • negotiated without notice 	<p>Section 20 creates one concept of a “competitive tendering procedure” which may be either:</p> <ul style="list-style-type: none"> • a single-stage open procedure; or • any other competitive procedure that the authority considers appropriate (introducing freedom to design a procedure). This may contain deselection phases and in, a new flexibility, may provide for the refinement of award criteria in accordance with the Act. These non-open procedures are referred to as “multi-staged” procedures. <p>This represents a significant change to current procurement procedures and will allow greater flexibility to design more bespoke procedures within a broad framework.</p> <p>Whatever procedure is adopted, it must be proportionate to the nature, complexity, and cost of the contract (section 20(3)).</p> <p>The government intends to issue guidance and template documents which are intended to be flexible enough to cater for a wide range of requirements.</p> <p>Sections 21(5) and (6) impose an express duty on authorities, when publishing a Tender Notice, to ensure that details of the requirements are sufficiently clear and specific as to allow suppliers to prepare their tenders.</p>
Conditions of Participation (Selection Criteria)	<p>At present selection criteria are set out in the CCS SQ, to assess economic and financial standing and technical and professional ability. There is some discretion to choose project-specific questions, but these must fall within Regulation 60(9) on means of proof.</p>	<p>Section 22 deals with what we currently refer to as “selection criteria” – and what are referred to in the Act as “conditions of participation”.</p> <p>These conditions are aimed at ensuring suppliers have the legal and financial capacity and the technical ability to perform the contract. Section 22(4) gives the authority to discretion to set the conditions, but these must be proportionate to the cost, nature and complexity of the contract.</p> <p>Note that “economic and financial standing” becomes “legal and financial capacity”, while “technical and professional ability” becomes “technical ability”.</p>

Position under current regime	Position under the Procurement Act 2023
	<p>Section 22(3) prevents authorities from requiring the submission of annual accounts or requiring insurances prior to the award of the contract, as part of the conditions of participation.</p> <p>Section 22(4) prohibits any condition of participation that requires a supplier to have been awarded a particular contract previously, or to have particular qualifications without accepting equivalents, or that breaks the rules on technical specifications in section 56.</p> <p>It is not yet clear whether there is an intention to continue with the CCS standard form selection questionnaire – this is not mentioned in this draft of the Act nor the explanatory notes.</p>
<p>Award criteria – link to subject matter of the contract</p>	<p>The requirement that the award criteria be linked to the subject matter of the contract is retained generally.</p> <p>Section 23(5) makes it clear that, as now, staff experience and qualifications are linked to the subject matter where this makes a material difference to the quality of provision under the contract.</p>
<p>Award Criteria – most advantageous tender from whose point of view?</p>	<p>Section 23(6) makes it clear that, for light touch contracts, the views and potentially different needs of service end-users may be taken as being a proper part of the “subject matter of the contract”. However the Act does provide for this flexibility to apply outside of the light touch context.</p>

	Position under current regime	Position under the Procurement Act 2023
Refinement of award criteria	Once published in the contract notice and procurement documents, the award criteria may not be amended without attracting risk.	<p>Section 24 introduces a useful flexibility to refine award criteria and relative weightings during a procurement - provided that:</p> <ul style="list-style-type: none"> • it is not an open procedure; • the ITT document has not yet been issued; and • there are no suppliers who have been excluded from the process who would have been able to progress had the refinement been in place at the time of their exclusion. <p>The procurement documents must have reserved the right to make this refinement, and making these changes triggers an obligation to republish the tender notice/documents. A refinement is not permitted if, had it been made earlier, it would have allowed one or more suppliers (that did not progress beyond an earlier round or selection process) to have done so.</p>
Excluding suppliers	Regulation 57 (and the CCS SQ) set out the mandatory and discretionary exclusion grounds.	<p>New terminology is introduced - “excluded” suppliers (excluded on a mandatory ground) and “excludable” suppliers (excludable on a discretionary ground).</p> <p>Excluded suppliers must be excluded from the procurement, while the authority may exclude excludable suppliers.</p> <p>The mandatory grounds are set out in full in Schedule 6 and the discretionary grounds in Schedule 7.</p> <p>A supplier can also be excluded/excludable if an associated supplier is itself excluded/excludable. An associated supplier is a supplier on whom the tenderer is relying in order to deliver the contract. The tenderer must be given an opportunity to replace an associated person prior to any exclusion (section 26(3)).</p> <p>A similar regime applies in relation to sub-contractors (see section 28).</p> <p>In addition to the mandatory and discretionary grounds set out in schedules 6 and 7 there are extra sections permitting exclusions for “improper behaviour” (section 30) or where the supplier is a threat to national security (section 29).</p>
Modifying a procurement	The PCR 2015 are silent on making modifications to the terms of a procurement process that is ongoing.	Section 31 contains a helpful flexibility allowing a contracting authority to modify the terms of a procurement provided the tender deadline has not passed (for an open process) or the request to participate period has not ended (for a competitive flexible procedure). Any modification of this sort triggers an obligation to re-publish the Tender Notice.

Position under current regime	Position under the Procurement Act 2023
	<p>If that modification is <u>not</u> ‘substantial’, a competitive flexible process may be modified ahead of the <i>tender</i> deadline (not only during the participation period). It will not be necessary to re-publish the tender notice, but all suppliers must be notified. Substantial modifications to the tender process are those which would have the potential to change the “field” of suppliers who would or would not have been interested in taking part; such substantial modifications to the procedure are not permitted.</p> <p>In both cases, consideration must be given to amending timelines and deadlines where appropriate.</p>
<p>Dynamic market</p> <p>Currently, Dynamic Purchasing Systems (DPS) are suitable only for more common commodity-type contracts.</p>	<p>The new regime will expand DPS into a “dynamic market” – advertised via a “dynamic market notice” with the intention that dynamic markets could be used for more sophisticated requirements than presently.</p> <p>Sections 34-40 set out the basics for how a dynamic market is to be procured and operate and confirms that a fee may be charged (as a % of the value of an awarded contract).</p> <p>Until guidance is published it is difficult to comment on how it is intended to operate in practice.</p>
<p>Chapter 3 – Direct Award (sections 41-44)</p>	
<p>Direct Award</p> <p>Regulation 32 PCR 2015 sets out scenarios where a direct award without notice may be made, including where only one supplier is in fact capable of providing the requirement, and in situations of extreme urgency not attributable to the authority.</p>	<p>The Act also sets out a number of limited scenarios that provides for the direct awards of contracts with no competition.</p> <p>Section 41 covers “direct award in special cases” referring to the direct award justifications in Schedule 5 and the requirement to publish a ‘transparency notice’ (i.e., a notice before awarding the contract confirming the intention to direct award a contract) under section 44. The requirement to publish a ‘contract details notice’ to notify the market once the contract has been awarded remains.</p> <p>Some of the situations listed in Schedule 5 are new and others are based on Regulation 32 PCR 2015:</p> <ul style="list-style-type: none"> • the contract is for production of a prototype or otherwise novel goods/services (NEW) • only a single supplier can supply the requirement • the procurement is for additional/repeated goods, services or works • the contract is for a commodity (e.g., raw materials where tendering in the usual way would not be appropriate) (NEW)

Position under current regime	Position under the Procurement Act 2023
	<ul style="list-style-type: none"> • in the context of insolvency proceedings, the direct award to a particular supplier will obtain advantageous terms to the authority • the contract is for strictly necessary goods, services or works and cannot be awarded following a competitive tendering procedure for reasons of unforeseen extreme and unavoidable urgency • the contract is for a light touch service which is a ‘user choice’ service – intended to allow direct awards for e.g., personal social care (note no transparency notice is required under this particular ground) • defence contracts where certain conditions are met <p>Section 42 also allows direct awards where regulations are made by the government permitting this in order to protect life. This takes the decision about whether to direct award in these cases out of the hands of contracting authorities and as such no transparency notices are required here.</p> <p>Section 43 allows a procurement to “switch to direct award” where no suitable tenders have been received and helpful sets out a definition of “suitable”. This mirrors Regulation 32(2)(a) (although a new element under the Act is that a transparency notice must be published in this situation).</p> <p>Planned direct awards of contracts fall within scope of the new section 93 obligation (applying to authorities intending to spend £100+ million in a financial year) requiring a pipeline notice to be published setting out details of all proposed contracts valued at over £2 million (including those contracts the authority expects to direct award).</p>

Chapter 4 – Award under frameworks (sections 45-49)

<p>Open and closed frameworks</p>	<p>Currently, frameworks may last for a maximum of four years (unless exceptional circumstances justify a longer term). New suppliers may not join an established framework.</p>	<p>There will continue to be “closed” frameworks of a 4-year duration which operate as frameworks do currently. In addition, there is a new concept of an “open” framework which can operate for a maximum of up to eight years and allow new suppliers to join during the lifetime of the framework.</p> <p>Section 49(1) defines an open framework as one that provides for the award of successive frameworks on essentially the same terms (i.e., the same framework can essentially ‘roll over’ successively) provided it is re-opened to new suppliers (section 49(2)).</p> <p>If the terms are to change, then it cannot be an open framework (i.e., successive on the same terms) and a new competitive tendering process must be conducted.</p>
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	Position under current regime	Position under the Procurement Act 2023
		This new flexibility is helpful as will make it easier to renew frameworks where there is no material change to the scope or terms/conditions, without having to run a full new tender process.
Charges for use of frameworks	There is no express right to charge for using a framework in Regulation 33 PCR 2015	Section 45(7) states any fees are to be charged as a % of contract value each time a contract is awarded to the supplier.
Central register of DPS/FW agreements	There is no central register currently, meaning that opportunities can often be duplicated across resources.	While the Response to the Green Paper consultation trailed the idea that a central register of all available DPS and FW agreements will be created (in an effort to reduce the duplication of FAs and DPSs by centralised procurement authorities), this is not covered in the Act. The Cabinet Office has an ongoing workstream dealing with systems and platforms and it may be we see more detail on addressing this duplication issue in another way in due course.

Chapter 5 – After award, standstill periods, and notices (sections 50-53)

Debrief letters	All tenderers receive a debrief letter (sometimes known as the ‘standstill’ or ‘Alcatel’ letter), which commences the standstill period and provides information on the contract award and the relative advantages and characteristics of the winning tender.	<p>Section 50 requires contracting authorities to publish a contract award notice notifying the market that it intends to enter into a contract (i.e., before awarding the contract). (Note the terminology change, this is not a CAN as we currently understand it – that is known under the Act as a Contract Details Notice). Sending the contract award notice commences the standstill period and announces that the authority has sent “assessment summaries” of feedback to the successful and unsuccessful tenderers.</p> <p>The detail of content required in an assessment summary is not set out in the Act itself but will be set out secondary legislation (which is currently being finalised following consultation). It appears that language around “relative advantages and characteristics” has disappeared, and instead authorities will simply be required to give feedback as to the reason for scores on the recipient’s bid and on the winning bid.</p>
Standstill period	The current standstill period is 10 calendar days, ending on a working day.	<p>Section 51 mandates a standstill period of 8 working days beginning with the day on which the contract award notice is published.</p> <p>There is no requirement to hold a standstill period for light touch contracts, contracts called off under a framework or dynamic market, or where a direct award is made on the urgency or “protect life” ground.</p>

	Position under current regime	Position under the Procurement Act 2023
Key performance indicators	There are no requirements in the PCR 2015 to publish details of KPIs in contracts awarded.	Section 52 requires where a contract is valued at over £5m, at least three KPIs must be published via a contract performance notice (and reported against at least every 12 months (section 71(2))). This is not required if the authority does not consider that performance of the contract can be assessed by reference to KPIs. The obligation does not apply to framework agreements, utilities contracts, concession contracts, or light touch contracts.
Contract details notices and publication of contracts	There is an obligation to publish a Contract Award Notice but no obligation in the PCR 2015 to publish a copy of the contract (although some authorities may be required to under existing guidance)	Section 53 requires a notice similar to the current contract award notice under the PCR 2015 –under the Act it is now referred to as a “contract details notice”. It must be published within 30 days of the date of contract signature (or 120 days if it is a light touch contract). For contracts valued at £5+ million, a copy of the contract must be published within 90 days from the date of contract signature (or 180 days for light touch contracts). This is current standard practice for central government bodies under guidance, but the Act places this obligation on all contracting authorities.

Chapter 6 – General provision about award and procedures (sections 54-66)

Time limits	The current minimum time limits under the PCR 2015 are set out in our timescale tracker here .	Although there is flexibility on how procurement processes can be designed, section 52 states certain minimum time limits for the participation period (i.e., the selection stage) and the tendering period (i.e., the award stage). Broadly speaking these time limits look to be five days shorter than their current equivalents. The minimum timescales for what we currently refer to as an accelerated restricted process appear to remain unchanged. There are no minimum timescales for light touch contracts but in setting time limits regard must be had to the general principles set out in section 54(1). Where a “qualifying” Planned Procurement Notice has been published in advance, there is flexibility to reduce the tender period to a minimum of 10 days, subject to the general rules on ensuring proportionality of timescales.
Abandoning a procurement	An authority may abandon a procurement without needing to publish an official notice about this. Regulation 55 sets	Section 55 introduces a new requirement to publish a Procurement Termination Notice in circumstances where a procurement is abandoned.

	Position under current regime	Position under the Procurement Act 2023
	out requirements to inform candidates and tenderers of the decision “as soon as possible”.	
Technical specifications	The PCR 2015 contain rules around setting specifications and particularly against doing so in a way which discriminates against certain suppliers.	The Act takes the same broad position as the PCR 2015 around the requirement to accept “equivalents”. Authorities also need to note the new obligation at section 56 that the specification must be sufficiently developed and clear that suppliers can tender to it, prior to publishing the Tender Notice. This is probably implicit in the current regime but the Act makes this an express requirement.
Excluding suppliers/debarment	At present suppliers may be excluded under Regulation 57 PCR 2015 under a mandatory or discretionary exclusion ground. However, there is no obligation to notify any centralised authority of this. although central government bodies are under guidance around addressing poor past performance in references for large government contracts, there is no centrally managed debarment list with statutory force.	<p>Section 59 requires a contracting authority which has excluded a supplier to give notice to an “appropriate authority” within 30 days of this exclusion.</p> <p>Under section 60, the appropriate authority may then decide to investigate whether the supplier is indeed an excluded supplier (mandatory exclusions) or an excludable supplier (discretionary exclusions); authorities and suppliers are required to cooperate.</p> <p>Section 62 then states that this report is then used by the Secretary of State to determine whether the supplier should be added to a Debarment List under section 62 (notice and an explanation must be provided to the supplier). The length of the debarment is decided by the Secretary of State.</p> <p>Section 63 allows a supplier to apply to the High Court for an injunction to prevent the Secretary of State adding it to the Debarment List until the court has made a ruling on the question. The court in making that decision will consider the public interest and the likely impact of the debarment on the supplier (together with any other relevant factors).</p> <p>Section 64 states that a supplier may apply to be removed from the Debarment List - but the Secretary of State must only consider this if a material change in circumstances is evidenced.</p> <p>Section 65 gives suppliers a right to appeal to the High Court against either their inclusion on the debarment list or against the length of their debarment.</p>
Past performance	Regulation 57(8)(g) provides a discretionary ground to exclude for serious poor	This ground is expanded to also include a situation where a supplier has “failed to remedy” a breach following the authority having exercised a contractual right to require it to do so. This represents a widening of the ground – poor performance is rarely dealt with via

	Position under current regime	Position under the Procurement Act 2023
	performance where this has led to early termination/payment of damages or similar.	<p>termination/a court order, but rather, contractually as between the parties. These latter measures may now come within scope of this ground.</p> <p>Schedule 7(12)(3) sets out this discretionary ground for “failure to remedy”. This applies where the supplier has not performed the contract to the authority’s satisfaction and has failed to remedy upon being given the opportunity to do so. The challenge for suppliers here is that the ground gives the authority a good deal of discretion and does not carve out situations where the failure to remedy is outside the supplier’s control. That said, the authority will need to act in accordance with the procurement objectives, which will include being proportionate and fair.</p> <p>Where a performance failure is more serious, and has not been remedied, this must be assessed and published within 30 days of the relevant failure (note this does not apply to Light Touch regime contracts).</p>
Supplier Registration System – simplified selection stage	There is no central registration system currently for the collation of data around selection criteria.	<p>Explanatory note 27 confirms that a single digital platform is to be used for supplier registration although at this stage the Act is silent on this and who will hold responsibility for it.</p> <p>We expect that this is an area that will be addressed via secondary legislation.</p>
Part 4 – Management of Public Contracts (sections 67-80)		
Implied Terms	At present terms around prompt payment of invoices are implied into public contracts via Regulation 113 and 113A PCR 2015	This continues in the Act and is supported by a new obligation to publish a Payments Compliance Notice (see section 69).
Contract modification	Public contracts may be modified in one of the six “safe harbour” situations set out in Regulation 72 PCR 2015.	<p>Section 74 largely mirrors the spirit of Regulation 72 PCR 2015 but helpfully more clearly sets out the instances when a modification may be made:</p> <ul style="list-style-type: none"> • where the contract is a light touch contract; • “permitted” modifications set out in Schedule 8; • modifications which are not “substantial”; and/or • modifications which are below-threshold modifications. <p>The permitted modifications are set out in Schedule 8 and reflect those we currently know in Regulation 72 PCR 2015. In addition, there is:</p>

Position under current regime		Position under the Procurement Act 2023
		<ul style="list-style-type: none"> • a new safe harbour for modifications required due to the materialisation of a “known risk”; and • a new safe harbour in situations where section 42 would also apply to allow the contract to be awarded directly (due to urgency and the need to protect life). <p>The old safe harbour for transfer to a new supplier on insolvency etc. is retained but interestingly there is now no requirement that the succeeding supplier meet the original selection criteria.</p> <p>Section 74(3) now clearly defines substantial modifications:</p> <ul style="list-style-type: none"> • increase or decrease of the term by more than 10% of the maximum term provided for at award; and/or • changes overall nature or scope; and/or • materially changes the economic balance in favour of the supplier. <p>Section 74(4) clearly defines below-threshold modifications.</p> <p>A new concept of “convertible contract” is introduced – a contract that will become a public contract as a result of the modification – and it is clarified that the rules on modifications do apply to these contracts.</p>
<p>Contract Change Notices</p>	<p>Currently the PCR 2015 require publication of contract modification notices in two of the six permitted safe harbours only.</p>	<p>Contract Change Notices will be required for all contract amendments, except where the amendment does not change the scope of the contract, and:</p> <ul style="list-style-type: none"> • increases or decreases the value by less than 10% (goods and services)/15%(works), or • increases or decreases the initial contract term by less than 10% of the original contract term. <p>Contract change notices will <u>not</u> be needed for Light Touch Regime contracts.</p> <p>Where it is required, the Contract Change Notice must be published before the change is made and under section 76 an authority may elect to hold a voluntary standstill period.</p> <p>If the change is over £5 million in value, this will be a “qualifying modification” under section 77 and will require a copy of the modified contract to be published within 90 days of the date of the modification.</p>
<p>Terminating a public contract</p>	<p>At present Regulation 73 PCR 2015 implies a right to terminate where a Regulation</p>	<p>The Regulation 73 termination rights continue via section 78 of the Act but are widened. The section 78 right allows termination where the authority considers that the contract was awarded in material breach of the Act, or where a supplier, associated person, or sub-</p>

	Position under current regime	Position under the Procurement Act 2023
	72 modification has been made unlawfully or where a supplier should have been excluded from the procurement.	contractor has become an excluded or excludable supplier <i>since the date of contract signature</i> . This includes termination due to a supplier become an excludable supplier by reference to the “national security” discretionary exclusion ground at schedule 7(14). In addition, section 80 brings in a new obligation to publish within 30 days of termination a Contract Termination Notice. This will provide much more transparency about why a contract was terminated (the notice must give details of the reasons for termination, e.g., expiry, discharge, early termination by a party, contract set aside, and so on).
Part 5 – Conflicts of Interest (sections 81-83)		
Duty to identify and mitigate, conflicts assessments	Regulation 21 PCR 2015 requires authorities to identify and mitigate conflicts of interest.	This continues in sections 81 to 83, with a new requirement at section 83 to prepare a formal conflicts assessment ahead of publication of the Tender Notice.
Part 6 – Below-threshold contracts (sections 84-88)		
Contract Notices, restriction on separate selection phase for under threshold contracts, de minimis values, implied terms, award notices	At present Part 4 of the PCR 2015 contains the “Contracts Finder” regime for the publication of information about under-threshold contracts, as well as a restriction on holding a separate selection stage for an under-threshold contract, and certain implied prompt payment terms.	These features continue in the new regime with a new concept of “Regulated Below-Threshold Contracts”. The de minimis thresholds are increased slightly to £12,000 (central government including NHS bodies) and £30,000 (sub-central authorities). A new concept of a “below-threshold tender notice” is introduced which will operate similarly to current Contracts Finder obligations. It remains the case that an authority is not obliged to publish a below-threshold tender notice but must do so if it opts to advertise the opportunity.
Part 7 – International Obligations (sections 89-92)		
Treaty state suppliers and international obligations	The UK is party to certain international agreements, under which certain UK contracting authorities are required to extend entitlements to access the UK	This Part gives effect to these obligations (and lists out at Schedule 9 the relevant international agreements). Secondary legislation will be used to update these provisions from time to time as needed.

	Position under current regime	Position under the Procurement Act 2023
	procurement regime to the goods, services and suppliers of other states.	

Part 8 – Information and Notices (sections 93-99)

Embedding of transparency	<p>Transparency is a key principle in both the PCR 2015 and in various procurement policy notes.</p> <p>There are regulatory requirements to publish various notices, but these are more limited currently than what is being proposed (see next column).</p>	<p>The range of notices required has been greatly expanded requiring consideration and resourcing by authorities. Notices will now cover the whole arc of the procurement from pipeline, pre-market to contract management and termination.</p> <p>The detail of the content of the notices is not set out in the Act itself but appears in secondary legislation (regulations are currently in draft form).</p> <p>Notices such as the Contract Performance Notice (which gives information on supplier performance on major contracts against KPIs) and the Contract Termination Notice (which will explain why a contract was terminated) represent a shift in the amount of information that is publicly available about the ongoing management of contracts which may well be a sensitivity for suppliers (which authorities will need to consider how to manage in terms of the commercial relationship).</p>
Open Data Contracting Standard (ODCS)	<p>The ODCS enables disclosure of data and documents at all stages of the contracting process by defining a common data model. It is not yet a regulatory requirement for authorities to adopt it.</p>	<p>The consultation response suggested that adoption of the ODCS be mandatory, so that data across the public sector can be shared and analysed at contract and category level. We understand that this is something the government is working towards in its new central digital platform.</p>
Record Keeping	<p>Regulation 84 requires an authority to record certain specified information about the procurement together with a general duty to keep a record to provide sufficient justification of all decisions taken in the procurement.</p>	<p>Section 98 requires an authority to keep such records as it considers are necessary to explain “material” decisions made in relation to the award of or entry into a public contract. “Material” here means where the authority is required to publish a notice or where it is required to make a decision. There is also an obligation to keep records of all communications with suppliers which are made prior to contract award and concern the procurement or the award of the contract.</p>

Position under current regime	Position under the Procurement Act 2023
	<p>There is an obligation to keep these records for a period of three years from contract award date, although obligations around record keeping in other legislation take precedence if these require longer retention.</p> <p>The obligation to keep records is extinguished if the authority decides not to proceed to award and publishes a Procurement Termination Notice.</p>
<p>Part 9 – Remedies for breach of statutory duty (sections 100-107)</p>	
<p>Review system</p>	<p>At present a claim must be made in the High Court, which can be burdensome for both suppliers and authorities.</p> <p>The route to a formal challenge under the Act remains the same: a claim in the High Court. Certain limited duties of authorities under the Act (e.g., the duty under section 12(4) to consider barriers to SMEs and the duty under section 13(9) and section 14(8) to have regard to procurement policy statements) are not enforceable in the High Court. Otherwise, any breach by an authority could potentially be challenged in the Court by a supplier under this Part.</p> <p>The time limits for bringing damages claims remain the same under the Act as currently, i.e., 30 days from the date that the supplier knew or ought to have known of the breach.</p>
<p>Automatic suspension</p>	<p>Bidders can suspend contract award by starting a claim in the High Court at any point prior to contract signature. At present the court will apply the long-standing “American Cyanamid” test - used in all cases where injunctive relief is sought - to assess whether the suspension should be maintained or lifted. The test is not procurement specific.</p> <p>Section 102 empowers the court to make a variety of “interim” orders (for example, lifting the auto-suspension, or extending it, suspending the procurement, suspending contract performance, suspending the making of a contract modification). Section 102(2) sets out a new test for the court to apply in deciding how to exercise these powers:</p> <ul style="list-style-type: none"> - have regard to the public interest; - have regard to the interest of suppliers (including whether damages are an adequate remedy for the supplier); and - any other appropriate matters. <p>Interestingly, under the Act, an automatic suspension is only available if a supplier starts a claim during the 8-day standstill period – rather than at any time up to contract signature, as is currently the case.</p>
<p>Contract Set Aside</p>	<p>Where the contract has been entered into, a Court can grant a “Declaration of</p> <p>Under the Act, “ineffectiveness” is now known as “contract set-aside”. It remains available in the same three circumstances as under the PCR 2015. Section 104 confirms that, where</p>

Position under current regime	Position under the Procurement Act 2023
<p>Ineffectiveness” which terminates or shortens the contract. This is available in three specific circumstances only, most commonly where a direct award has been made unlawfully without competition.</p>	<p>a framework agreement is set aside, this does not then automatically set aside all contracts called off under it.</p> <p>Under the Act one of the time limits for bringing a set aside claim is slightly different. Currently where a contract award notice is published, the time limit for an ineffectiveness claim is 30 days from the date of that notice. Under the Act, it is 30 days from the date that the supplier knew or ought to have known of the breach giving rise to the set aside claim.</p> <p>The publication of a contract award notice and holding of a standstill period with no claim brought in that period remains a defence to a set-aside claim (as currently).</p>

Part 10 - Procurement Oversight (sections 108-110)

<p>Creation of a Procurement Review Unit (PRU)</p>	<p>The Public Procurement Review Service (PPRS) can currently deal with informal complaints by tenderers, publish findings and issue guidance to authorities, but has no formal enforcement powers.</p>	<p>The response to the consultation trailed a new Procurement Review Unit to sit above the PPRS. Its role would be to focus on non-compliance and systemic and institutional challenges, building on work done by PPRS (which will continue to exist as a subset of the PRU). It would have a power to make recommendations and an authority will have a duty to implement these.</p> <p>The PRU would have an independent panel of procurement experts empowered to investigate potential procurement challenges and provide advice. The government will also use the PRU to monitor how the new legislation is working in practice.</p> <p>The PRU is likely to be helpful as a source of expertise and guidance. There will be limitations on its impact, particularly around resourcing and lack of enforcement powers – it will not be analogous to, say, the Employment Tribunal. While the PRU may make recommendations that an authority will have a duty to implement, it will not be able to adjudicate on the lawfulness of a particular procurement – this will require, as now, a High Court challenge.</p> <p>Sections 108-110 implement these ideas and cover oversight of procurement. The PRU is not expressly named but an “appropriate authority” is empowered to investigate an authority’s compliance. As part of this, it can order an authority to provide documents and to co-operate.</p> <p>Following an investigation, if it is considered that there is a breach or potential breach, the appropriate authority may issue a “section 108 recommendation” setting out what action should be taken to remedy the situation. The authority concerned must report on progress,</p>
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Position under current regime	Position under the Procurement Act 2023
	<p>and the appropriate authority may issue general guidance and lessons learned to contracting authorities at large.</p> <p>Government departments and utilities may not be investigated.</p> <p>The appropriate authority does not have the power to adjudicate on the lawfulness or otherwise of a particular procurement and may only make recommendations, not orders.</p>

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