



Essex County
Fire & Rescue Service

Procurement Act 2023

About

This document sets out to compare the new public procurement regulations as per the Procurement Act 2023 with the previous Public Contract Regulations 2015, our internal financial regulations and the Constitution.

EXECUTIVE SUMMARY

The Procurement Bill, which will reform the existing procurement rules, received Royal Assent in October 2023. In early 2024 secondary legislation will be laid to bring some elements of the Bill and the wider regime into effect. This document sets out to explain the differences between the new legislation and the current rules.

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

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

- New tender procedures.
- Change to the tender evaluation criteria (MEAT vs. MAT).
- Transparency requirements regarding information to be published.
- Standstill period timeline and scope.
- Mandatory and discretionary grounds for exclusion.
- Central debarment list.

BACKGROUND

“One in every three pounds of public money, some £300 Billion a year, is spent on public procurement”

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

The Procurement Bill which will reform the above existing rules has made its way through Parliament and after receiving Royal Assent on the 26th October, the Bill is now officially an Act of Parliament.

“They will place value for money, public benefit, transparency and integrity at the heart of our procurement system; they will modernise and unify our systems and processes; and they will get tough on the poor performers and fraudsters.”

The Procurement Act 2023 (hereafter referred to as the Act) aims to simplify procurement, reducing bureaucracy and creating a fairer system that works better for both buyers and suppliers. There will be more flexibility for the public sector to have the freedom to better-design their procurement procedures and allow public procurement to be opened up for new entrants such as small businesses and social enterprises so that they can compete for and win more public contracts. Transparency is to be embedded throughout the commercial lifecycle so that the spending of taxpayers' money can be properly scrutinised.

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

- Delivering value for money,
- Maximising public benefit,

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- Sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions, and
- Acting, and being seen to act, with integrity.

Public authorities must also treat suppliers the same (unless a difference is justified and reasonable steps are taken not to advantage/disadvantage any supplier) and have regard to barriers to SMEs and whether barriers can be removed or reduced.

As a comparison PCR centres around:

- Transparency
- Equal Treatment
- Non-discrimination
- Proportionality

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

A minimum of 6 months' notice before 'go-live' will be given to allow for implementation, go live is anticipated to be October 2024.

Secondary legislation is still being finalised and is expected to be laid in Parliament in March 2024, much more detail around elements of the Act such as the transparency notices will become clearer in this secondary legislation.

A formal policy guidance will be published in February 2024 which will include guidance on the transition and how to navigate.

BELOW THRESHOLD SPEND

Procurement thresholds are set by the Cabinet Office every two years, these are the financial thresholds which govern the procedures for the award of public contracts for goods, works and services.

It should be noted that this briefing document is referring to above threshold procurements, for reference the current thresholds are as follows:

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Public Contracts Regulations 2015

	Supplies	Services	Works
Central government authorities (listed at schedule 1 to the Public Contracts Regulations 2015, including NHS Trusts and NHS Foundation Trusts)	£139,688 inc. VAT	£139,688 inc. VAT	£5,372,609 inc. VAT
Other public sector contracting authorities	£214,904 inc. VAT	£214,904 inc. VAT	£5,372,609 inc. VAT

We fall under the ‘other public sector contracting authorities’.

Currently the procurement procedures for spend below threshold is broken down and different procedures apply to each spend group as set out in the Strategy as follows:

Route to Market	Value of Spend (excluding VAT)
Minor Procedure – direct award to a supplier on the Approved Suppliers List	Up to £5,000
Competitive Procedure – request for a minimum of 3 quotes	£5,000 - £25,000
Competitive Procedure – request for a minimum of 3 quotes (must be conducted with the procurement team)	£25,000 - £50,000
Formal Tender advertised on Contracts Finder (goods and services)	£50,000 - £177,000
Above Threshold Formal Tender advertised on Find a Tender & Contracts Finder (goods and services)	£177,000 +
Formal Tender advertised on Contracts Finder (works)	£50,000 - £4,447,447
Above Threshold Formal Tender advertised on Find a Tender & Contracts Finder (works)	£4,447,447 +

ECFRS adopted a higher limit of £50k for the advertising of tenders on Contracts Finder due to the allowable change to the set Government limit stated in the Guidance Document on the new transparency requirements for publishing on Contracts Finder.

Whilst we await the secondary legislation it is unclear how much flexibility ECFRS will have regarding the setting of limits and choosing of procedures for procurements below threshold.

The Act refers the value of £30k for below-threshold contracts:

84(4) A “notifiable below-threshold contract” is a regulated below-threshold contract with an estimated value of –

- a) In the case of a contract to be awarded by a central government authority, not less than £12,000, or*

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b) *Otherwise, not less than £30,000.*

Until further guidance is published ECFRS cannot determine if we can increase our limit to £50,000 as per the Constitution and our current financial regulations, but it is likely we can continue to set a higher limit noting the use of 'not less than' within the Act. If the limit is allowed to be increased ECFRS can state this within our strategy and Constitution as we currently do so to compliantly work to a higher limit as to when below threshold procurements will be advertised.

Further information to be provided as more detail on below-threshold procurements is released.

PROCEDURES

Currently under PCR there are 7 procurement routes:

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

ECFRS predominantly use the Open procedure for advertised tenders.

Under the new Act there will only be 3 procedures:

- Open procedure
- Competitive flexible procedure
- Direct award

The Act refers to the procedures collectively as the 'Competitive Tendering Procedures' (20(2):

- A single stage tendering procedure without a restriction on who can submit tenders (an "open procedure"), or*
- Such other competitive tendering procedure as the contracting authority considers appropriate for the purposes of awarding the public contract (a "competitive flexible procedure")*

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

The new competitive flexible procedure provides ECFRS with much more flexibility to shape our procurements in a more proportionate manner. Documentation will need updating and new documents produced to ensure that we are getting the most out of the flexibility the new procedure will give us.

Direct Award

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A new procedure under the Act is to allow the Direct Award of a contract in special cases.

There are specific direct award justifications within the new Act as follows:

- Prototypes and development
- Single suppliers¹
- Additional or repeat goods, services or works
- Commodities
- Advantageous terms on insolvency
- Urgency
- User choice contracts (supplied for the benefit of a particular individual)
- Defence and security

Currently under the Constitution there are exemptions to the procurement rules listed (section 4.11), these are currently only applied to below threshold procurements and therefore consideration needs to be given to update the Constitution to include the Direct Award exemptions under the Act for all tenders at all values. This would mean that a Single Tender Action would not apply if the procurement came under the Direct Award exemptions. It is proposed that any procurements to be approved as Direct Award are agreed in advance with the Category Procurement Manager and/or Chief Financial Officer.

As per the section below on Transparency a notice would have to be published of the intention to award a contract under the Direct Award provision.

Frameworks

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

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

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

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

Allowing suppliers to join an Open framework will provide more flexibility and options for ECFRS when procuring under frameworks.

¹ Schedule 5 Direct Award Justifications for single suppliers:

4 The public contract concerns the creation or acquisition of a unique work of art or artistic performance.

5 The following conditions are met in relation to the public contract:

- a) Due to a particular supplier having intellectual property rights or other exclusive rights, only that supplier can supply the goods, services or works required, and
- b) There are no reasonable alternatives to those goods, services or works.

6 The following conditions are met in relation to the public contract:

- a) Due to an absence of competition for technical reasons, only a particular supplier can supply the goods, services or works required, and
- b) There are no reasonable alternatives to those goods, services or works.

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ECFRS do not set up our own frameworks but as regular users of frameworks we will continue to use them when it provides value for money to do so.

Dynamic Purchasing Systems (DPS)

A DPS is unlike a traditional framework as suppliers can join at any time, it only provides access to a pool of pre-qualified suppliers and does not conduct additional checks, documentation and assurances as per a standard framework. The Act has updated the DPS to become a Dynamic Market where unlike the DPS which was to be used for commonly used, commodity type purchases, the Dynamic Market can be used for all procurements. It still remains as a pre-qualification tool to create a ready pool of bidders.

The change from DPS to Dynamic Markets opens up the opportunity for more procurement options and a quicker route to market. This is a positive change to the Act and one that ECFRS can utilise to save time in completing supplier checks when a Dynamic Market has been identified as the most suitable route to market.

CONSTITUTION

It is not proposed that the Competitive Contract Procedure as laid down in the Constitution will change, unless the secondary legislation does not afford us the flexibility to set our own procedures for below threshold tenders. The Formal Tender Procedure will also remain unchanged but it should be noted that contracts with a value above threshold are to be carried out in accordance with the Act (NB: much of the process we follow for above £50k tenders is the same as the full PCR and it is envisaged this would continue but as per the Act).

The financial levels stated in the Procurement Procedures table should be amended to only refer to the thresholds set by the Government as these change every 2 years and therefore the Constitution would be incorrect each time the thresholds are updated.

MEAT VS. MAT

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

The MEAT approach requires the contracting authority to decide the relative weighting it should attribute to quality and price, the quality and price scores are converted to a percentage score in accordance with pre-set weightings to create a combined score to identify the successful bidder.

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

19(2) states:

The ‘most advantageous tender’ is the tender that the contracting authority considers:

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

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- i. The assessment methodology under section 23(3)(a)², and*
- ii. If there is more than one criterion, the relative importance of the criteria under section 23(3)(b)³*

The difference between MEAT & MAT is that MAT allows price not to be included as an award criteria as it allows the use of non-financial criteria only when identifying the successful bidder and to ignore the price. PCR did not allow price to be ignored as a scored element of the tender evaluation.

Initial discussions between the Chief Financial Officer and the Category Procurement Manager are that ECFRS would not exclude price as an award criteria in future procurements, but to note that under the Act we have the option to do so should this be relevant and applicable to the procurement taking place. No procurement evaluations should take place by excluding price without the agreement of the Category Procurement Manager and/or Chief Financial Officer. The reasons for not evaluating against price must be documented and justified.

TRANSPARENCY / NOTICES

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

Under PCR there are only 4 types of notices applicable to ECFRS currently:

- Prior Information Notice
- Contract notice
- Contract award notice
- VEAT notice

The Act brings in many more notices, and with these different publication timings to what we are currently required to follow. More guidance will be provided in the secondary legislation that is due early 2024, for now below provides a brief overview of each notice:

Pipeline Notice

To provide the market with advance notice of opportunities with an estimated value of more than £2m that the contracting authority is proposing to enter in the forthcoming 18 months.

Planned Procurement Notice

A contracting authority may choose to publish this notice to inform the market that they intend to publish a tender notice. If the notice is published for at least 40 days (and no longer than one year) the contracting authority can benefit from a reduced tendering period.

Preliminary market engagement notice

A notice advising that the contracting authority intends to carry out, or has conducted, preliminary market engagement. This allows more flexibility in that we do not have to alert the market of premarket engagement, but we must be transparent and inform the market

² 23(3)(a) states tenders must describe how they are going to be assessed, and if they fail more than one criteria would that disqualify a tender.

³ 23(3)(b) if evaluating against more than one criterion to indicate their relative importance.

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either by publishing a notice afterwards or state in the tender notice why it was not published.

Tender Notice

This remains an unchanged required notice when conducting a procurement procedure under the Open or Competitive flexible procedure.

Transparency Notice

For any Direct Award (in the context of the Act) a notice must be published advising that the contracting authority intends to award a contract directly.

Procurement Termination Notice

If after publishing a tender or transparency notice the contracting authority then decides not to award the contract a notice has to be published to that effect.

Contract Award Notice

Before entering into a contract a contract award notice must be published. A set aside condition is met if the court is satisfied that a required contract award notice was not published. This will in most cases start the standstill period (now 8 working days instead of 10 calendar days). This is a big change from PCR in that a contract award notice is not published until after the standstill period has successfully passed and the contracts are fully signed.

Although this is not required for below threshold contracts, it is understood it is required for awards under frameworks (it is unclear if it also applies for awards under a Dynamic Market) this should be clearer in the secondary legislation.

Contracts Details Notice

This notice follows the contract award notice and any associated standstill period. Certain high-value below-threshold contracts may also require a contracts details notice.

Payments Compliance Notice

ECFRS will be required to publish every 6 months specified information regarding the compliance with payment against 30 day terms.

ECFRS will also be required to publish specified information about any payment of more than £30,000 made under a public contract. The information must be published before the end of the period of 30 days beginning with the last day of the quarter in which the payment was made.

Contract Performance Notice

This notice records the KPI information for those contracts with an estimated value of more than £5m where KPI's should be set (unless the contracting authority considers that the suppliers performance cannot be appropriately assessed). It is also to publish any serious breach of contract.

Contract Change Notice

Before modifying a contract, a notice must be published of that change if it modifies the contract value by 10% or more for goods or services, or 15% or more for works. Or the modification increases or decreases the term by 10% of the maximum term stated at award. It should also be noted that there will be a voluntary standstill period for the modification of contracts where the Act states the 'contracting authority may not modify a public contract before the end of any standstill period'. Under PCR it was only required to give notice that a

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contract has been modified, whereas the Act states that a notice must be published before modifying the contract. This is a substantial new notice and the timelines around this notice will need to be taken into account when modifying contracts.

Contract Termination Notice

Before the end of the period of 30 days beginning with the day on which a public contract is terminated a contract termination notice must be published. This will apply not only to contracts terminated before the end of their term, but also on natural expiry of a contract.

The Fire and Rescue Authority (Police and Crime Commissioner) (Application of Local Policing Provisions, Inspection, Powers to Trade and Consequential Amendments) Order 2017/863 (the Order)

There is no reference at this stage regarding the need to publish the copies of contracts awarded under the new Act. ECFRS will comply with the Order and publish copies of contracts exceeding £10,000 as per the update paper explaining how ECFRS will comply with the Order.

It is believed that the ECFRS will still be required to publish a contracts list under the Act but information on this has not been released yet, but whether it is required or not under the Act ECFRS will continue to publish its contracts register as per the Order.

STANDSTILL PERIOD

As mentioned above in the transparency notices section how we will inform suppliers of a contract award decision is going to significantly change. The letters that we currently issue to trigger the standstill period list out the relative advantages and characteristics of the winning tender compared to the unsuccessful bidder, this will change to an 'assessment summary' of the unsuccessful tender and the winning tender.

50(4) An “assessment summary” means, in relation to an assessed tender, information about the contracting authority’s assessment of –

- a) The tender, and*
- b) If different, the most advantageous tender submitted in respect of the contract.*

Further guidance is due on what details need to be included in the assessment summary, our standard letter templates will need to be amended to reflect this change and further templates and changes to the evaluation process may be required. The mandatory standstill period will change to 8 working days instead of 10 calendar days.

MANDATORY AND DISCRETIONARY GROUNDS FOR EXCLUSION & CENTRAL DEBARMENT LIST

Under PCR there is a list of mandatory and discretionary grounds for exclusion, with a self-cleaning mechanism available. The Act will provide a new list of mandatory and discretionary grounds which will be similar to but build on the current list. The aim will be to exclude suppliers who pose an unacceptable risk to UK confidence in procurement, public protection/national security/service delivery. The self-cleaning mechanism will be retained

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but includes a new 5-year exclusion period of both mandatory and discretionary grounds for exclusion (it will be irrelevant if the exclusion ground took place in the UK or abroad). Suppliers may be excluded where persons who have close connections with the company have committed the offence (including beneficial owners, directors etc.) More detail on the full list of exclusion grounds is to follow.

A substantial change under the Act is that suppliers will only have to register their company information and complete the mandatory and discretionary exclusion grounds on one system owned by the Cabinet Office. Currently suppliers bidding for contracts are required to enter the same information for each and every tender they bid for, by having a central storage system for this information means that it will be less of a burden on suppliers when responding to tenders. For ECFRS it also means that we do not have to duplicate questions for each tender that are covered in the standard questions managed by the Cabinet Office, saving us time processing and checking.

The secondary legislation will cover this in more detail, it is also expected that more information will be available regarding the 'central debarment list'. This list will be those suppliers which are subject to an exclusion ground, we will be required to notify central government within 30 days of excluding a supplier from a procurement process.

NEXT STEPS

Regulation 84 Report

It is unclear at this stage how the previous Regulation 84 report fits into the new Act, this is expected to be clearer once the secondary legislation and training is released. If the requirement for such a report is removed, it should be considered that a procurement award sign off report is still produced for internal sign off to proceed to contract award, plus to document any key issues or decisions that arose during the procurement process.

Training

Training is being rolled out for all procurement practitioners throughout 2024. The Category Procurement Manager is a superuser for the new Act and all available free resources, webinars, training etc. are being taken advantage of.

Procurement Strategy

The procurement strategy will be updated and submitted to the May SLT and June Strategic Board. The strategy was due to be submitted early 2024 but due to some legislation not being due until early 2024 it has been agreed to push back the update to ensure that a fully comprehensive update consistent with the Act can be provided.

A further update can be taken to the September Strategic Board should further amendments be required.

Freeze on Procurements

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It is to be suggested that no procurement tender exercises are run in the 6 weeks leading up to the Act going live. The reason for this decision is that if there is a delay to a tender being published and it has been produced inline with PCR it could cross over to the time that the Act will then apply and the full tender pack would need to be redone.

It also allows the team to be working on procurements that will go out once the Act is live under the new rules allowing them additional time to familiarise themselves with the new Act and ensure all documentation is correct as per the Act.

Data is being gathered by the Category Managers to be aware of all tenders that are due to be run in the 6 weeks leading up to the Act going live so that they can work with stakeholders to look at other options, for example; pull forward the tender to be run under PCR, extend the contract, utilise a framework.

During the 6 week freeze period frameworks can still be utilised and low value requirements can continue and preparations made for tenders to go out upon go live.

Training and Comms Roll Out

A plan for the roll out of training and communication to the wider Service of the Act is being developed and will be submitted to SLT.