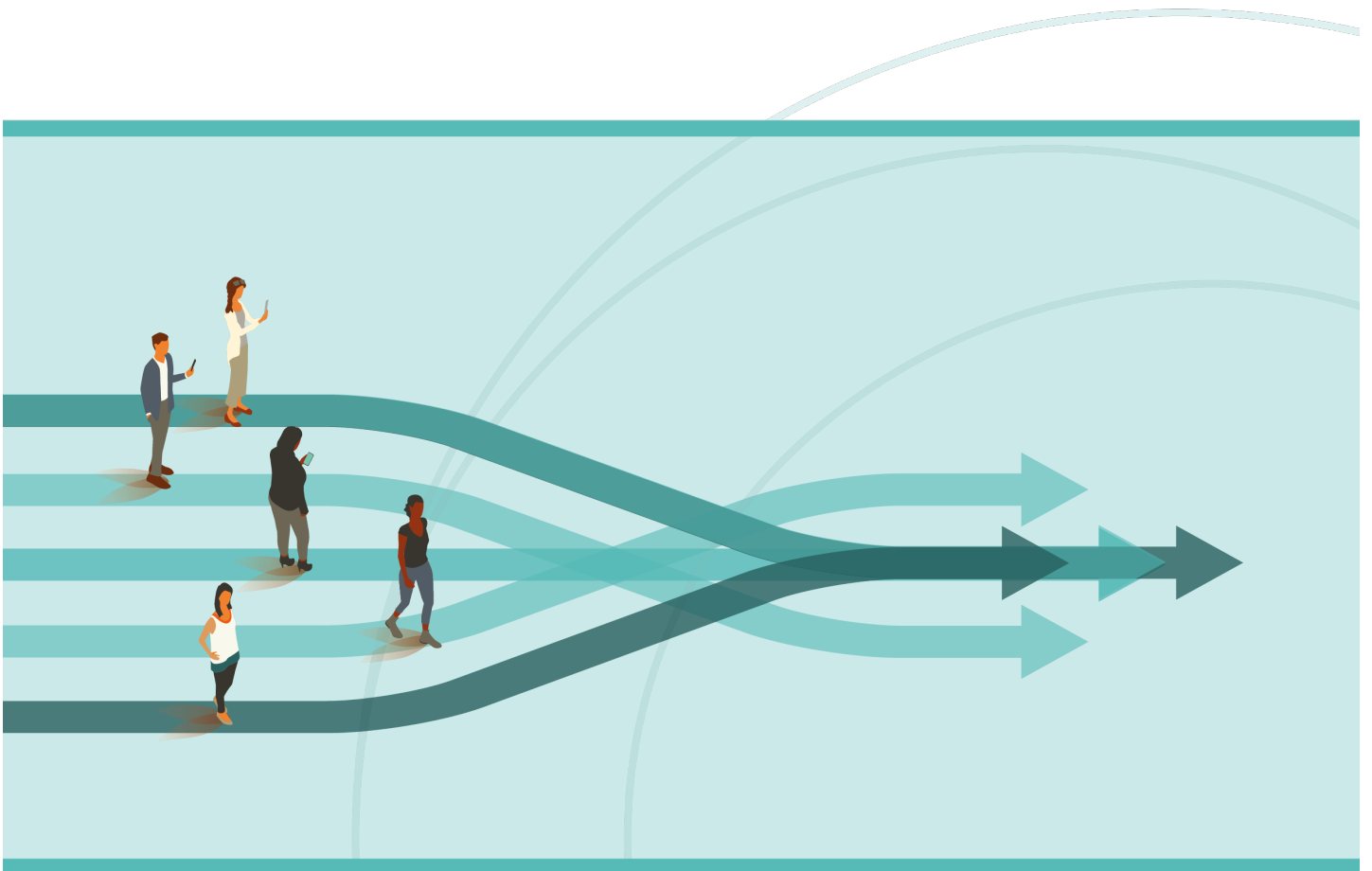




Government  
Commercial  
Function

Procurement Act 2023

# Guidance: Procurement Oversight



August 2024

## **Guidance on Procurement Oversight**

### **What is procurement oversight?**

1. Procurement oversight is intended to help ensure the requirements of the Procurement Act 2023 (Act) are adhered to, through the provision of recommendations and guidance, following investigation of a contracting authority's compliance. This will thus also help to ensure the benefits of the legislation are achieved.

### **What is the legal framework that governs procurement oversight?**

2. Part 10 of the Act (Procurement Oversight) comprises three provisions which enable the procurement oversight regime to support contracting authorities' compliance with the requirements of the Acts:
  - a. Section 108 (Procurement investigations) provides that an appropriate authority may investigate a relevant contracting authority's compliance with requirements of the Act and require a relevant contracting authority to provide documents and give assistance in connection with the investigation, as is reasonable;
  - b. Section 109 (Recommendations following procurement investigations) provides that, following a procurement investigation, an appropriate authority may issue a recommendation (a section 109 recommendation) to a relevant contracting authority, if it considers that the contracting authority is engaging in action which is causing, or that is likely to cause, a breach of any requirement of the Act. The contracting authority must have regard to the section 109 recommendation;
  - c. Section 110 (Guidance following procurement investigations) provides that, following a procurement investigation, an appropriate authority may publish 'lessons learned' guidance, to support compliance with the requirements of the Act by contracting authorities generally. Contracting authorities must have regard to this guidance.
3. The oversight powers in Part 10 may be exercised by an appropriate authority (which is defined in section 123 of the Act as 'a Minister of the Crown, the Welsh Ministers, or a Northern Ireland department') within its own jurisdiction.

### **What has changed?**

4. The Small Business, Enterprise and Employment Act 2015 (SBEEA) gave powers to the Minister for the Cabinet Office or Secretary of State to investigate a contracting authority's exercise of relevant functions relating to procurement. The Act repeals these powers and replaces them with the powers in Part 10, which explicitly relate to compliance with the Act. To strengthen the ability to tackle any non-compliance, the Act introduces new powers to issue recommendations to a supplier following an investigation to improve compliance (and to require progress reports on the implementation of recommendations) and to issue lessons learnt guidance to all contracting authorities following an investigation.
5. 'Maintained schools' (as defined in the Education Act 2002) and 'academies' (as defined in the Education Act 1996 and Academies Act 2010) were not within scope of investigation under the SBEEA but are in scope of the new oversight regime in the Act.

6. The Public Procurement Review Service (PPRS), which sits within the Cabinet Office, currently carries out investigations into procurement functions under the SBEEA on behalf of the Minister. These investigations are initiated by complaints from suppliers about a particular procurement. PPRS will continue to operate on this basis, but utilising the power provided by section 108 of the Act and as part of a new Procurement Review Unit (PRU), which has been established to operate the procurement oversight regime, as well as debarment.

## **Key points and policy intent**

### The role of PRU

7. PRU will manage the oversight regime on behalf of a Minister of the Crown.
8. It will monitor compliance across contracting authorities and will focus on investigations into contracting authorities who demonstrate patterns of repeated non-compliance across its procurements (referred to as institutional non-compliance). A pattern of non-compliance could also be across a number of different contracting authorities (referred to as systemic non-compliance) and this could mean that a number of contracting authorities are investigated in parallel. It is anticipated that an investigation into an individual procurement will only be in response to a supplier's complaint, in line with PPRS current practices.
9. The Minister will ultimately decide whether a section 109 recommendation is issued to a contracting authority following a procurement investigation.
10. PRU will manage the publication of any investigation reports, including any recommendations issued, and progress reports submitted by contracting authorities (or notice of a contracting authority's failure to submit a progress report). They will be published on a dedicated gov.uk page, which will also serve as the mechanism for suppliers and other stakeholders to raise a concern regarding a contracting authority's compliance with PRU.
11. PRU will also work with other central commercial teams, as appropriate, to manage the release of any guidance resulting from an procurement investigation.
12. PRU has published an ambition document. Further information including a Target Operating Model which provides more insight into its operation of the oversight regime will be published on the gov.uk page from October 2024.
13. The oversight regime applies to all contracting authorities that are subject to the Act, except private utilities (as independent regulators already provide oversight of these organisations). Welsh contracting authorities should refer to the Welsh-specific guidance for information on how the oversight regime will be managed on behalf of Welsh Ministers.
14. Government departments are excluded from the scope of the investigatory powers in the Act since Ministers already have non-statutory powers to oversee the contracting activities of government departments. However, government departments must have regard to any guidance issued under section 110.

### Procurement investigations

15. An appropriate authority may investigate a relevant contracting authority's compliance with the Act at any time; there does not need to be evidence of a contracting authority's non-compliance in order for an investigation to be triggered. However, it is most likely that an investigation will be initiated as a result of a complaint or referral to the appropriate authority or other evidence of non-compliance (for example, from analysis of data on the central digital platform).
16. If an investigation is being conducted, an appropriate authority may by notice require a relevant contracting authority to provide relevant documentation as is reasonably required for the purposes of the investigation and/or request other assistance as is reasonable in the circumstances. This could include requiring the contracting authority to make personnel available to be interviewed. The notice issued by the appropriate authority will provide details of the documentation or assistance required, including the form of documentation.
17. Depending on the nature of the investigation, a notice may be sent directly to a desk officer, for example if it relates to the procedure that the desk officer is managing, and/or the named point of contact on the tender notice. Other notices may be addressed to the relevant commercial director, or equivalent.
18. A contracting authority that receives a notice as part of a procurement investigation must comply within the timeframe specified in the notice, which must be at least 30 days from the day the notice is given. A contracting authority may request additional time to comply with the notice, but the appropriate authority (or an oversight unit acting on their behalf) is not obliged to agree. However, where a longer time frame is agreed, it will supersede the date given in the original notice.
19. The results of the investigation, including any recommendations issued, may be published.

### Recommendations following procurement investigations

20. Where an appropriate authority has conducted a procurement investigation and, as a result, considers that the contracting authority is acting in a way that either breaches, or is likely to breach, the requirements of the Act, the appropriate authority may issue a section 109 recommendation to that contracting authority.
21. Section 109(4) imposes a legal obligation on a contracting authority to 'have regard' to any section 109 recommendation that has been issued to it when carrying out covered procurements. To fulfil the duty to have regard to the section 109 recommendation, a contracting authority is not obliged to follow the recommendation, but it must properly consider and engage with it and, if a contracting authority decides not to follow it, it must have clear reasons for doing so and should record these in writing.
22. Section 109 recommendations are intended to bring contracting authorities back into compliance with the requirements of the Act and will specify the action(s) that the relevant contracting authority(ies) should take to achieve this, as well as the timing of these steps.
23. Section 109(3) sets out some limitations on the scope of section 109 recommendations; these are intended to maintain the contracting authority's autonomy regarding how it, for example, implements procurement objectives and to protect the probity of the procurement

procedure. Section 109 recommendations must not, therefore, relate to how the contracting authority:

- a. complies with section 12 (procurement objectives) and section 86 (regulated below-threshold contracts: duty to consider SMEs);
- b. has regard to the national procurement policy statement (NPPS) under section 13 or the Wales procurement policy statement under section 14 (as applicable);
- c. exercises its discretion in relation to a particular procurement, i.e. a section 109 recommendation must not relate to an individual procurement procedure.

24. However, section 109 does not prevent other, non-statutory recommendations being made with a view to addressing non-compliance relating to an individual procurement or to address other areas of procurement practice that fall outside of the boundaries of section 109 recommendations. It is therefore possible for non-statutory recommendations to be made as a result of a complaint raised by a supplier about a specific procurement. And it is possible that an investigation into repeated non-compliance could lead to both statutory and non-statutory recommendations being issued to a contracting authority. The appropriate authority will need to be clear about the status of the recommendations issued.
25. Sections 109(5) to 109(8) make provision for a contracting authority to submit progress reports, where this is required by the section 109 recommendation. Where required to do so, a contracting authority must submit a progress report setting out the action it has taken as a result of the recommendation. If no or different action (to that specified in the recommendation) has been taken, the progress report must include the contracting authority's reasons for this.
26. The appropriate authority may publish these progress reports or, if the contracting authority has failed to submit one, a notice of that failure.

#### Guidance following procurement investigations

27. Section 110 allows an appropriate authority to issue guidance following a procurement investigation, which contracting authorities are required to have regard to (see paragraph 14) when considering how to comply with the requirements of the Act.
28. This guidance will adopt a 'lessons learned' approach and will allow an appropriate authority to tackle compliance concerns identified by a procurement investigation which may affect a broader range of contracting authorities. All contracting authorities are subject to section 110, but an appropriate authority can target guidance to the types of contracting authorities that would benefit from the particular lessons.
29. A Minister of the Crown may, with express consent from devolved administrations, be able to issue guidance to devolved authorities.

## **Where can I go for more information or training?**

[PRU ambition document](#)

PRU Target Operating Model (from October 2024)

The PRU gov.uk page (from October 2024).

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