

BRAVE NEW WORLD - THE PROCUREMENT ACT 2023 IN ACTION

The UK's new post-Brexit procurement law regime is fully operational following the entering into force on 24 February 2025 of the Procurement Act 2023 (the "Act"). The Act was designed to be a definitive departure from the former EU law-based regime, and now that it's operational a number of its distinguishing features are evident in practice.

BACKGROUND

The law governing the process for the award of contracts by UK public sector entities ("Contracting Authorities") to ensure transparency, non-discrimination, and efficient use of public funds was previously based on EU directives and set out in a series of regulations (including the Public Contracts Regulations 2015, Utilities Contracts Regulations 2016, Concessions Contracts Regulations 2016 and Defence and security Public Contracts Regulations 2011).

The post-Brexit Conservative government made reforming procurement law one of its priorities. Beginning in 2020 with the publication of a Green Paper on Transforming Public Procurement, the legislative effort that would culminate with the enactment of the Act sought, first and foremost, to streamline the previous Regulations into one simplified document and to give Contracting Authorities greater discretion in how to award contracts.

Having advised on the application of the Act since coming into force, the following observations for clients will be useful for those navigating the new world of UK procurement law.

THE NEW ACT ACTUALLY DOES SEEM TO BE EASIER TO USE

The most visible and obvious distinction between the Act and the former UK procurement law regime is that the Act is a unitary document that – at just over 100 pages including Schedules – is significantly shorter than any one of the previous four Regulations it has replaced.

When first viewed by procurement professionals and legal practitioners in draft, the Act's brevity gave rise to concern that the government's effort to reduce and simplify that law would result in much important detail being left out and therefore potentially significant difficulty in interpreting and applying the new Act. However, the Guidance documents that the government promised to fill in gaps in the written legislation (a solution that was viewed with scepticism by some at the time) have now been published in significant volume, are all available in one place online at the Cabinet Office's gov.uk website, are easily searchable, and are proving to be an effective

Key issues

- With the Procurement Act 2023 now in force, key aspects of the UK's new procurement law regime are playing out in practice
- In particular, contracting authorities are taking advantage of their increased discretion to exclude unsuitable bidders from public tenders
- In addition, there is an increased likelihood that contracting authorities' ability to modify existing contracts may be subject to legal challenge under the new Act.

tool to aid practitioners with interpreting and understanding. Although it is yet to be seen how/whether decisions based on this non-primary legislation will stand up to challenge in Court, the online Guidance read together with the Act itself is currently proving to be a very efficient alternative to the former process of trolling through several bulky Regulations, often simultaneously.

EXCLUSION AND DEBARMENT FROM PUBLIC TENDERS IS A REAL CONCERN

One of the more prominent changes in the new Act is the additional ability it grants Contracting Authorities to exclude bidders from public tenders.

The Act retains the former regime's distinction between mandatory and discretionary grounds for exclusion and continues to limit mandatory exclusion largely to convictions for serious criminal offences (e.g. corporate homicide, terrorism, theft, human trafficking, fraud, bribery etc). However, the Act introduces new mandatory exclusion grounds for breaches of a number of non-criminal laws – notably including cartel competition law infringements and certain tax violations – for which a penalty can be imposed by the relevant authority (e.g. the Competition and Markets Authority or His Majesty's Revenue and Customs) if the violation occurred within the previous five years. Any company that has committed such an infringement must be excluded from all public tenders. The Act also gives contracting authorities the discretion to exclude bidders for previous contractual breaches or poor performance – defining this much more loosely (contract not performed "to the regulated authority's satisfaction") than the previous "gross misconduct" ground for discretionary exclusion.

The Act introduces a "debarment list" to which all those excluded from bids for whatever reason – including following official investigations which the UK Government is empowered to undertake – will be added, with those placed on the list due to mandatory exclusion being barred from bidding in any public tender (subject to certain rights of appeal) for up to 5 years, and having the reasons for their debarment made public. The UK government announced its first debarment investigations (into seven companies implicated for professional misconduct by the Grenfell Tower Inquiry) within days of the new Act coming into force.

CONTRACT MODIFICATIONS WILL BE SUBJECT TO INCREASED SCRUTINY

Changes to public contracts – such as extending the duration of the contract or adjustments to consideration – are frequently contemplated, particularly in respect of long-term contracts which are more likely to be subject to changes in commercial and economic circumstances. However necessary both public and private sector counterparties might deem such "modifications", the application of procurement law to proposed modifications must be considered.

The previous UK procurement law regime required an entirely new competitive procurement procedure for "substantial" modifications to most public contracts, even if the original contract was itself awarded pursuant to such a compliant process. This caused significant concern – compounded by the fact that a substantial modification to a public contract without a new procurement procedure could be deemed an illegal direct award of a new contract and therefore subject to being declared "ineffective" (void) if challenged in court, and the uncertain effectiveness of voluntary *ex ante* transparency (VEAT) notices as the most popular means of reducing the time period for (and therefore the risk of) legal challenges.

Equally uncertain was how much of the previous regime's approach to contractual modifications, based as it was on EU directives and decades of EU case law, would survive post-Brexit. In the end, the new Act and its associated guidance arguably provide better clarity on the treatment of contractual modifications, albeit likely at the increased risk of legal challenges to such modifications.

Although much of the substance has not changed from the previous regulations, the Act's presentation of the application of procurement law to contract modifications is much clearer. It states three categories of modifications that will not require new procurement procedures:

- modifications that are below-threshold – that (in summary) do not increase or decrease the estimated value of the contract by 10% (goods and services contracts) or 15% (works contracts).
- modifications that are not substantial – that do not increase or decrease the contractual term by more than 10% or otherwise materially change the scope of the contract or the "economic balance" of the contract in favour of the incumbent supplier; or
- modifications that are permitted – these include examples from the previous regulations of modifications that (i) were anticipated in the original contract; (ii) are for additional goods, services or works provided for in the contract; (iii) are necessary due to unforeseeable circumstances; or (iv) enable the transfer of the contract due to a corporate restructuring - but also contain the following new examples that give arguably-greater flexibility to Contracting Authorities and extend the concept of permissible modifications to defence/security contracts, whose previously-separate regulations did not account for the concept:
 - direct award due to "extreme and unavoidable urgency", or to "protect life";
 - modifications required due to the materialisation of a known risk (not caused by the supplier);
 - modifications to a defence contract to enable the authority to enable the authority to take advantage of technological developments, or prevent/mitigate against the adverse effects of such developments; or
 - modifications of a defence contract to ensure the ability of the Armed Forces to maintain operational capabilities and effectiveness.

This increased flexibility is, however, balanced by a significantly-increased transparency requirement. The Act replaces the previous regime's discretionary and inconsistently-published VEAT notices with a mandatory requirement to publish (i) a "contract change notice" on the UK's centralised "Find a Tender" platform in respect of any proposed above-threshold (see above) and substantial (see above) modification to a public contract before it is concluded and (ii) to publish the modified contract itself within 90 days of modification.

For further details on the Procurement Act 2023 or assistance with compliance, please contact our team at Clifford Chance.

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