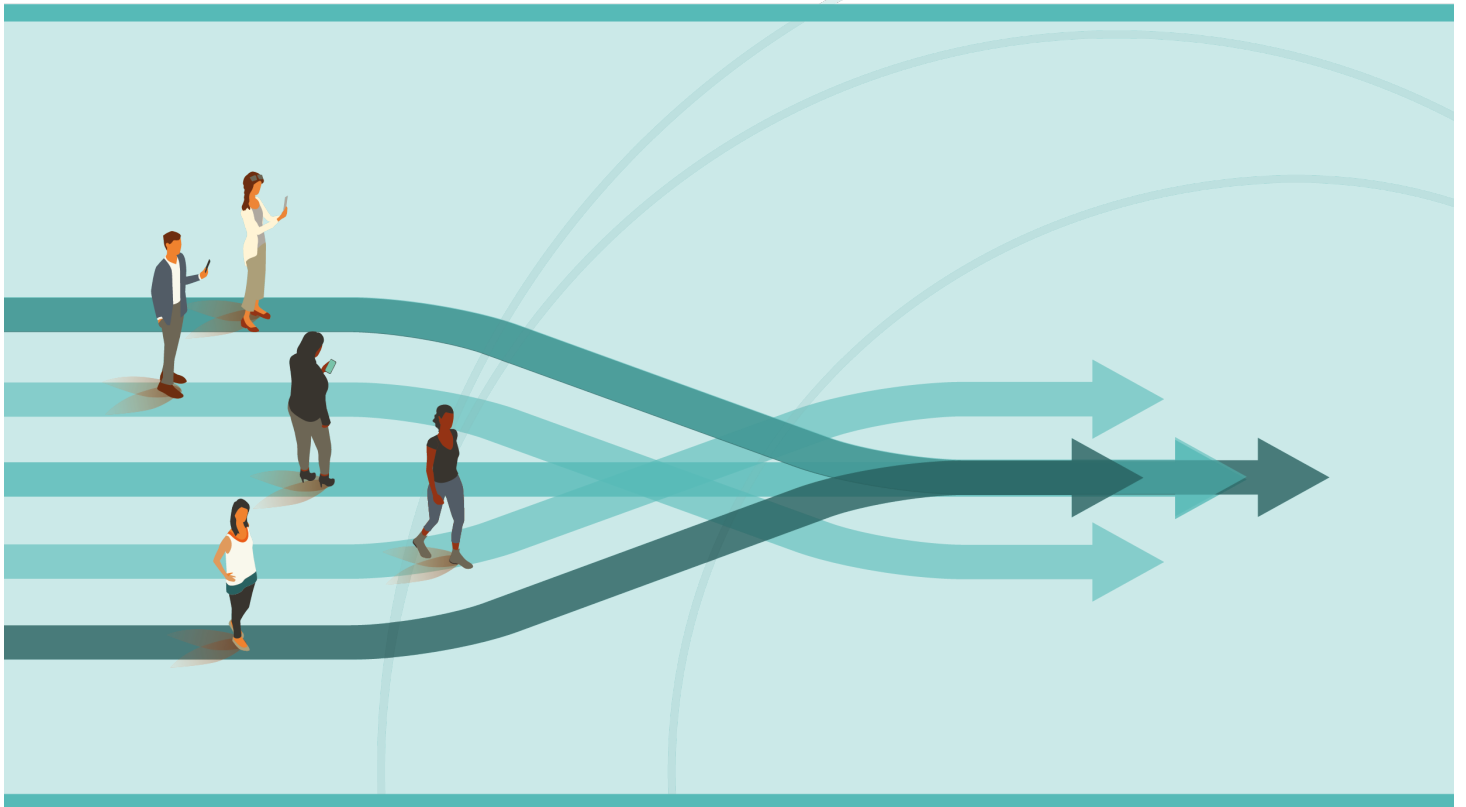




Government
Commercial
Function

Procurement Act 2023

Guidance: Transitional and Saving Arrangements



April 2024

Guidance on transitional and saving arrangements

What are transitional and saving arrangements?

1. Transitional and saving arrangements are set out in the regulations which determine how the changeover from the previous legislation to the Procurement Act 2023 (Act) is managed and effected by contracting authorities. They determine how procurements which straddle the implementation date of the Act are to be carried out and which legislation applies. The intent is that the implementation of the Act will cause as little disruption as possible for procurements which are already underway, and contracts which have already been awarded, when the Act comes into force.

What is the legal framework that governs the transitional and saving arrangements?

2. The transitional and saving arrangements will be set out in regulations made under the powers set out in sections 122(3)(d) and 127(2) of the Act.
3. These regulations, the Procurement Act (Commencement No. 3 and Transitional and Saving) Regulations 2024, set out the rules for which legislation applies to ongoing procurements and contracts awarded under the previous legislation, which determine how those procurements and contracts are to be managed.

Key points and policy intent

4. The fundamental principle is that procurements that commence after the entry into force of the Act must be conducted by reference to the Act only, whilst those that were commenced under the previous legislation (the Public Contracts Regulations 2015 (PCR), the Utilities Contracts Regulations 2016 (UCR), the Concession Regulations 2016 (CCR) and the Defence and Security Public Contracts Regulations 2011 (DSPCR)) (see paragraphs 8 and 9 below) must continue to be procured and managed under that legislation.
5. Any contracts awarded under the previous legislation will continue to be managed under that legislation until such a time as the contract, or commercial tool (see paragraph 18 below), ceases to exist. This means that in respect of modifications, for example, contracting authorities can only modify contracts awarded under the previous legislation using provisions set out at regulation 72 of the PCR, regulation 88 of the UCR and regulation 43 of the CCR as appropriate. Contract management includes only using the noticing pertaining to the previous legislation. For example, after the Act comes into force and a contract awarded under the PCRs is modified in accordance with regulation 72 of the PCR, a notice in accordance with regulations 51 and 72 of the PCR must be published (on find a tender service, contracts finder or the tenders electronic daily (TED) portal as required) and not a contract change notice (under section 75 of the Act).

6. Procurements, including those that would result in a below-threshold contract, that have been commenced under the previous legislation will continue to be procured, and any resulting contracts or contracts already awarded will continue to be managed (which includes modified and terminated) under the previous legislation until:
 - a. the end of the contract (for whatever reason) that is awarded under the previous legislation (including contracts that have had valid extensions);
 - b. where no contract is awarded, the procurement process ends (i.e. where the procurement does not result in the award of a contract - for example, because the contracting authority has discontinued the procurement);
 - c. where it is a framework agreement, the end (for whatever reason) of the last contract awarded under the framework agreement during the term of the framework arrangement;
 - d. where it is a dynamic purchasing system, the end (for whatever reason) of the last contract awarded under the dynamic purchasing system during the term of the dynamic purchasing system; or
 - e. where it is a qualification system, the end (for whatever reason) of the last contract awarded under the qualification system within the term of the qualification system, or where it has an unlimited duration, the end (for whatever reason) of the last contract awarded before the termination of the qualification system.

7. In respect of qualification system, the organisations that set up the qualification system are encouraged to terminate it as follows (although no later than 27th October 2028, when all qualification system must end):
 - a. where the qualification system is used for the procurement of a specific programme or project (e.g. building and operating a nuclear reactor), the qualification system should be terminated when the programme or project comes to a natural end; or
 - b. where the qualification system is currently used for general utilities procurement, the qualification system should be terminated after a fair and reasonable period.

Competitive procurements commenced under the previous legislation

8. For the purposes of the previous legislation, a competitive procurement is 'commenced' when:
- a. before 26th May 2023 a PIN was used as a call for competition by a sub-central contracting authority; or
 - b. a contract notice¹ has been submitted to be published under the previous legislation; or
 - c. a voluntary transparency notice is published under the PCR (see regulation 99(3)(b) and (4)), or the DSPCR (see regulation 60(4)); or
 - d. a below-threshold contract opportunity is published under the PCR (see regulation 110); or
 - e. a utilities notice on the existence of a qualification system that acts as a call for competition is published under the UCR (see regulations 44(4)(b), 68 and 77); or
 - f. a sub-contract notice has been submitted to be published under the DSPCR (see regulation 42(1)).

Negotiated procedure without prior publication ('direct award') procurements commenced under the previous legislation

9. Where a contracting authority has contacted a supplier with the intention of entering into a contract with it under any of the following provisions, the procurement is deemed to have been commenced for the purposes of the transitional and saving provisions and the relevant previous legislation will continue to apply:
- a. regulation 32 of the PCR;
 - b. regulation 50 of the UCR; or
 - c. regulation 16 of the DSPCR.

10. This means if a contracting authority signalled its intent to enter into a contract with a supplier without prior publication of a contract notice, then they can continue to negotiate that contract under the previous legislation that was in place when the intention to award the contract was given. This is consistent with the position on competitive procurements.

¹ 'Contract notice' in this document includes 'Contract notice' (regulation 49 PCR and 69 UCR), 'Contract notice for contracts in the field of defence and security' (regulations 17-19 DSPCR), 'Concession notice' (regulation 31 CCR), 'Design contest notice' (regulation 79 PCR).

Pipeline notices

11. A pipeline notice sets out the forthcoming procurements of a contracting authority. While best practice (and a policy requirement for central government), there is no obligation in the previous legislation for contracting authorities to publish a pipeline notice. The Act includes an obligation (in section 93) on contracting authorities who anticipate spending more than £100 million under 'relevant contracts'² in the coming financial year to publish a pipeline notice. That notice must list all public contracts with an estimated value of more than £2 million for which the contracting authority anticipates publishing a tender notice or transparency notice in the coming 18 months starting with the first day of the financial year.
12. Where a public contract has been included on a 'non-statutory' pipeline notice before section 93 comes into force, but as at the date the Act comes into force the procurement for that public contract has not yet 'commenced' as described in this guidance, the procurement must be carried out under the Act. It should also be noted that a contracting authority's statutory obligation to publish a pipeline notice will only arise from the 1st April which follows section 93 coming into force (i.e. from 1st April 2025), and will need to include all forthcoming procurements which fall within the requirements of section 93 irrespective of whether the procurement was included in a previous non-statutory pipeline notice or not.

Prior information notice/periodic indicative notice

13. Under the previous legislation, contracting authorities could publish their potential forthcoming procurements via the use of a prior information notice (under the PCR, DSPCR or CCR) or a periodic indicative notice (under the UCRs), collectively referred to as 'PINs'. PINs have also been used for the purposes of preliminary market engagement.
14. Unless used as a call for competition by a sub-central contracting authority prior to 26th May 2023, the publication of a PIN under the previous legislation, whether used for preliminary market engagement or not, is not one of the commencement trigger notices referred to at paragraph 8 above. This means that where a PIN has been published before the Act comes into force, but none of the other circumstances in paragraph 8 apply, the procurement must be carried out under the Act and not the previous legislation.

² 'relevant contracts' are defined in section 93(4) as 'any contracts for the supply of goods, services or works to the contracting authority other than exempted contracts'.

15. However, where a PIN has been used for preliminary market engagement, this engagement and the PIN can be relied on as part of a procurement under the Act and a preliminary market engagement notice would not have to be published under section 17 of the Act. Under section 17 of the Act, where preliminary market engagement has been carried out a contracting authority is required to publish a preliminary market engagement notice before publishing a tender notice, or provide reasons for not doing so. The fact that the preliminary market engagement was carried out via a PIN under the previous legislation can be used as the reason to justify why a preliminary market engagement notice has not been published under section 17, even though preliminary market engagement has been carried out.
16. This would require the contracting authority to state when publishing a tender notice that a preliminary market engagement notice was not published because the preliminary market engagement was undertaken, and notice of it provided in a PIN, prior to the Act coming into force.
17. If a contracting authority wishes to shorten the tendering period (as permitted by section 54 of the Act) then a planned procurement notice will need to be published enough time in advance of the tender notice to become a qualifying planned procurement notice (see guidance on the planned procurement notice for more information), regardless of whether or not a PIN was issued under the previous legislation.

Commercial Tools

18. Any contracts awarded through a framework agreement, dynamic purchasing system or qualification system (referred to as 'commercial tools') under the previous legislation will continue to be managed in accordance with that legislation. For example, a call-off contract awarded under a framework agreement set up under the PCR will continue to require publication of the relevant notices for that framework under the PCR until the call-off contract is terminated (for whatever reason), even if the framework itself has ended.
19. The transitional and saving regulations set out that any dynamic purchasing system and qualification system established under the previous legislation must come to an end as set out when they were established, or by 27th October 2028 (four years after the new regime comes into effect), whichever is earlier. Any contract awarded under such an arrangement will continue until it comes to an end and be managed by the previous legislation (even if the dynamic purchasing system or qualification system has terminated prior to that point).
20. The regulations restrict the ability to extend a dynamic purchasing system or qualification system awarded under the previous legislation (see, for example, as might arise under PCR regulation 34(28)) by providing that any dynamic purchasing system or qualification system extended after the Act comes into force can only be extended in the first twelve months after the Act comes into force and cannot be extended beyond 27th October 2028.

21. There will be a transition period during which contracting authorities may be able to award contracts under commercial tools set up under both regimes. Therefore contracting authorities should also ensure that any decision on which commercial tool is to be used and the associated rationale is fully documented before commencing the procurement.

Payments compliance notice

22. The obligations in the Act in relation to the payments compliance notice will apply to all contracts awarded by a contracting authority's, not those just awarded under the Act. i.e. the notice must also include payments against contracts awarded under the previous legislation.

23. Under the Act, the obligation set out in section 69 requires contracting authorities to publish payments compliance notices every six months where they have made a payment under a public contract, or a sum owed under a public contract has become payable, in the previous six months. (The precise requirements and detail of what is to be included in such notices are set out in section 69 of the Act and regulation 38 of the Procurement Regulations 2024; please see guidance on the payments compliance notice for more information.) The payment reporting obligations under the previous legislation, found in PCR regulation 113(7), required contracting authorities to publish prompt payment performance statistics online once per year. Once the ability to publish this information on the central digital platform is available (see paragraph 24 below), contracting authorities will also be required to include payments made or due under public contracts procured under the previous legislation in the payments compliance notices.

24. The phased delivery model of the central digital platform will mean the digital capability to publish a payments compliance notice on that platform will not be available when the Act comes into force. As such, contracting authorities should continue to publish their notices under regulation 113(7) PCR as they do currently, until the payments compliance notice obligation under section 69 of the Act comes into force.

Key Performance Indicators (KPIs)

25. The obligations in the Act relating to KPIs only apply to contracts awarded under the Act. Contracting authorities are not required by the Act to set or publish KPIs for contracts that were awarded under the previous legislation, even where those contracts are above the threshold set out in section 52 of the Act.

Direct award for additional works and services relating to contracts awarded under the previous legislation

26. The transitional and saving regulations make provision for the use of the direct award ground set out in Schedule 5, paragraph 8 of the Act for contracts awarded under the previous legislation in very specific circumstances. Schedule 5, paragraph 8 allows for the direct award of a contract for additional works and services from a supplier with whom the contracting authority already has a contract (provided it was awarded under a competitive tendering procedure) provided that intention was set out in the tender notice or tender documentation for the original contract.
27. This ground broadly replicates a similar ground in the previous legislation (at PCR regulation 32(9-12), DSPCR regulation 16(1)(d)(ii) and 16(6), and UCR regulation 50(1)(f) and 50(4)). In order to preserve the expectation when these contracts were awarded under one of the competitive procedures in the previous legislation that such additional works and services could be procured at a later date through direct award, the transitional and saving regulations permit contracting authorities to use the ground at Schedule 5, paragraph 8 where they can demonstrate compliance with the relevant requirements of the previous legislation, including that the contracting authority has set out its intention to rely on the right to make a direct award in this way before it entered into the original contract.

Awards under the Act

28. Once the Act comes into force, contracting authorities wishing to carry out a 'covered procurement' (see section 1 and guidance on covered procurement) or a procurement for a regulated below-threshold contract in accordance with Part 6 of the Act (see guidance on below-threshold contracts), and have not yet 'commenced' the procurement in accordance with the transitional and saving provisions must conduct the procurement in accordance with the Act.
29. Any contracting authority intending to carry out a procurement soon after the Act comes into force will need to consider the provisions in the Act when planning that procurement, even though the Act may not be in force during the planning process. For example, this would mean ensuring that the procurement is in compliance with all obligations contained in the Act in relation to, for example, obligations with regard to the national priorities in the NPPS, procurement objectives, conflicts of interest, record-keeping, KPIs etc., even if this requires the contracting authority to take steps prior to the Act coming into force to ensure compliance.

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