

The Procurement Act 2023: what you need to know

Monday 28 April 2025

Your speakers for today



Tim Buley KC

Chair
Introduction by Chair



James Neill

The role of policy and
guidance: the new National
Procurement Policy and PPNs



Siân McGibbon

Overview of key differences to
the Public Contract
Regulations



Barney McCay

Remedies and challenges
under the PA 2023

Overview of key differences to the Public Contract Regulations



Siân McGibbon



Consolidation of procurement regimes

- The 2023 Act provides a single regime to replace:
 - **Defence and Security Public Contracts Regulations 2011**
 - **Public Contract Regulations 2015;**
 - **Utilities Contracts Regulations 2016;**
 - **Concessions Contracts Regulations 2016.**

- The Act applies to England and Wales, Scotland and Northern Ireland (though note that 'devolved Scottish authorities' are included in the definition of 'excluded authorities' and will continue to be governed by existing Scottish regulations).



Terminology

- Changes in terminology reflect the desire to move away from the language used in EU procurement law post-Brexit:
- **‘Public contract’**
- **‘Contracting authority’** (no longer **‘bodies governed by public law’**)
- **‘Most advantageous tender’** (no longer **‘most economically advantageous tender’**)
- How far will the courts diverge from established case law (domestic and ECJ)?



Simplified, more flexible procedures

- Fewer, less prescriptive procedures:
- **Direct award**
- Award made directly to a supplier without a competitive tender procedure
- Available only where a direct award justification applies
- Two new grounds for direct awards
- **Competitive tender**
- Open procedure (single stage with no restriction on who can tender)
- Competitive flexible tender (designed to suit the procurement)
- **Award under an existing framework**



Transparency provisions

- Throughout the procurement lifecycle
- **New notices cover the full procurement lifecycle – from pre-market engagement to termination**
- **A shift to focus on contract management**
- Building public trust and improving public scrutiny?



Support for Small and Medium Enterprises

- Contracting authorities must:
- **Have regard to barriers to participation by SMEs**
- **Consider whether such barriers can be removed or reduced**
- Illustrations may include:
- **Unrealistic or very short deadlines;**
- **Unnecessarily prescriptive specifications;**
- **Overcomplicated competitive flexible tender procedures.**



Exclusion and debarment

- PCA2023 introduces new and expanded grounds for exclusion
- **New terminology ('excluded' = mandatory ground applies, 'excludable' = discretionary ground applies);**
- **Wider discretionary grounds (performance and behaviour).**
- Procedures relating to exclusion:
 - **Contracting authorities must notify ministers when they exclude a supplier;**
 - **The minister may investigate the supplier and following investigation may if appropriate add the supplier to a central debarment list;**
 - **Suppliers will (for mandatory grounds) or may (for discretionary grounds) be unable to win public contracts while on the list;**
 - **A supplier can appeal or request removal in certain circumstances.**



Procurement policy

- Procurement objectives:
- **Delivering value for money;**
- **Maximising public benefit;**
- **Acting and being seen to act with integrity;**
- **Sharing information (for the purpose of allowing supplies to understand the policies and decisions of the procuring authority).**
- A new statutory requirement to have regard to any **National Procurement Policy Statement** which sets out **strategic priorities** for procurement...



The role of policy and guidance: the new National Procurement Policy and PPNs



James Neill



The Section 13(9) Duty

“(9) A contracting authority must have regard to the national procurement policy statement.”

Does not apply to:

- private utilities/awards of contracts under frameworks/dynamic market membership
- Devolved Welsh or NI authority or procurement under a devolved Welsh/NI procurement arrangement



The nature of the “have regard” obligation

- See for example R(Britwell Parish Council) v Slough BC [2019] PTSR 1904 (at [33]. Authority must:
 - Take guidance into account
 - Proceed on a proper understanding of the statutory guidance
 - Act in accordance with the guidance unless the authority gives clear reasons for departing from it



The National Procurement Policy Statement

(1): Value for Money

Best value: “a contracting authority must have regard to the importance of delivering value for money...this must include consideration of outcomes and quality to avoid waste from low value, poor quality bids”

Authorities should:

- (1) Maximise procurement spend with SMEs and voluntary, community and social enterprises
- (2) Ensure suppliers are committed to high quality jobs, safe and healthy working conditions, fair pay, opportunity and progression for works
- (3) Engage early with the market to consider innovative products and services



National Procurement Policy Statement (2): social and economic value

Authorities should:

4. Secure social and economic value which supports delivery of the national missions taking into account priorities in local and regional economic growth plans (where available) and working in partnership with other contracting authorities, the private sector and civil societies. This includes the mission aims and outcomes outlined at the beginning of the Statement.
5. Ensure their suppliers are actively working to: tackle bribery, corruption, fraud, modern slavery and human rights violations, environmental impact (including reducing greenhouse gas emissions and minimising waste in their operations); comply with their tax, employment law and other legal obligations, and stamp out late payment of invoices in their supply chains



National procurement policy statement (3): “Building commercial capability”

6. Apply commercial best practice including the principles and policies in the Government’s Playbook series (where appropriate) and make decisions based on value for money and service quality when assessing delivery models and outsourcing decisions.

7. Benchmark their organisational capability and workforce capacity to ensure they have the appropriate procurement and contract management skills and capacity necessary to deliver value for money.

8. Use collaborative procurement agreements, where appropriate for the requirement and the market, to ensure value for money (as long as those agreements are operating in accordance with relevant procurement legislation and good practice).



Enforcement of the National Procurement Policy Statement

Section 100(5) “(5) A contracting authority's duty to comply with section 12(4) (requirement to have regard to barriers facing SMEs), or section 13(9) or 14(8) (requirement to have regard to procurement policy statements), is not enforceable in civil proceedings under this Part.”

So only remedy is via judicial review....



Procurement Policy Notes

Status: “Procurement Policy Notes (PPNs) and supporting guidance are used to communicate new policies to be applied to public procurement activities to support practical implementation”

21 PPNs issued between 13 Feb 25 – 24 April 2025

Majority apply to central govt departments, executive agencies and NDPBs

Majority are updated versions of previous PPNs, some are wholly new.



Status of the PPNs in decision making

See R(Good Law Project) v SofS Health and Social Care [2021] EWHC 346 (Admin) : common law duty to comply with the Transparency PPN (see [132] – [135])



What's new in the PPNs? Some selected highlights...

PPN 001 – SME and VCSE procurement spend targets: from 1 April 2025, central government authorities need to set a 3 year target for SME spend, and from 1 April 2026 a two year target for VSCE spend

PPN 002 – the Social Value Model has been updated to align with the NPPS. The new Social Value Model is mandatory from October 2025 (5 March)

PPN 021- Payment Spot Checks in Public Sub-Contracts (24 April)



Social value under the new PPN and the new Social Value Model

Must be applied to central govt/NDPBs procurement after 1 October 2025

For procurements commencing before this date, use PPN 06/20

As with PPN 06/20 a minimum 10% weighting for social value must be applied

References the new Social Value Model for the assessment of social value (with model questions, criteria, sub-criteria, and reporting metrics)



Social Value Model: 8 Outcomes



Cabinet Office

Old Model

1. Help local communities to manage and recover from the impact of COVID-19
2. Create new businesses, new jobs, and new skills
3. Increase supply chain resilience and capacity
4. Effective stewardship of the environment
5. Reduce the disability employment gap
6. Tackle workforce inequality
7. Improve health and wellbeing
8. Improve community integration

New Model

1. Fair work: that offers fair wages and good working conditions
2. Skills for growth: supporting growth sectors and addressing skills gaps
3. Resilient, innovative and flexible supply chains
4. Sustainable procurement practices
5. Support the reduction in crime
6. Employment and training for those who face barriers to employment
7. Creating a pipeline of opportunities for the contract workforce
8. Increasing productivity through physical and mental wellbeing

Other Guidance (1) Cabinet Office Procurement Act 2023 Guidance

- Technical guidance and help with interpretation and understanding of the PA 2023
- Divided into four sections: Plan, Define, Procure, Manage
- Note new section on Exclusions Process recently published



Other Guidance (2): the Procurement Review Unit

- Guidance now issued on how the Procurement Review Unit will operate.
- Comprises the former Public Procurement Review Service
- Now includes: the Procurement Compliance Service and the Debarment Review Service
- PCS under its Part 10 powers can issue statutory recommendations to the contracting authority and/or “guidance that applies more generally to contracting authorities following the conclusion of any investigation”



Remedies and challenges under the PA 2023



Barney McCay



Remedies

- Part 9 of the Act.
- No wholesale change – e.g.
 - Standstill periods.
 - Automatic suspension.
 - Pre- and post-contractual remedies, including damages.



Actionable breaches and standing – s100

- Contracting authority's duty to comply with Parts 1-5, 7 and 8 is enforceable in civil proceedings – s100(1).
- This does not extend to authority's duty to comply with s12(3), s13(9) or s14(8) – s100(5).
- An authority's duty is owed to any supplier that is a UK supplier or a "treaty state" supplier – s100(2).
- Proceedings can be brought in the court by a supplier that is such a supplier and "has suffered, or is at risk of suffering, loss or damage in consequence of a breach of the duty" – s100(3).



Automatic suspension – s101 and s102

- Contracting authority cannot enter in a public contract – “or modify a public contract or convertible contract” – if “during any applicable standstill period”:
 - (a) proceedings are commenced in relation to the contract – and
 - (b) the authority “is notified of that fact”.
- Automatic suspension can be lifted by the Court by an order under s102 – s101(2).
- Court can make various orders including lifting an automatic suspension – s102(1).
- In doing so, Court must have regard to – s102(2):
 - (a) the public interest – see definition in s102(2)(a)
 - (b) the interests of suppliers – see s102(2)(b)
 - (c) any other matters that the Court considers appropriate – see 102(2)(c)



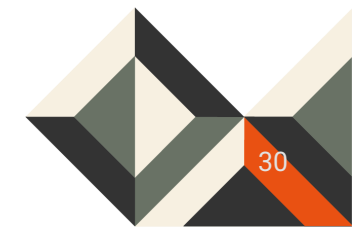
Pre-contractual remedies – s103

- If the Court is satisfied that an authority has breached the duty in s100(1) and the relevant contract/modification has not been concluded/made, then Court can make an order - s103(1)-(2):
 - (a) setting aside the decision or action;
 - (b) requiring the contracting authority to take any action;
 - (c) for the award of damages;
 - (d) that the court considers appropriate.



Post-contractual remedies and set aside conditions – s104 and s105

- If the Court is satisfied that an authority has breached the duty in s100(1) and the relevant contract/modification has been concluded/made, then Court – s104(1)-(2):
 - (a) must set aside the contract/modification if a “set aside condition in s105 is met” - and
 - (b) may make an award of damages
- Obligation to make a set aside order does not apply if there is an “overriding public interest” in not doing so – s104(3). See considerations that apply in determining whether there is an “overriding public interest” - s104(5).
- If contract/modification is set aside, it’s “without effect from the date of the order” – s104(6).
- Set aside conditions are contained in s105.



Time limits on claims – s106




- “Specified set aside proceedings” (defined in s106(5)) must be commenced before the earlier of – s106(1):
 - (a) 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;
 - (b) the end of the period of six months beginning with the day the contract was entered into or modified.
- Other proceedings must be commenced 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 – s106(2).
- Court can extend 30-day period if there is a “good reason” – s106(3). Though see longstop in s106(4)(b).



Thank you

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