trowers & hamlins

THE PROCUREMENT ACT 2023

Essential Guide

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Foreword

Seen as a bonfire of red-tape and regulation, the transformation of the UK's public procurement legal framework commenced even before it left the European Union with the publication of the consultation paper, "Transforming Public Procurement" in December 2020. Constrained by the UK's membership of the World Trade Organisation's Agreement on Government Procurement, the reform of public procurement in the UK was never going to start from a blank sheet of paper. The first stage of the reform journey has now concluded, and the Procurement Act 2023 (the Act) obtained Royal Assent on 26 October 2023, paving the way for the new legislative landscape. The Act will not have immediate effect, and there is secondary legislation and guidance still to come, but the expectation is for the new regime to be in force by October 2024 at the earliest.

For Welsh contracting authorities, there is a further piece to the legislative jigsaw (including the Social Partnership and Public Procurement (Wales) Act 2023). We understand that these wider reforms will be in force around the same time as the Act (that is late 2024 to early 2025).

Those who may have been hoping for a more radical reform agenda will inevitably have been disappointed by the changes brought forward into the Procurement Bill (the Bill) and now reflected in the Act. Nevertheless, there are significant changes within the detail of the Act. When those changes are considered beside the significant stylistic and linguistic differences of the new legislation (due to the difference between our domestic statutory language and the previous "copy-out" approach of the European Directive(s)), it will take a committed reader, possessing an eagle eye and a pre-existing knowledge of the public procurement landscape, some significant time to plough their way through the Act.

Trowers & Hamlins LLP is committed to helping our clients, contacts and colleagues across the public sector implement the new public procurement regime to best effect. We have been working alongside the Cabinet Office, professional bodies, clients and colleagues across the public and private sectors from the outset of the proposals, helping to deliver meaningful change and progress the public procurement conversation across the industry.

As part of this work, we have produced our Essential Guide to the Act. This Essential Guide aims to provide an overview of the key changes to the legal landscape. Whilst the Essential Guide covers the Act as it currently stands, we still await further secondary legislation and guidance to flesh the regime out further. However, we hope that this will help interested readers to get to grips with the new regime.

We will issue updates to the Essential Guide following the outcome of the consultations on the draft secondary legislation, and we welcome feedback on its current format and content. The key aim is to keep the conversation going; to raise the profile of public procurement and its importance across the public sector and for those that tender to the public sector and to ensure that those working with public procurement remain abreast of the developments during this time of change.

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Introduction

On 11 May 2022, the UK Government introduced the much-anticipated Procurement Bill (the Bill) into the House of Lords, where it received its first reading. The Bill was accompanied by supporting documents including Explanatory Notes to the Bill, an Impact Assessment, an Equality Impact Assessment and a Delegated Powers Memorandum.

Having concluded its passage through Parliament, the Bill was passed into law on 26th October 2023 as the Procurement Act 2023.

The Act follows an extensive consultation process on procurement reform following the UK's withdrawal from the European Union. The Act represents the Government's post-Brexit approach to the proposed procurement regime as set out in its earlier Green Paper on Transforming Public Procurement published in December 2020, and the subsequent Government Response to the consultation, published in December 2021.

Whilst not all of the proposals trailed in the Green Paper have made their way into the Act, this marks a major change to the existing procurement landscape. There are numerous stylistic and linguistic differences in the Act compared to what we are used to under the current rules.

In this Essential Guide to the Act, we have summarised the key concepts that have been brought forward by the Government into the new legislation.

We have focused on comparisons between the Act and the current Public Contracts Regulations 2015 (the PCR), and not the wider landscape of other procurement legislation.

Commencement provisions

Section 126 confirms that the Act extends to England and Wales, Scotland and Northern Ireland, and section 127 sets out the commencement provisions of the Act. The "General provisions" contained in Part 13 came into force on the day the Act became law (i.e. when it obtained Royal Assent).

The remaining parts of the Act will not come into force until such times as a Minister of the Crown by regulations may appoint. This aligns with the Government's intention of a six month "go live" period following the secondary legislation being implemented and the Government is currently working towards the Act coming fully into force by October 2024 at the earliest.

Part 1: Key definitions

Part 1 of the Act sets out the key definitions relating to the new regime, as well as rules governing the valuation of public contracts and mixed procurements.

Section 1 of the Act is a new addition from the Bill, and introduces the definitions of "procurement" and "covered procurement". A "procurement" will mean the award, entry into and management of a contract, whereas a "covered procurement" means the award, entry into and management of a "public contract".

The Act also sets out (at section 11) that a contracting authority may not carry out a covered procurement except in accordance with the Act, and so covered procurements will be subject to the full scope of the Act.

Contracting authority

Section 2 sets out the new definition of "contracting authority", which the Government has sought to simplify. While the Cabinet Office has confirmed that the intention is for coverage under the Act to remain as it currently is (i.e. there is no change to the scope of organisations and bodies currently caught by the PCR), there are some areas in this essential definition that require clarification, hopefully forthcoming in guidance, particularly around its application to Registered Providers of social housing, which were confirmed to remain subject to the rules.

The definition of contracting authority now refers to the concept of a "public authority" being a person that is (a) wholly or mainly funded out of public funds, or (b) subject to public authority oversight and who does not operate on a commercial basis. The Act also sets out a definition of a "public utility", being a person that is not a public authority or public undertaking and carries out a utility activity (which is separately defined in section 6 and Schedule 4, and includes (for example) the provision and supply of electricity via fixed networks, and the provision and supply of drinking water via fixed networks).

Notwithstanding the above, section 2(10) sets out that a person operating on a commercial basis but who is a controlled person awarded an exempted contract under paragraph 2 of Schedule 2 (vertical arrangements) is to be treated as a public authority (and therefore a contracting authority) for the purposes of any relevant sub-contracts (i.e. a contract that is substantially for the purpose of performing or contributing to the performance of all or any part of the exempted contract). The effect of this is that where a contracting authority sets up a subsidiary which ordinarily falls outside the scope of the Act, where that entity is awarded an exempted contract as a result of the vertical arrangements exemption, the organisation awarded the exempted contract falls within scope of the Act in respect of any sub-contract that it enters into in order to deliver that contract.

In light of the new definition, those organisations considered "contracting authorities" under the existing procurement regime should proceed on the basis that they will remain "contracting authorities" under the new procurement regime.

Authorities excluded from the definition are listed in subsection 5, including devolved Scottish authorities, the Security Service, the Secret Intelligence Service, the Government Communications Headquarters, the Advanced Research and Invention Agency and any person that is subject to public authority oversight by reference to the aforementioned authorities.

Public contract

Section 3 provides a definition for a "public contract" under the Act, and includes any above threshold contract which is:

- for the supply, for pecuniary interest, of goods, services or works to a contracting authority; and
- is not an exempted contract.

Additionally, a public contract within the meaning of the Act also includes above-threshold (and not exempted) framework agreements and concession contracts. This is a structural change under the new Act. Under the PCR, framework agreements and concession contracts are, in certain circumstances, treated as "public contracts", but their actual status is "other". The inclusion of frameworks as "public contracts" results in a few oddities explained below.

In a change from the current approach to publishing threshold amounts, section 3(5) sets out the current thresholds which are listed in Schedule 1. This is a departure from the usual publication of thresholds on a bi-annual basis through Procurement Policy Notes. We understand that the intention is for procurement thresholds to be aligned to the World Trade Organisation Agreement on Government Procurement (the WTO GPA), which will require amendment to primary legislation to give effect to future changes.

Of note, the Government has recently introduced new secondary legislation to amend the existing thresholds under the PCR, and so the Act will need to be similarly updated ahead of the new regime coming fully into force so as to reflect the revised thresholds.

Exempted contracts

Section 3(6) states that "exempted contracts" under the Act are set out in Schedule 2, and is the replacement for the current list of exempted service contracts in regulation 10 of the PCR. Schedule 2 also includes the new replacement tests for the current Teckal and Hamburg Waste exemptions under regulation 12 of the PCR, which cover awards between linked contracting authorities (counterparty exempted contracts) (referred to as "vertical arrangements" and "horizontal arrangements" respectively).

In respect of vertical arrangements, the Act links the definition of a controlling authority to the Companies Act 2006 in an attempt to simplify the existing definition that is drawn from the European Directive and numerous judgments of the Court of Justice of the European Union (the CJEU).

The existing "Teckal" and "joint Teckal" provisions are retained in the Act in paragraph 2, which confirms that vertical arrangements will be available for contracts between a contracting authority and a person that is controlled by:

- the contracting authority;
- the contracting authority acting jointly with one or more other contracting authorities;
- another contracting authority, where that authority also controls the contracting authority entering into the contract with the controlled entity; and
- another contracting authority acting jointly with one or more other contracting authorities, where the authorities acting jointly also control the contracting authority entering into the contract with the controlled entity.

In addition to the counterparty exempted contracts set out above, Schedule 2 also covers a number of subject-matter exempted contracts, including (for example):

- Land and buildings (contracts for the acquisition, by whatever means, of land, buildings or any other complete work, or of an interest in or right over any of them, or contracts which concern an interest or right over any of them);
- Broadcasting services;

- Electronic communications services;
- Alternative dispute resolution services;
- Certain exempt legal services (for example, legal representation by a lawyer in judicial proceedings or other dispute resolution proceedings, or the giving of advice in connection with such proceedings);
- Financial services; and
- Employment contracts.

Value of public contracts

Section 4 is to be read with Schedule 3, which together set out the rules to be taken into account when estimating the value of a public contract. The definition of "estimated value" is an example of where a "brevity is best" approach to drafting may create unintended confusion in practice.

Under the current regime, the contracting authority must estimate the value of a contract at the date the contracting authority would have sent the call for competition (above threshold) or commenced a procurement process for below threshold contracts (see regulation 6(7) of the PCR). However, under the new test (see section 4(1): the "estimated value" of a contract is its value "for the time being"), there is no definitive date that a contracting authority can identify either before or after the need to make that valuation. This means that a contracting authority could decide on one day that the contract is below threshold and proceed on that basis, but have its procurement timetable affected by shifting market conditions (or other circumstances not within its control), meaning that the contract value subsequently exceeds the relevant financial threshold : which date is to be deemed as "the time being"? This point is also relevant for post-contract modifications pursuant to section 74.

As noted above, section 4 also links to Schedule 3 of the Act, which sets out more detailed rules on estimating values. Notably, the Act is missing important concepts that have been developed through case-law regarding how to value an opportunity (including the concepts developed by the CJEU in Roanne, and adopted by the then Office of Government Commerce regarding payment from third parties, where it was held that for the purposes of deciding whether a contract exceeds the works threshold, the total value from the point of view of the tenderer is the relevant figure, including any sums to be received from third parties). It remains to be seen whether this point is addressed in further guidance.

Schedule 3 also brings into the Act the rules on aggregation that exist under the current regime, in the context of anti-avoidance rules. That is, if a contracting authority artificially sub-divides a contract, then the value of the contract opportunity will be the total combined value of all of the underlying contracts.

In terms of contracting authorities themselves, the current regime provides explicitly for the ability to structure a contracting authority as "discrete operational units", with the aggregation rules under the PCR explicitly recognising the ability to value contracts through a delegated procurement model. The explicit provisions around discrete operational units have not been taken forward into the Act, but such structures should be considered in light of the general anti-avoidance provisions and we hope that guidance from the Cabinet Office will confirm that these delegated structures can still be used where appropriate.

Additionally, Schedule 3 sets out that where it is not possible to estimate the value of a contract (for example, where the duration of a contract is unknown, such as for annual rolling contracts for repetitive services eg. annual audit services), contracting authorities must treat the contract as being above threshold. This is a simple device and the "above threshold" presumption has removed the need for the lengthier, more complex rules on valuation used under the current regime.

Section 5 of the Act replaces the existing rules under regulation 4 of the PCR regarding how to deal with mixed procurements. The result is a simplification of the current regime and the removal of the consideration of the "main subject-matter" of the contract when considering which procurement regime a public contract falls into. Instead, the only test now seems to be one of value. The provisions are simplified so as to refer to whether the constituent elements of a mixed contract could "reasonably be supplied under a separate contract". Further guidance would be helpful to set out how this provision would treat previously accepted and ingrained procurement concepts, for example, services that are incidental to works.

Utilities, defence and security contracts, concession contracts and light-touch contracts

Sections 6 and 7 set out further definitions in the Act relating to "Utilities" and "Defence and Security" contracts (respectively).

Section 8 sets out further definitions relating to concession contracts and section 9 sets out definitions and provisions for light touch contracts. The definition of a concession contract has been simplified to refer to:

"a contract for the supply, for pecuniary interest, of works or services to a contracting authority where:

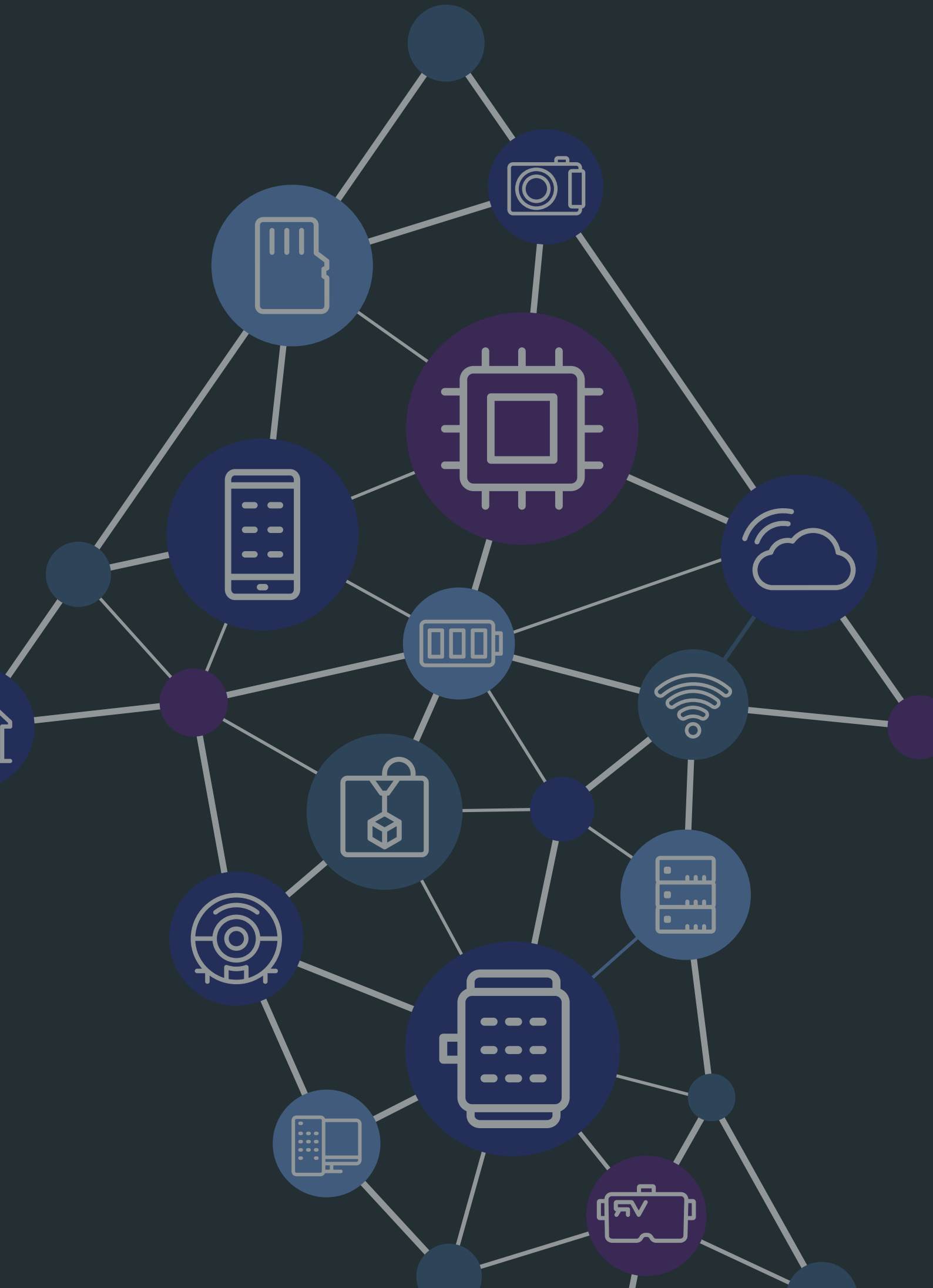
- at least part of the consideration for that supply is a right for the supplier to exploit the works or services; and
- under the contract the supplier is exposed to a real operating risk."

Further guidance or worked through examples of the meaning of "operating risk" will be important to fully understand what, if any, changes result from the change in the language of the definition.

Section 8(2) defines "operating risk" as "the risk that the supplier is not able to recover its costs relating to the supply and operation of the works or services during the contract, and the factors creating the risks were not reasonably foreseeable at the time of award and arise from issues outside the control of the contracting authority and the supplier".

Section 9 retains the concept of "light touch contracts", although further regulations will be published in due course to specify the services that are caught by this regime. The Government has consulted on the draft regulations that will set out which CPV codes are within scope of the light touch regime, and (as at the date of publication) we are expecting the outcome of that consultation to be published soon. Section 9 reflects the current light touch regime, a specific set of rules for certain service contracts which have tended to be of less cross-border interest pre-Brexit, and included certain social, health and education services.

Section 10 sets out additional rules for mixed procurements on the award of a "special regime contract" where certain elements of that contract could reasonably be supplied under a separate contract and which would not, by itself, have been a special regime contract or a below-threshold contract. Examples of "special regime" contracts here include: concession, defence and security, light touch and utilities contracts. In these circumstances, the position under section 10 is that the contract in question should not be treated as a special regime contract. Notwithstanding the above, subsection 4 permits mixed defence and security contracts to be treated as a special regime contract (even where the conditions in subsection 1 or 2 apply) where the contracting authority has good reasons for not awarding separate contracts.



Part 2: Principles and objectives

Part 2 of the Act provides a key, overarching obligation at section 11: that a contracting authority may not carry out a covered procurement (as defined in section 1 of the Act) except in accordance with the Act.

Section 11 sets out that a contracting authority may not enter into a public contract unless it is awarded in accordance with one of the following: section 19 (competitive award); section 41 (direct award in special cases); section 43 (direct award after switching procedures); and section 45 (award under frameworks).

Of note, section 11 is silent in respect of Dynamic Markets (the replacement for Dynamic Purchasing Systems under the PCR). This can be explained by the processes under section 34 (Competitive award by reference to dynamic markets) which is considered below, but broadly speaking, an award of a public contract in accordance with a Dynamic Market is covered by section 19 and is therefore included in the general rule set out in section 11.

The Act covers contracting authorities procuring directly for themselves, jointly with other contracting authorities, or through another entity, including "centralised procurement authorities".

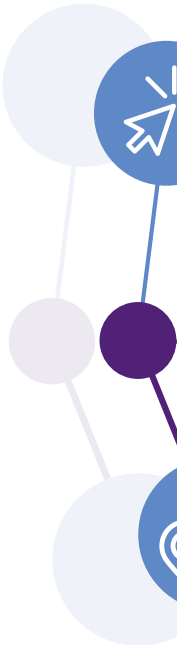
Section 12 sets out the objectives that a contracting authority must have regard to in a covered procurement, being:

- 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 decision; and
- acting, and being seen to act, with integrity.

In addition, a contracting authority must treat all suppliers the same unless a distinction between them justifies different treatment, in which case the contracting authority must take all reasonable steps to ensure it does not give rise to any unfair advantage or disadvantage. In general terms, this appears to equate to the current principle of equal treatment of bidders.

Section 12(4) requires contracting authorities to have regard to "the particular barriers to participation in public procurement that small and medium-sized enterprises may have, and whether they can be removed or reduced." Section 18 further requires a contracting authority to consider whether breaking a contract into lots is reasonable and appropriate, prior to publishing a tender notice. Where a contracting authority considers that the contract could reasonably be supplied under more than one contract as separate lots, the contracting authority must arrange for the contract to be awarded by reference to lots or provide reasons for not doing so.

Section 13 provides for the publication of the Government's national procurement policy statement (NPPS) and the review, amendment and/or replacement of the same. A contracting authority must have regard to the NPPS save for certain exceptions, including the award of a contract under a framework and in relation to Welsh and Northern Irish procurement arrangements.



This duty to have regard to the NPPS requires contracting authorities to consider the NPPS on a case-by-case basis, to take it into account as part of their procurement planning, and only to depart from the NPPS if clear and legitimate reasons can be identified to do so (perhaps, for example, by reference to the subject matter, context and/or value of the procurement in question).

Section 14 contains similar provisions for the publication of the Wales procurement policy statement which subject to certain exceptions applies to devolved Welsh authorities and procurement arrangements.

Whilst the current NPPS remains relevant for the time being, we expect a new NPPS to be published by October 2024 and the Act's "go live" date.

Part 3: Award of public contracts and procedures

Part 3 of the Act covers the award of public contracts and the procedures which contracting authorities must comply with.

Part 3 is made up of the following six chapters:

- Chapter 1: Preliminary steps;
- Chapter 2: Competitive award;
- Chapter 3: Direct award;
- Chapter 4: Award under frameworks;
- Chapter 5: After award, standstill periods and notices; and
- Chapter 6: General provisions about award and procedures.

The provisions of greatest interest to practitioners will no doubt include: the new "competitive flexible procedure" combining a number of the many separate procedures set out under the PCR; the new concept of "open frameworks"; the revised timescales for procurement procedures; and the introduction of a debarment list requiring contracting authorities to exclude certain suppliers mentioned therein.

Chapter 1: Preliminary steps

The Act sets out the preliminary steps that contracting authorities may voluntarily take when conducting a procurement exercise.

Section 15 (Planned procurement notices) introduces the concept of a "planned procurement notice" confirming the contracting authority's intention to publish a tender notice. If a planned procurement notice is published at least 40 days but not more than 12 months before the tender notice is published, it will be deemed a "qualifying planned procurement notice." Accordingly, reduced tendering periods may apply (see the table set out below in our commentary on Chapter 6 re. general provisions about award and procedures for further details of the reduced periods). The planned procurement notice fulfils one of the purposes served by the current Prior Information Notice (PIN) and reflects the recent change in position that such a notice cannot be used as a call for competition in light of certain commitments under Free Trade Agreements entered into between the United Kingdom and Australia and New Zealand. Given that the purpose of this planned procurement notice will be limited to simply notify of an intention to procure (which was what a PIN was used for prior to the 2015 PCR), there is some debate as to the usefulness and practicality of the notice (particularly given that there is a separate notice to use in relation to pre-market engagement activity), although contracting authorities may find that this is a useful way to discharge their duties to reduce or remove barriers for SMEs (who may find such notices helpful in identifying potential opportunities).

Section 16 of the Act provides that contracting authorities may engage with suppliers and others by way of "preliminary market engagement".

The Act sets out the purposes for which preliminary market engagement may be undertaken in section 16, for example, development of specifications, designing the appropriate procurement procedure, award criteria and procurement documents and building capacity among suppliers in relation to the contract being awarded. Contracting authorities engaging in preliminary market engagement must take steps to ensure that those participating are not put at an unfair advantage and that competition is not distorted. If a supplier is put at an unfair advantage that cannot be

avoided due to preliminary market engagement, the supplier must be treated as an "excluded supplier" (see section 57, Meaning of excluded and excludable supplier) in relation to the relevant contract award, and the supplier must be excluded from participating in, or progressing as part of, any competitive tendering procedure.

Under section 17, the starting position is that a contracting authority must publish a preliminary market engagement notice before publishing a tender notice, unless it provides reasons for not having done so in the tender notice. This is a departure from the original position under the Bill where a preliminary market engagement notice was entirely voluntary.

The Act also includes a mandatory preliminary step at section 18, imposing a duty on contracting authorities to consider, prior to issue of a tender notice, whether the subject matter of the contract could be supplied under more than one contract and whether such contracts could be awarded by way of lots. If the contract could be so supplied or awarded, the contracting authority must proceed on such a basis or provide reasons for not doing so. As this relates to a mandatory step in the procurement, we would recommend that contracting authorities record this decision with accompanying reasons in their tender report (see section 98 of the Act).

Chapter 2: Competitive award

Terms of a procurement

Section 19 of the Act requires contracting authorities to award contracts to the "most advantageous tender". The new "most advantageous tender" (MAT), rather than the "most economically advantageous tender" required under the PCR (MEAT), is the tender which the contracting authority considers satisfies its requirements, and "best satisfies the award criteria". This is a much anticipated amendment to the existing approach to evaluation, and aligns with the terminology adopted under the WTO GPA. However, as was made clear in the Government's Green Paper on Transforming Public Procurement, "adopting MAT (together with accompanying guidance) should provide greater reassurance to contracting authorities that they can take a broader view of what can be included in the evaluation of tenders in assessing value for money including social value as part of the quality assessment. This approach is already provided for in the current regulations under MEAT, so this change would be about reinforcing and adding clarity rather than changing scope".

In assessing tenders, section 19(3) provides that contracting authorities must disregard any tender that does not satisfy the conditions of participation, and may disregard any tender which offers a price that the contracting authority considers to be abnormally low, or which materially breaches a procedural requirement set out in the tender documents. There is also a discretionary right for contracting authorities to disregard a tender from a supplier that is not a UK or Treaty state supplier (defined in section 89(1) of the Act as a supplier that is entitled to benefit from the international agreements set out at Schedule 9 of the Act) or if the supplier intends to sub-contract to such a supplier.

Before disregarding a tender for being abnormally low, section 19(4) sets out the process to be followed, including a notification to the supplier that the contracting authority considers the price to be low, and the reasonable opportunity for a supplier to demonstrate that it will be able to perform the contract for the price offered. This adopts the current approach to abnormally low bids and has not clarified the position as to whether the contracting authority has an obligation to investigate suspected abnormally low bids.

Section 20 sets out the new rules concerning competitive tendering procedures. The Act replaces the numerous competitive procedures under the PCR with two main competitive tendering procedures which can either be an "open procedure"

(single-stage, open to all) or "such other competitive procedure as the contracting authority considers appropriate for the purposes of awarding the public contract" (the "competitive flexible procedure").

Section 20 sets out the following characteristics of a competitive tendering procedure:

- must be a proportionate means to award the contract considering nature, complexity and cost (clause 20(3));
- may limit numbers of participants (generally or per round) (clause 20(4)(a));
- may allow for award criteria to be refined (clause 20(4)(b));
- must restrict participation by bidders who did not participate in or were excluded from an earlier round (clause 20(4)(c));
- may provide for the exclusion of suppliers by reference to an intermediate assessment of tenders against the award criteria (i.e. may allow for the deselection of tenderers in stages by reference to the evaluation of initial or subsequent tenders) (clause 20(5)(b) and clause 20(6)); and
- may limit the number of lots that a supplier can submit a tender for (clause 20(7)).

Contracting authorities should note that there does not appear to be any rules around the minimum numbers of tenderers who are able to be shortlisted under a competitive tendering process which makes use of a shortlist (by contrast under the PCR, the minimum number of bidders for a Restricted Procedure is 5, or for a Competitive Dialogue or Competitive Procedure with Negotiation, 3, if numbers allow). With this in mind, contracting authorities should carefully design their procedures to ensure that they retain competitive tension in the procurement process, and to ensure that a suitable number of tenderers are shortlisted to ensure genuine competition. After all, key to a successful procurement exercise is making sure that there is a sufficient number of bidders in the room.

Section 21 sets out when a tender notice must be published. Under an open procedure, the notice must be published to invite suppliers to submit their tenders. For a competitive flexible procedure, a tender notice must be published to invite suppliers to submit a request to participate or to invite them to submit a tender. Section 21 also requires the notice to set out that a contracting authority intends to award a public contract and any other information specified in regulations, which will be made under section 95 (and we await the secondary legislation to have a full understanding of what these details will include).

Section 22 sets out the various conditions of participation in procurement exercises. Of note, contracting authorities may set conditions that a supplier must satisfy to be awarded the contract. The conditions must be a proportionate means of ensuring the supplier has the legal and financial, and/or technical capacity to perform the contract. If the conditions of participation are not satisfied either by the supplier themselves or by a supplier associated with the supplier (as defined in section 22(9) of the Act), a contracting authority may exclude the supplier from progressing through the competitive procedure. The Act sets out several restrictions on the requirements that can be stated as conditions of participation such as the requirement for particular qualifications without allowing for their equivalents.

The rules regarding award criteria are now set out in section 23, which sets out that the award criteria against which tenders may be assessed must relate to the subject matter of the contract, be sufficiently clear, measurable and specific, and be a proportionate means of assessing tenders, having regard to the nature, complexity and cost of the contract. Section 23 also sets out that contracting authorities must be satisfied that the award criteria do not break the rules on technical specifications in section 56 of the Act (for example, the procurement documents may not refer to a design, a particular licensing model or a description of characteristics in

circumstances where they could appropriately refer to performance or functional requirements, nor may they refer to a UK standard without permitting equivalent international standards).

Contracting authorities must describe how tenders are assessed against the award criteria and confirm if a criterion is mandatory (e.g. and that failure to satisfy it will result in disqualification) and indicate the importance of criteria (weightings, rankings etc.) The Act sets out at section 23(5) a non-exhaustive list of things included in the "subject matter" of a contract, namely:

- the goods, services or works to be supplied under the contract, including in respect of any aspect of their production, trading or other stage in their life-cycle;
- how or when those goods, services or works are to be supplied;
- the qualifications, experience, ability, management or organisation of staff where those factors are likely to make a material difference to the quality of goods, services or works being supplied;
- price, other costs or value for money in all the circumstances.

Section 23(6) provides an additional non-exhaustive list of what may constitute the "subject matter of a contract" for light touch contracts, including:

- the views of an individual for whose benefit the services are to be supplied (a "service recipient"), or of a person providing care to a service recipient, in relation to:
  - who should supply the services, and
  - how and when they should be supplied;
- the different needs of different service recipients;
- the importance of proximity between the supplier and service recipients for the effective and efficient supply of the services.

Additionally, section 24 sets out that award criteria and their relative importance can be refined as part of the competitive procedure provided that:

- the tender notice/documents allow for refinement;
- suppliers are yet to be invited to submit tenders for assessment in accordance with section 19; and
- the refinement would not, if made earlier, have allowed for other suppliers to progress beyond an earlier point in the tender process.

Section 24 covers anticipated refinements of award criteria in a competitive flexible procedure and can be distinguished from section 31 accordingly: the latter covers changes to the "terms" of a procedure (which includes award criteria) made on a more ad hoc or reactionary basis. We understand there will be a free text box in the Tender Notice to note that, whilst a refinement has been made in accordance with section 24, the Tender Notice is for transparency purposes only, it does not denote a new procurement opportunity.

Section 56 sets out that technical specifications must not refer to a design, a particular licencing model or description of characteristics where they could (instead) appropriately refer to performance and functional requirements. Specifications should not be too prescriptive, thereby risking the contracting authority restricting access to the process (and therefore competition) where it is unnecessary to do so. Contracting authorities' requirements should not refer to trademarks, trade names, patent, design or type, place of origin or producer/supplier unless it is necessary and the exceptions set out in section 56 of the Act are satisfied (which shows wider international constraints placed upon UK procurement

and the practical limitations of the post-Brexit ability to "Buy British"). Additionally, where such matters are referred to, the procurement documents must also provide that equivalent quality or performance proposals will not be disadvantaged.

UK standards should only be referenced in procurement documents where the standard adopts an internationally-recognised equivalent or where there is no such equivalent. Additionally, the procurement documents must also provide for equivalence of international standards. Given this position, section 56 does not, overall, provide a significant difference from the PCR.

Section 25 (Sub-contracting specifications) provides that where a contracting authority has a mixed contract (comprising goods, services or works that could be procured either by way of "direct award in special cases" to a particular supplier in accordance with section 41 or via a competitive procedure run in accordance with section 19), the contracting authority may require that the supplier appointed in accordance with section 19 sub-contracts the supply of the goods, works and services to the supplier who has been appointed pursuant to a direct award.

For the provisions in section 25 to apply, one of the direct award justifications in section 41 must apply. In respect of a supplier who is not an "excluded" supplier,[1] this relates to the justifications in Schedule 5 (Direct award justifications). In respect of an "excluded" supplier, it is possible to make a direct award only where there is an overriding public interest in awarding the contract to that supplier. Section 41(5) specifies that there is only such an overriding public interest in very limited circumstances, including in relation to the construction, maintenance or operation of critical national infrastructure, or for defence and intelligence contracts.

Exclusions and modifications

Section 26 of the Act introduces various rules regarding "excluded suppliers" (those who must be disregarded from a procurement process) and "excludable suppliers" (those who may be disregarded at the discretion of the contracting authority). If a supplier is excluded / excludable by virtue of an associated supplier (supplier relied on by the bidding supplier in order to satisfy the conditions of participation) or a subcontractor only, the contracting authority must allow reasonable opportunity to replace the associated supplier or subcontractor (see below for further details).

Section 27 (Excluding suppliers from a competitive flexible procedure) requires contracting authorities to determine whether a supplier is an excluded or excludable supplier before allowing them to participate in competitive flexible procedures.

Where a supplier is an excluded supplier, they must be excluded from participating in a procurement procedure.

Where a supplier is an excludable supplier, they may be excluded from participating in a procurement procedure.

Pursuant to section 27(4), where a bidder is an excluded or excludable supplier by reference to an associated person, the contracting authority must first notify the supplier before excluding them from the procurement, and must give the opportunity for the supplier to replace the associated person.

1 Pursuant to section 57, a supplier is an excluded supplier if a contracting authority considers that a mandatory exclusion ground applies to the supplier or an associated person and the circumstances giving rise to the exclusion ground are continuing or are likely to occur again, or where the supplier is on the central debarment list by reference to a mandatory exclusion ground.

Section 28 (Excluding suppliers by reference to sub-contractors) requires contracting authorities to ask for details of intended sub-contractors, to check whether any intended sub-contractors are on the debarment list, and to ask a supplier for information to determine if any sub-contractor it intends to sub-contract to is an excluded or excludable supplier. If a sub-contractor is an excludable supplier, the authority may treat the supplier itself as an excludable supplier and exclude the supplier (or disregard their tender) from a competitive tendering procedure. However, the authority must provide the supplier with the opportunity to find a suitable replacement sub-contractor prior to excluding the supplier or disregarding the tender.

Section 29 (Excluding a supplier that is a threat to national security) allows contracting authorities to disregard a tender or exclude a supplier on the basis of the national security discretionary exclusion ground in paragraph 14 of Schedule 7, subject to the authority having notified a Minister of the Crown and the Minister confirming that the exclusion ground applies.

Section 30 (Excluding suppliers for improper behaviour) requires contracting authorities to exclude a supplier from participating in, or progressing as part of, any competitive tendering procedure where a supplier has acted improperly, resulting in an unfair advantage in the competition which cannot be avoided other than by exclusion of the supplier. Before excluding a supplier under section 30, the contracting authority must allow representations and evidence to be put forward by the supplier before determining whether a supplier has acted improperly. Section 30(4) sets out the following exhaustive list of circumstances in which a supplier has acted improperly in a procurement:

- failing to provide information requested by the contracting authority;
- providing information that is incomplete, inaccurate or misleading;
- accessing confidential information; or
- unduly influencing the contracting authority's decision-making.

Section 31 provides that the terms of a procurement may be modified prior to the deadline for submitting tenders (for the open procedure) or the deadline for submitting a request to participate or, where there has been no invitation for such request, the deadline for submitting the first tender (for the competitive flexible procedure). Modifications to a competitive flexible procedure can also be made after the deadline noted above, provided they are not "substantial" (as defined in section 31(3) of the Act), or if the procurement relates to the award of a light touch contract, and provided that the the modification is made before the deadline for submitting a tender for assessment under section 19. Contracting authorities must consider revising applicable tender deadlines if a modification is made. This is a useful clarification of modification principles for pre-award changes.

Reserving contracts to certain suppliers

Section 32 (Reserving contracts to supported employment providers) permits contracting authorities to design a competitive flexible procedure in order that it provides for the exclusion of any supplier who is not a supported employment provider. Section 32(4) explains that a supported employment provider is an organisation that operates for the purpose of providing employment or employment-related support to disabled or disadvantaged individuals and where at least 30% of that organisation's workforce is made up of disabled or disadvantaged individuals.

Section 33 (Reserving contracts to public service mutuals) permits contracting authorities to design a competitive flexible procedure for the procurement of a contract for reservable light touch services with a maximum term of five years or less in order that it provides for the exclusion of any supplier who is not a "qualifying public service mutual" (defined in section 33(5) as a public service mutual who has not entered into a comparable contract in the three years preceding the award of the contract).

Sections 33(7) and 33(8) provide a route for an appropriate authority to publish further regulations to define reservable light touch services, and we await further regulations and guidance on what may be covered.

Section 33(6) defines a "public service mutual" as a body that operates for the purpose of delivering public services and mainly for the purpose of delivering one or more reservable light touch services (which may be defined in further regulations). Additionally, a public service mutual must be run on a not-for-profit basis (or provide for the distribution of profits only to its members), and must be under the management and control of its employees.

For the purposes of section 33(5), a comparable contract is defined in section 33(7) as a contract that was:

- a contract for the same kind of services;
- awarded by the same contracting authority; and
- awarded pursuant to a reserved procurement in accordance with section 33.

Awarding contracts by reference to dynamic markets

Section 34 (Competitive award by reference to dynamic markets) allows contracting authorities to exclude suppliers that are not members of an appropriate dynamic market or an appropriate part of an appropriate dynamic market, in a competitive flexible procedure. However, if the supplier has submitted an application for membership of the dynamic market, the authority must consider their application. The effect of this section is to ensure the award of a contract under a dynamic market will be through a competitive flexible procedure, and not an open procedure or direct award.

Section 35 (Dynamic markets: establishment) of the Act provides that arrangements may be established for the award of public contracts by reference to suppliers' participation in to a "dynamic market". These provisions replace the current dynamic purchasing systems under the PCR. There is no requirement expressly set out in the Act for the dynamic market to be operated electronically (as there is in the current legislation). The Act also provides for the use of "utilities dynamic markets", and section 35(2) limits the establishment and use of utilities dynamic markets to only those set up for the purpose of the award of utilities (being a public authority or undertaking which carries out a utility activity, or a private utility) contracts by utilities.

Contracting authorities may provide for the exclusion of a supplier during a competitive flexible procedure if the supplier is not part of an appropriate dynamic market or an appropriate part of a dynamic market. In other words, it can use a dynamic market as its sole route to market. Whether or not a dynamic market is "appropriate" will be determined by reference to whether the terms of the dynamic market permit the award of the contract by the contracting authority – e.g. (Inter alia) its scope needs to cover the subject matter of the contract to be called-off.

Before excluding a supplier for not being part of a dynamic market, a contracting authority should consider any application for membership submitted from those who have submitted a tender unless, due to exceptional circumstances resulting from the complexity of the procurement, a contracting authority is unable to consider the application before the deadline for submitting a request to participate (or, where there is no invitation for requests, the deadline for submitting the first tender).

Conditions for membership of a dynamic market (or part of it) can be set pursuant to section 36, provided they are a proportionate means of ensuring that the supplier has legal and financial capacity and technical ability to perform the contract awarded, by reference to the market. Applications for membership to a dynamic market must be accepted at all times during the term of the dynamic market and be considered within a reasonable period. If the conditions are satisfied and the supplier is not an excluded/excludable supplier, it should be admitted to the market as soon as reasonably practicable. There should be no limit set by a contracting authority to the number of suppliers that can be admitted to a dynamic market (or part of it). Conditions for membership should not be modified during the term of the market. Members can be removed from a dynamic market in accordance with section 37 if the contracting authority who lets the dynamic market considers that the supplier is: an excluded supplier; an excludable supplier; or they do not satisfy the conditions for membership. Presumably, these rules regarding removal of members do not extend to the contracting authority accessing the dynamic market if it has been set up by a centralised procurement authority, although that is not entirely clear from the provisions of the Act. The Act currently reads that only the centralised procurement authority is under an obligation or an ability to remove a supplier and therefore this may be a question that a contracting authority asks as part of its consideration as to whether or not a dynamic market is "appropriate".

Section 38 sets out that fees may be charged to suppliers that are awarded contracts by reference to membership of a dynamic market. The fee must be a fixed percentage of the estimated value of the awarded contract. Charging of fees must be set out in the documentation used to establish the dynamic market. For utilities dynamic markets, fees may be charged in connection with obtaining and maintaining membership to the market.

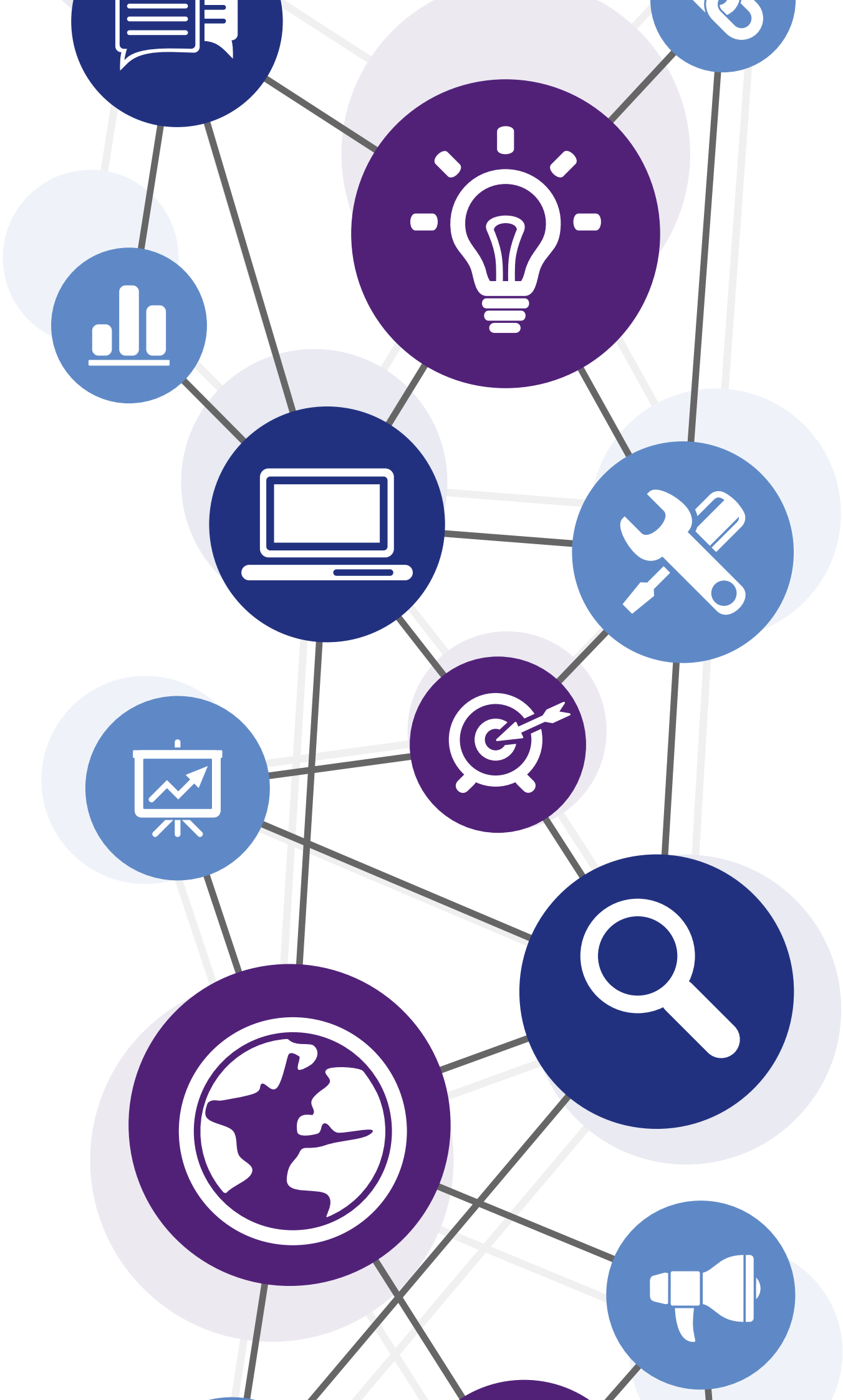
Before establishing a dynamic market, section 39(2) provides that a contracting authority must publish a notice confirming that it intends to establish the dynamic market (along with any further information which may be specified in further regulations).

Section 39 (Dynamic market notices) sets out a series of other notices (each a "dynamic market notice") that contracting authorities will be required to publish in respect of any dynamic market that they establish, including:

- A notice setting out that the dynamic market has been established (section 39(3));
- A notice setting out any modifications to the dynamic market (section 39(4); and
- A notice confirming once the dynamic market has ceased to operate (section 39(5)) (although this does not apply to private utilities).

The notices referred to in sections 39(3) to (5) must be published as soon as reasonably practicable following the relevant event referred to in those sub-sections. The detail of what is required to be included in a dynamic market notice will be provided in the further secondary legislation, and we await the Government's response to the consultation on those Draft Regulations.

Section 40 (Qualifying utilities dynamic market notices: no duty to publish a tender notice) defines a qualifying utilities dynamic market notice,and sets out rules and exceptions for tender notices for utilities dynamic markets established under a qualifying utilities dynamic market notice. Of note, there is no requirement to publish a tender notice in respect of a contract to be awarded by reference to membership of a qualifying utilities dynamic market.



Chapter 3: Direct award

Section 41 sets out certain special cases where a direct award of a public contract may be permitted, i.e. where a contracting authority may award a public contract directly without having followed a competitive award process. Where a "direct award justification" applies, a contracting authority can award a contract directly to a supplier who is not excluded. "Direct award justifications" are set out in Schedule 5 of the Act and include:

- Prototypes and development (subsections 2 and 3) – where the public contract concerns the production of a prototype, or the supply of other novel goods or services, and for the purpose of testing the suitability of the goods or services, researching the viability of producing or supplying those goods or services, or for other research, experiment study or development.
- Single suppliers (subsections 4 to 6)– where only one supplier is capable of performing the public contract for any of the following reasons:
    - the public contract relates to the creation or acquisition of a unique work of art or artistic performance;
    - due to the supplier having unique intellectual property rights or other exclusive rights, only that supplier can supply the goods, services or works and there are no other reasonable alternatives to the goods, services or works; or
    - due to an absence of competition for technical reasons, only a particular supplier can supply the goods, services or works and there are no other reasonable alternatives to the goods, services or works.
- Additional or repeat goods (subsections 7 to 9) – where:
    - the public contract relates to the provision of goods, services or works from the existing supplier as an extension, or partial replacement, to the existing goods, services or works, and where a change in supplier would result in differences or incompatibility with the existing goods, service or works which would also result in disproportionate technical difficulties in maintenance or operation; or
    - where the public contract relates to the provision for goods, services or works by an existing supplier that are similar to those already provided, and where those goods, services or works were provided under a contract that was awarded pursuant to a competitive tendering procedure in the previous five years, and where the original tender notice or supporting documents set out the contracting authority's intention to carry out a subsequent procurement for similar goods, services or works in accordance with this direct award justification.
- Commodities (subsection 10) – where the public contract concerns goods purchased on a commodity market.
- Advantageous terms on insolvency – where the public contract will ensure terms that are particularly advantageous to the contracting authority due to the fact that a supplier (whether or not the one to whom the contract is to be awarded) is undergoing insolvency proceedings.
- Urgency – where the goods, services or works are strictly necessary for reasons of extreme urgency and where the public contract cannot be awarded pursuant to a competitive tendering procedure (i.e. where the normal time limits cannot be complied with).
- User choice contracts – where the public contract relates to the supply of user choice services - either services specified as being "light touch" pursuant to further regulations, which are supplied for the benefit of a particular individual, or where the contracting authority is required by statute to have regard to the views of an individual or their carer in respect of who supplies the services), and where the following conditions are met:

  - the individual or their carer has expressed a preference as to who should supply the services, or only one supplier is capable of providing the services as a result of the nature of the services; and
  - the contracting authority considers it is not in the best interest of the individual to award a contract pursuant to a competitive tendering procedure.

- Defence and security – where the public contract relates to specific defence and security contracts, including circumstances where a new contract would be a "qualifying defence contract" under section 14(2) of the Defence Reform Act 2014.

If a contracting authority considers that there is an overriding public interest in doing so, it may directly award a public contract to an excluded supplier. The Act sets out at section 41(5) what is to be considered "in the overriding public interest". A selection process or other preliminary steps may be undertaken as deemed appropriate in the circumstances.

Additionally, section 42 introduces the concept of direct awards to protect life. If a Minister of the Crown considers it necessary to protect human, animal or plant life or health, or to protect public order and safety, the Minister may (by way of regulations) provide that certain contracts may be awarded as if a "direct award justification" applies. As the Explanatory Notes to the Act provide, this section is deemed to cover procurement during an emergency event (such as a pandemic) where the circumstances leading to the event are foreseeable, thereby possibly ruling out the application of Schedule 5 (Direct award justifications).

A direct award may also be made under the Act to a non-excluded supplier if the contracting authority invited suppliers to submit tenders or requests to participate as part of a competitive tender procedure, did not receive any suitable responses and it therefore deems that a competitive tender procedure is not possible for award of the contract. The Act sets out at section 43(2) what would render a tender or request unsuitable (for example, where it does not satisfy award criteria or where it materially breaches a procedural requirement in the tender notice or associated tender documents).

Section 44 (Transparency notices) sets out a mandatory requirement for contracting authorities to publish transparency notices where they intend to make direct awards pursuant to either section 41 or section 43, apart from where such a direct award is justified by virtue of paragraph 15 of Schedule 5 (direct award of user choice contracts).

Chapter 4: Award under frameworks

A public contract may be awarded in accordance with a framework. A "framework" is a contract between a contracting authority and one or more suppliers, that provides for future award of public contracts to those suppliers. Section 45(5) sets out in detail what information a framework must include, as follows:

- a description of goods, services or works to be provided under contracts awarded in accordance with the framework;
- the price payable, or the mechanism for determining the price payable, under such contracts;
- the estimated value of the framework;
- the selection process for awarding contracts in accordance with the framework;
- the term of the framework;
- which contracting authorities are entitled to award public contracts in accordance with the framework; and
- whether the framework is awarded pursuant to section 49 (Open frameworks).

Of note, the new definition for "public contracts" includes framework agreements. This

suggests that the ability to award public contracts under a framework also permits the award of a framework within a framework - a concept which is not permitted under the current rules, and further guidance on this point would be useful.

A framework may allow for the future award of public contracts pursuant to its terms by way of a competitive selection process (section 45(3)) or, in certain circumstances, without competition (section 45(4)). A public contract may be awarded under a framework without further competition if:

- there is only one supplier on the framework; or
- the framework sets out the core terms of the public contract and an objective mechanism for supplier selection.

If provided for in the relevant framework, fees can be charged representing a fixed percentage of the estimated value of the contract awarded under the framework (section 45(7)). As above (in relation to dynamic markets), the concepts trailed in the Green Paper for such fees to be proportionate and used solely in the public interest have not been taken forward into the Act.

Section 46 (Frameworks: competitive selection process) sets out rules governing a competitive selection process under a framework. It allows a contracting authority to set conditions of participation as part of the competitive selection process, insofar as the contracting authority is satisfied that the conditions are a proportionate way of ensuring suppliers on the framework have the legal and financial capacity or technical ability to perform the contract to be awarded under the framework (section 46(1)). A contracting authority is also allowed to exclude a supplier if they fail to satisfy a condition participation (section 46(7)).

However, if conditions of participation are applied, contracting authorities are prohibited from:

- requiring the provision of audited annual accounts from suppliers that are not required by the Companies Act 2006 to have their accounts audited (section 46(3)(a));
- requiring insurance relating to the performance of the contract to be awarded under the framework to be in place before the award (section 46(3)(b));
- requiring suppliers to have previously been awarded a contract under the framework or to have previously been awarded a contract by a specific contracting authority (section 46(4)(a));
- breaching rules on technical specifications in section 56 (technical specifications) (section 46(4)(b)); or
- requiring particular qualifications without allowing for equivalents(section 46(4)(c)).

As a general rule, section 47 states that the term of a framework must not exceed 4 years (or 8 years for a “defence and security framework” or “utilities framework”).

A framework may have a longer term if the contracting authority considers that the “nature” of the goods, services and works to be supplied means a longer term is required (section 47(2)). Reasons for a longer term must be set out in the tender notice or transparency notice for the framework (section 47(3)).

Section 48 (Frameworks: implied terms) confirms that a term will be implied into every framework that allows a contracting authority to exclude a supplier that is an excluded supplier, or who has become an excludable supplier since the framework was awarded, from participating in any call-off procedure run under the framework.

Section 49 (Open frameworks) of the Act provides for the new concept of “open frameworks.” An open framework provides for the award of successive frameworks, as part of a ‘scheme’ of frameworks, on substantially the same terms (capable

of being made by reference to the same tender or transparency notice without "substantial modification"). Given this, the framework is not so much a single open framework, as a number of individual frameworks let one after another. Whether this has significant utility and flexibility remains to be seen.

Open frameworks must provide for the award of a framework at least once during:

- the period of 3 years following the award of the first framework; and
- each period of 5 years following award of the second framework.

Each open framework in a scheme will expire on the award of the next framework. The final open framework must expire 8 years following the award of the first framework. An open framework awarded to only one supplier must expire 4 years following contract award.

In terms of refreshing an open framework, if the numbers are unlimited, then any subsequent additional/new suppliers will need to be made via a competitive process, although existing framework providers are able to submit an updated bid via the competitive process or choose to simply maintain their existing bid. If the numbers appointed to the framework are limited, then all suppliers (existing and new) must submit a new bid via a competitive process: this avoids existing framework providers "blocking" access to new suppliers under a limited open framework.

Chapter 5: After award, standstill periods and notices

Section 50 (Contract award notices and assessment summaries) of the Act provides that before entering into a public contract, contracting authorities must (unless an exception set out in section 50(6) applies):

- provide an "assessment summary" to each supplier who submitted a tender, comprising information regarding the authority's assessment of the supplier's tender and the assessment of the winning tender;
- publish a "contract award notice" (confirming that the authority intends to enter into a contract); and
- wait for the "mandatory standstill period" to end (8 working days starting on the date that the contract award notice is published) or, if later, any other standstill period provided for in the contract award notice (section 51, Standstill periods on the award of contracts).

Pursuant to section 52 (Key performance indicators), if the contract value exceeds £5 million, a contracting authority must set at least 3 key performance indicators in respect of the contract (subject to any exceptions set out in section 52(5) e.g. framework agreements).

Once a public contract is entered into, section 53 (Contract details notices and publication of contracts) provides that a "contract details notice" must be published confirming that it has been entered into within 30 days of the contract being entered into (120 days for light touch contracts). If the estimated value of the contract exceeds £5 million, the authority must publish a copy of the contract (contracting authorities will need to carefully consider which elements of the contract should be redacted).

The Act refers throughout to a range of notices that contracting authorities must or may issue during a procurement process. We have set out such notices below with confirmation as to whether they are compulsory or voluntary. All notices are subject to additional regulations that may be made under section 95 (Notices, documents and information: regulations) regarding the form, content, method of issue and publication requirements or notices under the Act.

Notice	Section	Compulsory / Voluntary
Pipeline notice	93	Compulsory for contracting authorities who consider that they will pay more than £100m under relevant contracts in the coming financial year
Planned procurement notice	15	Voluntary
Preliminary market engagement notice	17	Compulsory where preliminary market engagement is undertaken unless reasons for not publishing are set out in the Tender Notice
Tender notice	21	Compulsory where a contracting authority intends to award a public contract pursuant to section 19
Contract award notice	50	Compulsory before entering into a public contract (which does not include below-threshold call-offs awarded under a framework dynamic market)
Contract details notice	53	Compulsory
Procurement termination notice	55	Compulsory where a procurement exercise is terminated– to be published as soon as reasonably possible after making a decision not to award a contract following the publishing of a tender or transparency notice.
Contract change notice	75	Compulsory (except where exemptions in section 75(2) apply)
Contract termination notice	80	Compulsory – to be published within 30 days of the termination of a public contract, including discharge; expiry; termination by a party; rescission; or set aside by Court order
Dynamic market notice	39	Compulsory where a dynamic market is to be established
Transparency notice	44	Compulsory where there is a direct award within the meaning of section 41 and section 43
Payments compliance notice	69	Compulsory where the contracting authority makes a payment under a public contract or a sum owed by the contracting authority under a public contract becomes payable
Below-threshold tender notice	87	Compulsory where a contracting authority intends to advertise for the purpose of inviting tenders for a below threshold procurement

Chapter 6: General provision about award and procedures

Time limits

Section 54 (Time limits) provides that all time limits set by a contracting authority for a procurement process must be the same for all suppliers (equal treatment provision). Additionally, when setting time limits, contracting authorities must have regard to:

- the nature and complexity of the contract or any modification to the tender notice/associated documents;
- the need for site visits, physical inspection or other practical steps;
- the need for subcontracting;
- the nature and complexity of any modification made to the tender notice or associated tender documents; and
- the importance of avoiding unnecessary delay.

Section 54 also sets out the following minimum time limits which must be adhered to during the "participation period" and "tender period" of a procurement process:

Participation Period (commencing on the day following invitation to submit requests to participate and lasts until day of deadline for submission):

Circumstance	Minimum period
Light Touch Contract	No minimum
State of urgency making 25 days impractical	10 days
Standard	25 days

Tendering Period (commencing on the day following invitation to submit requests to participate and lasts until day of deadline for submission):

Circumstance	Minimum period
Light Touch Contract	No minimum
Qualifying planned procurement notice issued	10 days
State of urgency making other minimum periods impractical	10 days
Contract is awarded by reference to suppliers' membership of a dynamic market	10 days
Tenders submitted electronically and tender notice and associated tender documents are all provided at the same time.	25 days
Tenders submitted electronically and tender notice and associated tender documents are not all provided at the same time.	30 days
Tenders not submitted electronically and tender notice and associated tender documents are all provided at the same time.	30 days
Tenders not submitted electronically and tender notice and associated tender documents are not all provided at the same time.	35 days

Excluded and excludable suppliers

Section 57 (Meaning of excluded and excludable suppliers) sets out the definition for “excluded” and “excludable” suppliers.

Suppliers are excluded if the contracting authority considers that a mandatory exclusion (set out at Schedule 6 of the Act) applies to the supplier or an “associated supplier” (defined in section 26(4) as a supplier that the supplier tendering for a contract is relying on to meet the conditions of participation for the procurement) and the circumstances giving rise to the mandatory exclusion are likely to occur again; or the supplier or an associated supplier is on the “debarment list” due to a mandatory exclusion ground.

The broad headings of mandatory exclusion grounds have been recast according to UK-specific grounds and read much more easily than the previous grounds under the PCR. They are set out in Schedule 6 and include:

- Corporate manslaughter or homicide;
- Terrorism;
- Theft, fraud, bribery etc.;
- Labour market, slavery and human trafficking offences;
- Organised crime;
- Tax offences;
- Cartel offences;
- Ancillary offences (including aiding, abetting, counselling or procuring the commission of an offence otherwise set out in Schedule 6);
- Offences committed outside the United Kingdom which would otherwise have been an offence under Schedule 6;
- National security;
- Misconduct in relation to tax; and
- Competition law infringements.

In respect of the mandatory exclusion grounds in Schedule 6, there is a difference in approach to the timings that are currently set out in the PCR. Whilst the general rule is that the mandatory exclusion ground should have occurred in the preceding five years, paragraph 44 sets out various mandatory exclusion grounds that are to be disregarded to the extent that they occurred before the coming into force of Schedule 6, or within specified time periods of Schedule 6 coming into force. For example, in relation to the exclusion grounds relating to corporate manslaughter or homicide, theft or threats to national security, contracting authorities must disregard any event that occurred before the coming into force of Schedule 6.

Suppliers are excludable if the contracting authority considers that a discretionary exclusion (set out at Schedule 7 of the Act) applies to the supplier or an associated supplier and the circumstances giving rise to the discretionary exclusion are likely to occur again, or the supplier or an associated supplier is on the "debarment list" due to a discretionary exclusion ground. The broad headings of the discretionary exclusion grounds set out in Schedule 7 include:

- Labour market misconduct;
- Environmental misconduct;
- Insolvency, bankruptcy etc.;
- Potential competition infringements;
- Professional misconduct;
- Breach of contract and poor performance of a contract to which a contracting authority, a public authority, or an equivalent authority outside of the UK is a party to;
- Acting improperly in procurement; and
- Posing a threat to national security.

Again, these have been re-cast for UK-specific circumstances, but also address some of the previous frustrations of UK contracting authorities in applying the previous regime of exclusions, including the use of settlement agreements to avoid the previous ground for breach of contract.

Section 58 (Considering whether a supplier is excluded or excludable) sets out the matters that contracting authorities should consider in determining the likelihood of circumstances occurring again, including steps taken to prevent reoccurrence, time elapsed and evidence that the supplier took the circumstances seriously. This is the new version of "self-cleaning" in the Act, and the process here is the same for both "excluded" and "excludable" suppliers. Section 58 also includes requirements for contracting authorities to allow representations and evidence from suppliers prior to making a decision.

Debarment

Contracting authorities are obliged under section 59 (Notification of exclusion of supplier) to notify the relevant appropriate authority within 30 days of a supplier being disregarded, excluded, or replaced due to a relevant exclusion. Contracting authorities must also provide notice if proceedings are brought under Part 9 relating to the disregard or exclusion of a supplier within 30 days of the proceedings being commenced or determined.

A Minister of the Crown can investigate, at any time, whether a supplier is an excluded or excludable supplier due to a relevant exclusion ground. The Minister of the Crown must follow the procedural requirements set out in section 60 (Investigations of supplier: exclusion grounds) including the issue of a notice to the supplier relating to the investigation. An investigating Minister can, request by notice, documents and other assistance from contracting authorities and the supplier. In accordance with section 61, a Minister is required to prepare a report following an investigation under section 60 and may be required to publish or issue to the supplier the report (or part of it) pursuant to section 61.

Section 62 (Debarment list) provides for the new concept of a "debarment list" first explored in the Green Paper. This allows a Minister of the Crown to enter the name of a supplier as an excluded or excludable supplier on a list following an investigation under section 60 by the Minister. An entry on the debarment list must confirm which exclusion grounds apply to the supplier, if they are mandatory or discretionary and when the Minister expects the ground(s) to no longer apply (and the supplier's name be removed from the debarment list). A Minister of the Crown:

- must publish the debarment list and any amends;
- must consult with Welsh Ministers and Northern Ireland Department before entering or removing a supplier from the list;
- must keep the list under review;
- may amend the list at any time; and
- must remove an entry if it is satisfied that the supplier is not an excludable or excluded supplier.

A supplier may apply to a Minister of the Crown, at any time, for removal of their name from the debarment list (section 64, Debarment list: application for removal). The application must only be considered by a Minister if there has been a material change in circumstances since the supplier was listed or since the supplier's last application for removal or, the application is supported by significant information that has not previously been considered by the Minister.

Section 65 provides for appeals by suppliers against a decision to enter their names on the debarment list or not to remove their name from the list following an application under section 64. The procedure for bringing and determining such appeals is to be set out in secondary legislation.

Part 4: Management of public contracts

Part 4 of the Act refers to the management of public contracts, covering three key areas of procurement practice that will be of great interest to procurement practitioners. First, new implied terms that will be deemed to be incorporated into all public contracts. Second, requirements for contracting authorities to publish information about payments and supplier performance and clauses governing the interaction with sub-contractors, representing a radical change to on-going contract performance management with significant potential impacts on bidder's rights to participate in future opportunities. Third, are clauses governing the modification of existing contracts, replacing Regulation 72 of the PCR.

Terms implied into public contracts

The Act sets out a series of terms that are to be implied into every public contract which have the following effects:

- Contracting authorities must accept and process electronic invoices that meet certain minimum requirements – set by reference to standards adopted by the British Standards Institution (section 67, Electronic invoicing: implied term).
- Contracting authorities must make payment within 30 days of receiving an invoice from a supplier (section 68, Implied payment terms in public contracts). This payment period does not apply where the invoice is disputed, to concession contracts or utilities contracts awarded by a private utility, or to contracts awarded by a maintained school, academy or sixth form college. However, parties remain at liberty to agree shorter payment periods (section 68(7)).

Any term included in a public contract which purports to restrict or override these terms will not have legal effect (section 67(5)) or are "without effect" (section 68(6)).

Notices about payments and performance

Section 69 (Payments compliance notices) sets out the obligation for contracting authorities to publish a "payments compliance notice". This notice must be published every six months (with a reporting period ending 1 March or 30 September, as appropriate) and should set out information detailing that contracting authority's compliance with its obligation to make payments within 30 days of invoices (see section 68 above). This clause does not apply to private utilities.

Section 70(Information about payments under public contracts) sets out a further obligation for contracting authorities to publish information on a quarterly basis about any single large payment (over £30,000) made in the previous quarter (although the financial threshold and time limit for publication may subsequently be changed by secondary legislation). The information must be published within 30 days of the end of quarter in which the payment has been made. This clause does not apply to utilities, concession contracts, or contracts awarded by a maintained school, academy or sixth form college.

The requirements for the exact contents of these notices will be set out in secondary legislation under section 95 and the precise details will be confirmed following publication of the Government's response to the consultation on those Draft Regulations.

A further publication requirement is set by section 71 (Assessment of contract performance). Where a contracting authority has set and published Key Performance Indicators (KPIs) in compliance with section 52 (which requires at least three KPIs to be published for contracts worth more than £5m), it must publish information annually about the supplier's compliance with those KPIs.

Section 71(5) also requires contracting authorities to publish information about a supplier's breaches of contract where that breach leads to termination, damages or an agreed settlement. Full details of the contents of these notices will be specified in further regulations. Relevant information must be published within 30 days of the date when section 71(5) first applied (for example, the date when the public contract was terminated, the date that damages were awarded, or the date of a settlement agreement).

The discretionary exclusion grounds (set out in Schedule 7) include circumstances where a contracting authority has published information under section 71 (5) about a suppliers' breach or poor performance of a contract. Another discretionary exclusion ground is where a supplier has failed to improve performance after being given an opportunity to do so when they are not performing to the contracting authority's satisfaction. This is an extension of the existing discretionary exclusion ground for poor past performance under the PCR which was narrowly drafted and not widely used (notably as contracting authorities often struggled to gather enough information to confidently rely on the exclusion ground). The setting and monitoring of KPIs for higher value contracts and the general performance by suppliers under all contracts will undoubtedly take on much greater significance under the new rules. Section 71 does not apply to private utilities.

Sub-contracting

Section 72 (Sub-contracting: directions) creates a new power for contracting authorities to insist that suppliers enter into legally binding arrangements with sub-contractors who are to fulfil parts of a public contract. If a supplier fails to do so, having been directed by the contracting authority, the contracting authority can refuse to award the public contract (or, if the public contract has already been entered into, terminate it).

Section 73 (Implied payment terms in sub-contracts) creates implied payment terms in "public sub-contracts" that are equivalent to those implied into public contracts as set out in section 68. This means that payments by suppliers to sub-contractors must be made within 30 days of invoice, regardless of what the sub-contract actually says (see section 73(3)). In practice, it will be interesting to see the extent to which sub-contractors feel able to enforce this against lead suppliers.

Modifying public contracts

Section 74 (Modifying a public contract) and Schedule 8 (Permitted contract modifications) set out the situations in which a public contract may be modified. It also introduces a new concept – the "convertible contract" – which is a contract that will become a public contract as a result of a modification.

Modifications of either a public contract or a convertible contract are allowed where they are permitted modifications (within the meaning set out in Schedule 8, Permitted contract modifications), where the modification is not substantial (section 74(3)), or where the modification is below threshold (section 74(4)).

The permitted contract modifications in Schedule 8 provide that public contracts can be modified in the following circumstances:

- Provided for in the contract: where this is unambiguously provided for in the awarded contract and the tender documents, and where this does not change the overall nature of the contract.
- Urgency and the protection of life, etc: where the purpose could otherwise be achieved via direct award (under section 41) by reference to paragraph 13 of Schedule 5 (extreme and unavoidable urgency) or to section 42 (direct award to protect life, etc).

- Unforeseeable circumstances: where the modification is required in response to circumstances that were not reasonably foreseeable at the time that the contract was awarded and does not change the overall nature of the contract or increase the contract value by more than 50%.
- Materialisation of a known risk: this is a new "safe harbour" and one in which Trowers & Hamlins played a key role in its creation and development: this ground covers scenarios where the modification is required in response to a "known risk" that has prevented the contract from being performed as required, goes no further than necessary to address the "known risk", does not increase the contract value by more than 50% and where awarding a different contract would not be in the public interest. A known risk is one that has been identified in the procurement documents but, due to its nature, could not be addressed in the contract as awarded. We hope that this will be useful in long-term or complex contracts where different types or classes of risks are known from the outset but cannot be fully articulated (eg planning risk, market slow-down for works contracts etc.)
- Additional goods, services or works: where the modification is required for additional goods, services or works of the kind supplied in the original contract where using a different supplier would result in different or incompatible goods, services or works that would cause disproportionate technical difficulties or substantial inconvenience and substantial duplication of costs. Such a modification cannot increase the value of the contract by more than 50%.
- Transfer on corporate restructuring: where the modification is required to novate a contract following a corporate restructuring or similar circumstance.
- Defence authority contracts: where the modification is required to a defence authority contract to enable the contracting authority to respond to developments in technology and continuous supply of those goods, services or works is necessary to maintain the operational capabilities of the Armed Forces.

A modification is not substantial (and therefore permitted) within the meaning of section 74(3) where the modification does not:

- increase or decrease the term by more than 10% of the original period (e.g. a 5 year contract will only be able to be varied by 6 months);
- change the overall nature or material scope of the contract; or
- materially change the economic balance of the contract in favour of the supplier.

A modification is below threshold (and therefore permitted) within the meaning of section 74(4) where the modification does not:

- alter the value of the contract by more than 10% for a goods or services contract or 15% for a works contract;
- result in the aggregated value of the contract (i.e. the value of the contract following its modification) exceeding the relevant procurement threshold (or any series of modification do not, in total, exceed the relevant threshold); and
- change the scope of the contract.

Section 74(2) also provides that a contracting authority is permitted to modify a light touch contract.

Section 75 (Contract change notices and publication of modifications) sets out a requirement to publish a "contract change notice" if the contracting authority is relying on the "permitted modification" grounds set out in Schedule 8. Section 75 also requires the publication of a contract change notice if a series of modifications to a contract, when taken together, would no longer count as "not substantial" or "below threshold" as described above.

Section 75 (2) sets out that a contract change notice will not be required if the modification:

- (a) increases or decreases the value of the contract by 10% or less for goods or services contracts, or 15% or less for works contracts; or
- (b) increases or decreases the term of the contract by 10% or less of the maximum term provided for on award.

A contract change notice is not required for modifications to light touch contracts.

However, where the modification falls within (a) or (b) above, and the contracting authority considers that it could reasonably have been made together with another modification which itself requires a contract change notice, a further contract change notice will be required in respect of that modification (section 75 (4) and 75(5)).

Additionally, pursuant to section 77(6), where a contracting authority makes a qualifying modification (defined by section 77(2) as a modification which modifies, or results in, a public contract with an estimated value of more than £5m), the contracting authority must publish a copy of the contract (as modified) within 90 days of the modification.

Section 76(Voluntary standstill period) provides that contracting authorities are able to impose voluntary standstill periods in respect of contract modifications and, where such a voluntary standstill period has been included in the contract change notice, the contracting authority is not permitted to complete the modification until that standstill period has elapsed. As set out earlier in respect of Part 3 of the Act, the standstill period is a period of 8 working days beginning on the date of publication of the contract change notice.

Terminating public contracts

Section 78 creates further implied contractual terms enabling a contracting authority to terminate a public contract if any of the following grounds apply:

- the contract was awarded or modified in material breach of the Procurement Act or regulations made under it;
- the supplier has, since the award of the contract, become an excluded supplier or the contracting authority discovers that, at the time of contract award, the supplier was an excludable supplier (including by reference to an associated supplier); or
- a sub-contractor to the supplier has, since the award of the contract, become an excluded supplier or an excludable supplier – but only where the contracting authority has requested information in relation to sub-contractors under section 28(1) (Excluding suppliers by reference to sub-contractors) and did not know that the supplier intended to use a sub-contractor that is excluded or excludable.

Pursuant to section 78(7), before terminating a public contract under this implied term, the contracting authority must notify the supplier of its intention to terminate and the termination ground that applies. The supplier must be given a reasonable opportunity to make representations in response. If the proposed termination is due to a sub-contractor being excluded or excludable, the supplier must be given reasonable opportunity to cease sub-contracting with that sub-contractor and find alternative provision.

Section 79 of the Act also sets out an additional rule for "relevant contracting authorities" (defined as a Minister of the Crown, a government department, the Corporate Officer of the House of Commons or the Corporate Officer of the House of Lords) in relation to termination of public contracts on the basis of the discretionary and mandatory exclusion grounds regarding national security. For those relevant contracting authorities, they are not permitted to terminate a public contract on the basis of the discretionary exclusion unless they have first notified a Minister of the Crown and that Minister considers that the supplier is an excludable supplier and the contract should be terminated. Similarly, relevant contracting authorities may not terminate on the basis of the mandatory exclusion ground unless they have first notified a Minister of the Crown of their intention to do so.

Section 80 (Contract termination notices) contains a new requirement for contracting authorities to publish a "termination notice" within 30 days of a public contract's expiry, recission, discharge, termination by a party, or set aside by a court. The termination notice must specify that the contract has ended and include any other details required by regulations. It will be interesting to see whether, in practice, contracting authorities will remember to publish termination notices, particularly as they will inevitably coincide with the mobilisation of the newly procured contract (in the case of re-procurements), and contracting authorities will therefore need to ensure that they have robust contract management tools and procedures in place to ensure compliance with these obligations.

Part 5: Conflicts of interest

Part 5 of the Act addresses conflicts of interest and how to identify them, mitigate the impact of any conflicts and carry out conflict assessments. Although the PCR includes high level measures at Regulation 24 to tackle conflicts of interest, Part 5 of the Act goes into more detail in respect of what comprises a conflict, including a duty to exclude a supplier if it cannot be managed and a more onerous requirement to prepare a conflicts assessment prior to publishing a Tender Notice or transparency notice.

Duty to identify

Section 81 (Conflicts of Interest: duty to identify) provides that a contracting authority must take all reasonable steps to identify and keep under review any conflict of interest or potential conflict of interest in relation to a procurement.

A conflict of interest can arise in respect of a person (or Minister) acting for or on behalf of a contracting authority in relation to a procurement. Such person is "acting in relation to a procurement" if they influence a decision made by or on behalf of a contracting authority in relation to a procurement (see section 81(3)).

An "interest" is defined as a personal, professional or financial interest and may be direct or indirect (see section 81(4)).

Duty to mitigate

Section 82 (Conflicts of interest: duty to mitigate) provides that a contracting authority must take all reasonable steps to ensure that a conflict of interest does not put a supplier at an unfair advantage or disadvantage in respect of a procurement. This may include the contracting authority asking a supplier to take reasonable steps to ensure that it is not put at an unfair advantage (section 82(3)).

If a contracting authority considers that a conflict of interest puts a supplier at an unfair advantage in relation to the award of a contract, and either the advantage cannot be avoided or the supplier will not take steps that the contracting authority considers necessary, the supplier must be treated as an excluded supplier.

Conflict assessments

Section 83 (Conflicts assessments) provides that before publishing a tender or transparency notice or publishing a dynamic market notice, a contracting authority must prepare a conflicts assessment in relation to a procurement. A conflicts assessment must include details of any actual or potential conflicts of interest the contracting authority has identified (defined in the Act as the "duty to identify")

and any steps that the contracting authority has taken to mitigate such conflicts in accordance with Section 82 (defined in the Act as the "duty to mitigate"). Details must also be included where a contracting authority is aware of circumstances that might cause a reasonable person to wrongly believe that there is an actual or potential conflict of interest and the steps it has taken to address such a perception.

A contracting authority must keep any conflict assessments under review, revise such assessments as necessary and when publishing any notices, confirm that a conflicts assessment has been prepared and revised (see section 83(5)).

Part 6: Below-threshold contracts

Section 84(Regulated below-threshold contracts) defines a regulated below-threshold contract as a contract which has an estimated value that is below the relevant threshold as set out in Schedule 1 to the Act and which is not:

- exempted under Schedule 2 to the Act;
- a concession contract; or
- a utilities contract.

Section 84(2) provides that Part 6 of the Act regarding below-threshold contracts does not apply to a contracting authority that is a school, nor does it apply in relation to procurement by a transferred Northern Ireland authority unless the contract is let under a reserved procurement arrangement or a devolved Welsh procurement arrangement. Part 6 also does not apply to a contract awarded under a transferred Northern Ireland procurement arrangement.

Section 85 (Regulated below-threshold contracts: procedure) sets out the procedure to be adopted for the procurement of regulated below-threshold contracts, and sets out that where a contracting authority intends to procure a regulated below-threshold contract, it may not restrict submission of tenders on the basis of a supplier's legal and financial capacity or technical ability. This is equivalent to regulation 111 of the PCR that prohibits the use of a pre-qualification stage for below-threshold contract opportunities.

There is an exception to this prohibition in respect of works contracts with an estimated value of over £138,760 in respect of central government authorities or £213,477 in respect of any other contracting authority.

This prohibition in section 84(1) also does not apply in relation to the award of contracts by a devolved Welsh authority (unless awarded under a reserved procurement arrangement), under a devolved Welsh procurement arrangement, or for call-off contracts awarded in accordance with a framework.

In respect of regulated below-threshold contracts, section 86 also introduces a duty for contracting authorities to consider the particular barriers that small and medium-sized enterprises face in competing for contracts, and to consider whether such barriers can be removed or reduced.

Below-threshold tender notice

Section 87(Regulated below-threshold contracts: notices) relates to the notification requirements for regulated below-threshold contracts, and provides that before advertising a regulated below-threshold contract for the purpose of inviting tenders, such contracts must be notified to the market in a below-threshold tender notice if they have an estimated value of:

- • in the case of contracts to be awarded by a central government authority, not less than £12,000, or
- • in the case of contracts to be awarded by any other contracting authority, not less than £30,000.

These contracts are called "notifiable below-threshold contracts".

Whilst the Act is silent on where such advertisement might be placed, this is the equivalent of the current regulation 110 in the PCR which prohibits the advertisement of below-threshold opportunities which exceed specified values until a contract notice has been published to the Find a Tender Service. The requirement to publish does not apply if the contracting authority only invites tenders from particular or pre-selected suppliers and does not advertise the opportunity elsewhere.

The required content of a below-threshold tender notice will be set out in further regulations, and we await the Government's response to its earlier consultation on that secondary legislation.

Any time limits included in a below-threshold tender notice must be reasonable and the same time limits applied to all suppliers (section 87(6)).

Contract details notice

The contracting authority must publish a "contract details notice" as soon as reasonably practicable after entering into a notifiable below-threshold contract (see section 87(3)).

Section 88 (Regulated below-threshold contracts: implied payment terms) implies payment terms into every regulated below-threshold contract entered into by a contracting authority, providing for:

- sums due from the contracting authority to be paid within 30 days of the date of receipt of a valid and undisputed invoice (section 88(2)(a)) or (if later) the date on which the sum first became due in accordance with such invoice (section 88 (2)(b)); and
- the contracting authority to notify the supplier without undue delay if it receives an invoice which it considers to be invalid (section 88(4)(a)) or which it disputes (section 88(4)(b)).

Pursuant to section 88(7), invoices are considered to be valid if they meet the requirements of the contract, and set out:

- the name of the invoicing party,
- a description of the goods, services or works supplied,
- the sum requested, and
- a unique identification number.

Section 88(8) provides that terms equivalent to the above payment terms will be implied into any sub-contract, supply agreement or other contract which is wholly or substantially for the purpose of performing (or contributing to the performance of) the regulated below-threshold contract.

Section 88(10) and 80(11) provide that parties to a regulated below-threshold contract cannot contract out of these payment terms, although they can agree that sums must be paid earlier than the prescribed 30 days.

Part 7: Implementation of international obligations

'Excludable' bidders – non-UK and non-treaty state suppliers

In accordance with section 19(3) of the Act (Award of public contracts following a competitive procedure), contracting authorities may exclude non-UK suppliers and non-treaty state suppliers.

What is a treaty state supplier?

Section 89 introduces a new term of "treaty state supplier". This is distinct from a "United Kingdom supplier" (which is described below), and a treaty state supplier is a supplier that is "entitled to the benefits" of one (or more) of the international agreements listed in Schedule 9 to the Act.

The specified international agreements currently listed in Schedule 9 (in chronological order) include the WTO GPA, the EU-UK Trade and Cooperation Agreement (the TCA), and 22 other free trade agreements, strategic partnerships and other agreements providing for economic cooperation. Regulations may be brought forward to amend Schedule 9 from time to time (as and when new Free Trade Agreements (FTA) are concluded).

Section 89(1) provides that a treaty state supplier is entitled to the benefit of an international agreement set out in Schedule 9 (Treaty state suppliers (specified international agreements)).

For the purposes of section 89(1), being "entitled to the benefit" means being entitled to access to the relevant market-place, and being entitled to a right to enforce the provisions of that international agreement in respect of the same.

The rationale for the provisions contained in Part 7 relate to the United Kingdom's post-Brexit trade discussions, and the need to establish our own network of FTAs, and this was trailed as one of the key benefits of being a sovereign state outside of the European Union.

As part of each FTA that the United Kingdom has signed up to, an agreement is made to allow suppliers in the relevant state access to certain parts of our market (and vice versa). Not all FTAs will provide the same market access conditions, and in complying with the obligations under each FTA it will be necessary to understand which suppliers have access to which markets under each agreement (for example, whether the FTA only grants access to services markets, or whether it grants full market access).

Section 89(2) of the Act specifically addresses this issue, clarifying that a supplier is only a treaty state supplier to the extent that the FTA to which it is entitled to the benefit of in relation to the procurement being carried out or challenged (i.e. it has access under its relevant FTA to the specific market for the relevant procurement).

A treaty state can be a sovereign state, territory or organisation of states (but not the UK) that is party to a Schedule 9 international agreement with the UK.

Section 90 (Treaty state suppliers: non-discrimination) sets out that a "United Kingdom Supplier" must be established in, controlled from or mainly funded from the UK (including British Overseas Territories or Crown Dependencies), but cannot be a treaty state supplier.

Further, a supplier cannot claim to be a treaty state supplier if it is entitled to the benefit of an international agreement solely due to the UK being a party to that agreement.

Additionally, section 90 sets out the general prohibition on contracting authorities discriminating against a treaty state supplier in carrying out a procurement. This prohibition catches situations where a treaty state supplier is treated less favourably than any UK or other treaty state supplier by virtue of:

- association with a particular treaty state; or
- lack of association with the UK or any other treaty state.

This general prohibition aligns with the World Trade Organisation's Most Favoured Nation principle, whereby members must accord the most favourable treatment given to any one member to all other members (i.e. it is not permitted under those international obligations to discriminate in favour of UK based suppliers).

Part 8: Information and notices: General provision

Part 8 relates to the requirements to provide information in relation to any significant anticipated procurement spend and the use of electronic communication. It provides for regulations to be made to specify what should be included in any relevant notices and how they should be published. This Part also provides a power for further regulations to be made to support the sharing of procurement related information through a single electronic portal.

Pipeline notices

Section 93 (Pipeline notices) provides that where any contracting authority considers that it will spend more than £100 million under "relevant contracts" in the coming financial year, it must publish what is known as a 'pipeline notice' to notify the market of its anticipated spend. Contracts for the supply of goods, services or works (above and below-threshold and other than exempted contracts) will count towards the £100 million threshold.

The pipeline notice must be published within 56 days of the beginning of the relevant financial year.

The pipeline notice must provide information about any public contract with an estimated value of more than £2 million in respect of which the contracting authority intends to publish either a tender notice or a transparency notice within the next 18 months.

There will be additional mandatory information that should be included in the pipeline notice, but the details of this (and the requirements of any other notices under the Act, including how they should be published) will be introduced by way of regulations made under section 95 in due course. We are currently waiting for the Government's response to its consultation on these Regulations.

It is anticipated that the relevant financial thresholds for publishing a pipeline notice will change from time to time by regulations.

The requirement to publish a pipeline notice will not apply to private utilities.

Exemptions to the pipeline notices requirement

Section 94 (General exemptions from duties to publish or disclose information) makes clear that there are circumstances where a contracting authority is not required to provide the information anticipated in a pipeline notice and may withhold or otherwise redact the information. Those are where the contracting authority is satisfied that:

- withholding the information envisaged in a pipeline notice is necessary for the purpose of safeguarding national security, or
- the information is sensitive commercial information and there is an overriding public interest in it being withheld from publication. This will include information that amounts to a trade secret, or which would be likely to prejudice the commercial interests of any person (including legal persons such as companies and partnerships) if it were to be published.

In the event that either of those two conditions are met, the contracting authority should publish:

- the fact that the information is being withheld; and
- the basis on which it is being withheld.

If the contracting authority is satisfied that publishing that information alone would be contrary to the interests of national security, then it does not need to do so (section 94(4)).

Section 95 (Notices, documents and information: regulations) sets out that an "appropriate authority" (defined in clause 111 as a Minister of the Crown, the Welsh Ministers or a Northern Ireland department) may make further regulations to govern the form and content of notices, documents and other information to be published or provided under the new regime, and which set out how such notices or documents are to be published, provided or revised.

Given the numerous publication requirements under the Act, this provision is a key piece of the legislative jigsaw, and further regulations will need to be made pursuant to this provision.

Electronic communications

Section 96 (Electronic communications) provides that, so far as practicable when carrying out a procurement, the contracting authority must communicate with suppliers electronically and take steps to ensure that suppliers participating in a procurement do likewise.

However, in doing so, a contracting authority may only use, or require the use of, systems that are free of charge and readily accessible, general available (or operate alongside generally available systems), and are accessible to people with disabilities.

Section 96(4) provides that where the contracting authority is satisfied that communicating in this way poses a particular security risk in the circumstances, then it does not need to do so.

Information relating to a procurement

Section 97(Information relating to a procurement) relates to the requirement to share "information" relating to procurements. Full details will be set out in the further secondary legislation which are intended to support the creation of a 'single electronic portal' for the sharing of procurement related information. Information is widely defined by section 97(5) as "information shared under or for a purpose relating to the Procurement Act".

The requirement to share through the specified system may apply to both contracting authorities and suppliers, and is likely to be in line with the Open Contracting Data Standard (OCDS) principles and processes supported in the Green Paper. The OCDS is a free, non-proprietary, open data standard for public contracting which has been implemented by over 30 governments globally.

The OCDS explains how data and documents are to be published at all stages of the contracting process, and the Green Paper highlighted the intention for the new procurement regime to legislate in order to require all contracting authorities to publish procurement and contracting data throughout the entire commercial lifecycle in a format that adheres to the OCDS. Whilst the Act has not gone this far, it is likely that further regulations will adopt this principle.

In addition, section 98 requires a contracting authority to keep records of communications between it and suppliers that relate to procurement process, although it does not specify how those records should be kept.

Part 9: Remedies for breach of statutory duty

Section 100 (Duties under this Act enforceable in civil proceedings) sets out that a contracting authority's duty to comply with Parts 1 to 5, 7 and 8 of the Act are enforceable in civil proceedings.

There are a few exceptions to this general rule, and the following are not enforceable in civil proceedings:

- Duty under section 12(4) to have regard to barriers facing SMEs;
- Duty under section 13(9) or 14(8) to have regard to procurement policy statements; and
- Duty under section 90 (non-discrimination of treaty-state suppliers, except in relation to a covered procurement.

Additionally, section 100(7) prohibits suppliers from being able to bring proceedings against a Minister of the Crown on the basis that the following decisions were unlawful:

- To enter a supplier's name on the debarment list;
- Decisions relating to the information to be included in an entry on the debarment list;
- A decision not to remove an entry from the debarment list, or to revise information included in such an entry.

Section 101 (Automatic suspension of the entry into or modification of contracts) relates to the automatic suspension which prohibits the entry into or modification of contracts where a procurement challenge has been commenced in relation to that contract and the contracting authority has been notified of that fact. It is broadly reflective of the current rules regarding the automatic suspension (except that the automatic suspension now also applies to the modification of existing public contracts).

One notable difference under section 101 is that the automatic suspension does not apply where the contracting authority has been notified of the challenge after the expiry of any applicable standstill period. This seems to reflect the general direction of travel set out in the Green Paper, which seeks to focus on pre-contract remedies.

Interim remedies

Section 102(Interim remedies) sets out the interim remedies that are available for the domestic courts to make in proceedings under Part 9, and includes the following orders:

- an order lifting or modifying the automatic suspension;
- an order extending the automatic suspension or imposing a similar restriction;
- an order suspending the effect of any decision made or action taken by the contracting authority carrying out the procurement;
- an order suspending the procurement or any part of it;
- an order suspending the entering into or performance of a contract; and/or
- an order suspending the making of a modification of a contract or performance of a contract as modified.

In making any of the orders identified in section 102, the Court must have regard to the interest of suppliers (including whether damages are an adequate remedy) and the public interest in, amongst other things:

- upholding the principle that public contracts should be awarded and modified in accordance with the law;
- avoiding delay in the supply of goods, services or works in public contracts or modifications.

The Court must also have regard to any other matters that the Court considers appropriate.

Pre-contractual remedies

Section 103(Pre-contractual remedies) sets out the various pre-contractual remedies for procurement challenges (i.e. remedies that are available before the contract has been entered into or before a contract has been modified) and includes the following orders:

- an order setting aside the decision or action;
- an order requiring the contracting authority to take any action;
- an order for the award of damages; and/or
- any other order that the Court considers appropriate.

Post-contractual remedies

Section 104(Post-contractual remedies) and 105 (Post-contractual remedies: set aside conditions) provide for "set aside orders", replacing "declarations of ineffectiveness" under the PCR.

Courts must make a set aside order where the conditions in section 105 are met (see below), unless there is an "overriding public interest" in not doing so.

In the context of set aside orders, section 105(5) sets out that in considering the overriding public interest, the court may have regard to the financial consequences of setting aside the contract or modification only in exceptional circumstances, and must disregard costs that are associated with the contracting authority having to award the contract to a different supplier, a delay in the performance of the contract (or the contract as modified), or any legal obligations arising from setting aside the contract or modification.

The Courts can potentially consider the financial consequences of setting aside, however, they cannot take into account costs directly associated with having to award another contract or to a different supplier, delays in performance or complying with legal obligations.

If the contract is not set aside, the Court can reduce the term or scope of the contract.

Section 105 deals with the set aside conditions. In general terms, the set aside conditions will be met if the Court is satisfied that the supplier has been denied a proper opportunity to seek a pre-contractual remedy. That will be where:

- Contract award notices are not published (including publication of a notice that does not contain accurate information);
- The contract is entered into or modified before the expiry of any relevant standstill period;
- The contract is entered into or modified when the automatic suspension is in place;

- The breach only becomes apparent in certain instances, e.g. on publication of the contract award notice or contract change notice (unless those notices provide for a standstill period and the contract is not entered into or modified before expiry of that standstill period);
- The breach only becomes apparent after the contract is entered into or modified.

Time limits on claims

Section 106(Time limits on claims) provides that a supplier must commence proceedings before the end of the period of 30 days beginning with the day on which the supplier first knew or ought to have known, about "the circumstances giving rise to the claim". This time limit can be extended by a court to 3 months where there is good reason for doing so.

With regard to the remedy of set aside, where a contracting authority has not published a contract details notice, the time limit will be the earlier of (i) 30 days from knowledge of the circumstances giving rise to the claim or (ii) 6 months, starting with the day on which the contract was entered into or modified.

As with the existing rules, the Court can extend time limits for good reasons and, in a departure from the current rules around declarations of ineffectiveness (where time limits could not be extended beyond six months), the time limit for commencing claims for set aside can seemingly also be extended for good reasons. Where the court considers there to be good reasons for an extension, it is not permitted to extend for any longer than three months from when the challenger first knew or ought to have known of the grounds for challenge (see section 106(4)).

Section 107 of the Act also makes clear that the provisions under the Justice and Security Act 2013 regarding disclosure of sensitive materials also apply in relation to proceedings brought under Part 9 of the Act, and the provisions of the Justice and Security Act 2013 should be read as if the references to the Secretary of State also included reference to the Minister for the Cabinet Office.

Part 10: Procurement oversight

Part 10 relates to investigations which an appropriate authority (namely, Ministers, Welsh Ministers or a Northern Ireland department) may undertake to investigate a contracting authority's compliance with the Procurement Act. An appropriate authority can require contracting authorities to provide relevant documents or other assistance as part of the investigation and, upon the outcome of investigations, make recommendations with a view to ensuring compliance. The type of activity to be investigated under Part 10 is likely to include series or patterns of procurement breaches, and not just individual claims in isolation.

This Part also provides for an appropriate authority to publish guidance and lessons learned following an investigation, which other contracting authorities must have regard to when conducting their own procurements.

Procurement investigations

Section 108 (Procurement investigations) provides that an appropriate authority may investigate a "relevant" contracting authority's compliance with the requirements of the Procurement Act. An appropriate authority is a Minister of the Crown, a Welsh Minister or a Northern Ireland department.

Section 108 also sets out that a procurement investigation may not be undertaken into an appropriate authority itself or into a private utility, and the limitation of procurement investigations into a relevant contracting authority's compliance raises questions as to how central government will be held to account. It is odd that a government department cannot be investigated given the value of central government spend.

There is currently no guidance on what circumstances will justify the use of a procurement investigation by an appropriate authority. We hope that subsequent guidance will be provided to clarify this further.

As part of a procurement investigation under section 108, an appropriate authority may require, by notice, that a relevant contracting authority:

- provide such relevant documents as the appropriate authority may reasonably require for the purposes of the procurement investigation (such documents to include those specified in the notice or those which are in the possession or control of the relevant contracting authority).
- provide such other assistance in connection with the investigation as is reasonable in the circumstance and as specified in the notice.

A relevant contracting authority must comply with a notice from the appropriate authority within the period specified in the notice (which must be at least 30 days beginning with the day on which the notice is given).

Following the conclusion of the investigation, the appropriate authority may publish the results, including any section 109 recommendation issued (see below).

Section 109 recommendations and progress reports

Where an appropriate authority has conducted a procurement investigation pursuant to section 108 and considers, in light of the results of that investigation, that a relevant contracting authority is engaging in action which gives rise, or is likely to give rise, to a breach of the Act, a "section 109 recommendation" may be issued.

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A section 109 recommendation will set out the action which the relevant contracting authority should take to ensure compliance with the Act, together with the timing of such action. However, a section 109 recommendation must not relate to:

- how a relevant contracting authority should comply with the procurement objectives in section 12;
- how a relevant contracting authority should have regard to the national procurement policy statement (section 13) or the wales procurement policy statement (section 14); or
- how a relevant contracting authority should exercise a discretion in relation to a particular procurement.

When considering how to comply with the Act, a relevant contracting authority should consider any section 109 recommendation issued to it. Further, if required by the section 109 recommendation, a relevant contracting authority should submit a progress report to the appropriate authority setting out what action it has taken as a result of the recommendation or, if no action has been taken, a statement to that effect. Where no action is taken, or different action is taken to that which was recommended, reasons should be provided in the progress report.

The appropriate authority may also submit a progress report or, if the contracting authority itself fails to submit one, notice of that fact. We would expect such progress reports to be made publicly available, as per the current Public Procurement Review Service, but further detail on this point is required.

Guidance

Section 110 (Guidance following procurement investigations) provides that, following a procurement investigation, an appropriate authority may also publish guidance of the lessons learnt for compliance with the Act. Contracting authorities must have regard to any such guidance published when considering how to comply with the Act.

Part 11: Appropriate authorities and cross-border procurement

Part 11 sets out further detail in relation to 'appropriate authorities' within the devolved administrations of the United Kingdom. This Part has been carefully worded and includes areas where Westminster would need the consent of the Welsh Ministers or a Northern Ireland department to make further regulations.

Wales

Section 111 (Welsh Ministers: restrictions on exercise of powers) provides that Welsh Ministers' powers under the Act are limited to:

- devolved Welsh authorities;
- contracting authorities that are "treated as" devolved Welsh authorities; and/or
- the award of contracts under a devolved Welsh procurement arrangement, or the management of such contracts.

While devolved Welsh authorities are defined in accordance with the Government of Wales Act 2006 (GWA), a contracting authority may find itself treated as such under the Act if:

- its functions are exercisable wholly or mainly in relation to Wales and wholly or mainly not relating to "reserved matters" (as also defined in the GWA); and
- the contracting authority awarding or managing a contract for the purposes of exercising a function wholly in relation to Wales.

A public undertaking or private utility is subject to a slightly different test, being that:

- its functions are exercisable only in relation to Wales; and
- its activities are wholly or mainly not relating to "reserved matters" (defined in the GWA).

Northern Ireland

Section 112 (Northern Ireland department: restrictions on the exercise of powers) sets out provisions in relation to Northern Ireland departments, namely that exercisable powers under the Act are limited to:

- contracting authorities that are transferred Northern Ireland authorities;
- public undertakings or private utilities that are not transferred Northern Ireland authorities, but for the purposes of the Procurement Act are treated as transferred Northern Ireland authorities; and/or
- the award or management of contracts under a transferred Northern Ireland procurement arrangement.

"Transferred Northern Ireland authorities" (for the purposes of the Procurement Act) are those whose functions are exercisable only in or as regards Northern Ireland and are wholly or mainly functions that do not relate to reserved or excepted matters within the meaning given in the Northern Ireland Act 1998.

Cross-border procurement

Section 113 (Minister of the Crown: restrictions on the exercise of powers) and section 115 (Powers relating to procurement arrangements) navigate the powers exercisable by Westminster in relation to certain cross-border procurements.

Section 113 limits the powers of a Minister of the Crown in relation to a devolved Welsh authority in that the Minister may only exercise a power under the Act in relation to:

- the award of contracts under a reserved procurement arrangement or a transferred Northern Ireland procurement arrangement; or
- the management of such contracts.

Section 115 provides that a Minister of the Crown may make provision to regulate the award and management of contracts by devolved Scottish authorities under:

- reserved procurement arrangements;
- devolved Welsh procurement arrangements; or
- transferred Northern Ireland procurement arrangements.

Expanding on certain definitions

A “procurement arrangement” under the Act refers to when a contract is awarded:

- in accordance with a framework (or similar, e.g. as defined in the current Scottish regime that will not be changing or aligning with the Act);
- in accordance with a dynamic market (or similar);
- to a centralised procurement authority; or
- following a procedure or selection carried either jointly by two or more authorities or by a centralised procurement authority (or similar).

Further definitions are provided in order to identify devolved Welsh, transferred Northern Ireland and/or devolved Scottish procurement arrangements (see section 114 (Definitions relating to procurement arrangements)).

Part 12: Amendments and repeals

Part 12 sets out various provisions regarding amendments and repeals to the existing legislative landscape.

Of particular note, section 116 (Disapplication of duty in section 17 of the Local Government Act 1988) introduces the much anticipated ability for a Minister of the Crown to disapply section 17 of the Local Government Act 1988 relating to the exclusion of non-commercial considerations in relation to relevant authorities, functions, particular contracts etc.

We note that section 17 has already been disapplied insofar as it applies to the termination of Russian contracts and prevention of Russian companies being included in procurement processes in light of the current war in Ukraine pursuant to the Local Government (Exclusion of Non- commercial Considerations) (England) Order 2022.

Section 116 sets a path for the government to legislate to remove the prohibition on taking non-commercial considerations into account, and, in the event that such regulations are made, local authorities can expect to be able to avail themselves of (eg) the ability to reserve below-threshold contracts by supplier location (as provided for in PPN 11/20: Reserving below threshold procurements).

Section 119 (Repeals etc) and Schedule 11 (Repeals and revocations) of the Act will repeal various enactments relating to public procurement, including the existing secondary legislation governing the procurement regime (including the Public Contracts Regulations 2015, the Concession Contracts Regulations 2016, the Utilities Contracts Regulations 2016 and the Defence and Security Public Contracts Regulations 2011).

Schedule 11 also repeals the following primary legislation:

- Paragraphs 9(9)(d) and 11(6)(b)(ix) of Schedule 7B to the Government of Wales Act 2006 (relating to proposed amendments under the Trade (Australia and New Zealand) Act regarding no requirement for consent to Senedd Cymru);
- Sections 39 and 40 of the Small Business, Enterprise and Employment Act 2015 (dealing with the existing Public Procurement Review Service); and
- An Act of Parliament resulting from the Trade (Australia and New Zealand) Act that was introduced into the House of Commons on 11 May 2022.

Finally, Schedule 11 also repeals various Decisions of the European Commission relating to utilities procurement that are currently retained EU law (for example, the Commission decision that Article 30(1) of the 2004 Directive coordinating procurement procedures of entities operating in the waste, energy, transport and postal services sectors applies to electricity generation in England, Scotland and Wales), as well as Commission Implementing Decision (EU) 2017/1870 implementing a common European standard on electronic invoicing.

Part 13: General

Part 13 introduces several general provisions about the application and interpretation of the Act.

Section 120 (Power to disapply this Act in relation to procurement by NHS in England) provides a power for a Minister of the Crown to disapply by regulations any provision set out in the Act which relates to any procurement which is covered by supplier selection rules that may be brought into force pursuant to section 12ZB of the National Health Service Act 2006 (as amended by the Health and Care Act 2022).

Section 122 (Regulations) sets out the procedure to be adopted in implementing any further regulations as provided for under the Act, and sets out which regulations will be subject to the affirmative procedure and which shall be subject to the negative procedure. A statutory instrument laid under the negative procedure becomes law on the day the Minister signs it and automatically remains law unless a motion to reject that statutory instrument is agreed by either House within 40 sitting days. The affirmative procedure is subject to increased scrutiny in comparison to the negative procedure, as a statutory instrument laid under the affirmative procedure must be actively approved by both house of Parliament.

Section 123 (Interpretation) and 124 (Index of defined expressions) are interpretive aids, and set out various defined expressions in the Act, as well as an index of where other expressions have previously been defined. The index of terms in section 124 is a particularly helpful tool given the stylistic and linguistic differences between the Act and the current procurement regimes and will be invaluable in aiding interpretation of the provisions set out in the Act.

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