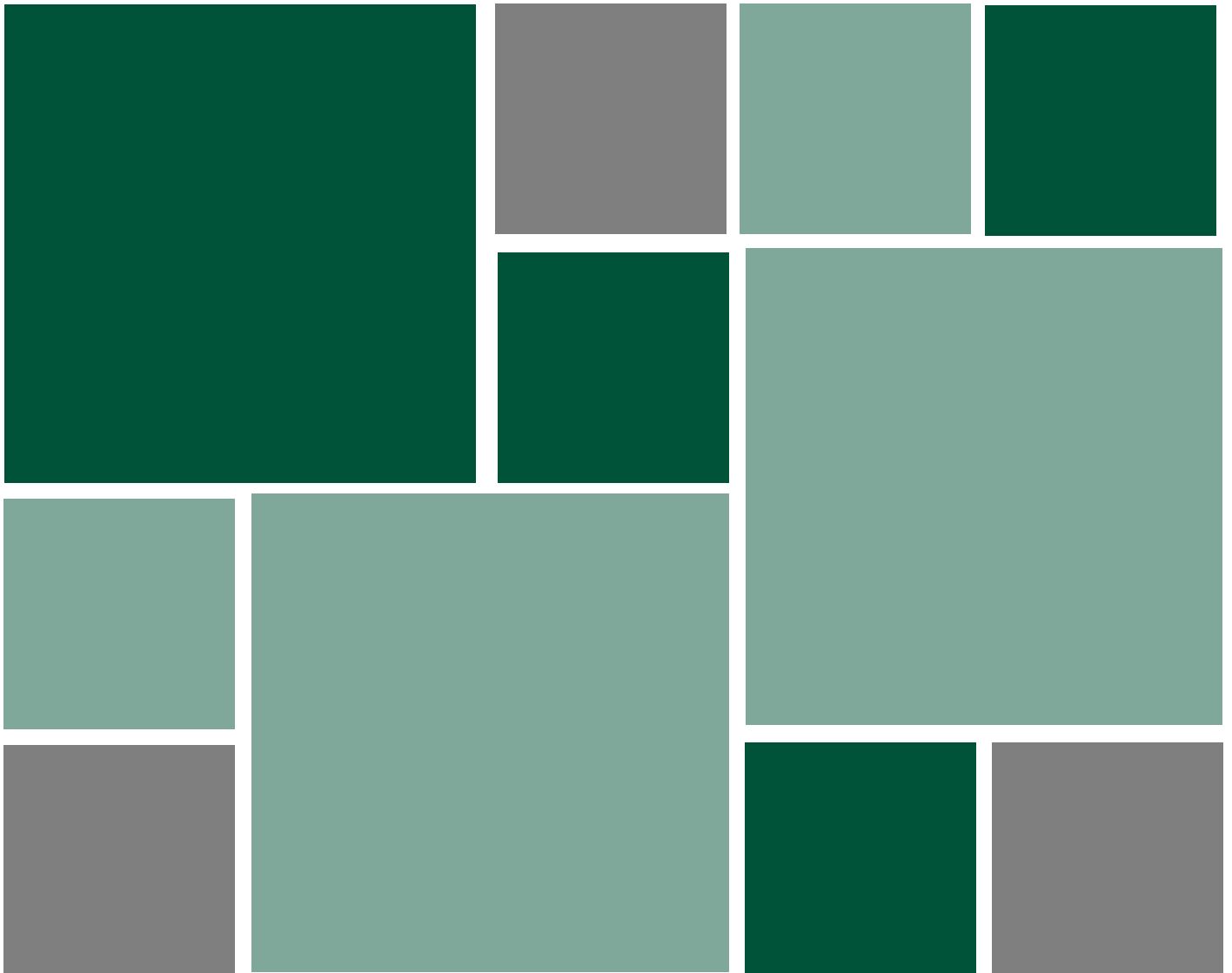




UKUPC

UK Universities Purchasing Consortia



Briefing Paper for Members Procurement Act Impact Review

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Updated March 2024

1. Executive Summary

- 1.1. In June 2023, the **New Procurement Bill** successfully passed through Third Reading & Report stages in the House of Commons; and in October 2023, the Procurement Bill received the Royal Assent which is now referred to as the Procurement Act.
- 1.2. Prior to go-live, there will be a 6-month transition period, with training being delivered by the Cabinet Office for all Contracting Authorities. The New Act aims to establish a single legal framework for the award of public contracts, utilities contracts, concession contracts, and defence and security contracts by Contracting Authorities. Many of the features of the new regime will be substantially the same as the current regime, but several **significant changes** are proposed. Contracting Authorities will be subject to broader transparency obligations under the new regime, which should mean that it will be easier to find out information about planned and completed procurements, but which will increase administration activities for Procurement Teams.
- 1.3. Wider UK Procurement colleagues are starting to communicate these changes to their Exec teams with the full impact not yet finalised. Faced with the fact, that it will lead to a significant increase in administrative and analytical/reporting activities for all Procurement teams and more involvement for Contract Managers as we create new processes and procedures to accommodate the need for more transparency.
- 1.4. Members will need to ensure that they have adequate resources to fulfil the increased obligations. Crucially, members of UKUPC's Procurement, Finance and all Contract Managers need to be prepared for the changes and undergo training in relation to data protection, plus have a deep understanding of what information cannot be released or must be redacted. The possibility of any inadvertent release of protected information could expose members to data breach claims.
- 1.5. The impact on our Suppliers too must be considered. Competitive and non-competitive tenders will change for Suppliers and the new requirement to publish contract and performance information by way of contractual KPIs, failure to perform and/or breach of contract and all other transparency requirements will have a significant impact. The Cabinet Office is reaching out to Suppliers to help them understand the changes and what it means for them, and we must also decide on our communications strategy to ensure they remain engaged, and we remain a customer of choice.

2. Background

2.1. In December 2020, the Government introduced a green paper entitled Transforming Public Procurement setting out its plans for a post-Brexit procurement regime and inviting consultation. The Procurement Bill was introduced in May 2022 to implement those changes. Progress was slow last summer but it is now progressing through the House of Lords.

2.2. **Pre-Brexit:**

Procurement law up until this point has come almost entirely from the EU. For a long time, EU procurement law was based on principles:

- The right for one business to trade across the EU without discrimination based on nationality
- Transparency of opportunities and decision-making
- Fairness between competitors (equal treatment)
- Proportionality in design and operation of procurements

2.3. The chief concern of EU procurement law was to allow the internal market to operate fairly and avoid protectionism. Over time, the EU created more detailed rules in the form of directives to supplement procurement principles. The most recent reform package was in 2014. This package was implemented in England and Wales by the Public Contracts Regulations 2015 and other similar regulations governing special types of procurement.

2.4. **Interim post-Brexit period**

On the completion of the Brexit process, the UK rolled over the Public Contracts Regulations 2015 and has made only small amendments to account for our departure from the EU: (e.g.)

- replacement of OJEU with "Find a Tender"
- use of pound sterling in thresholds
- removal of oversight powers from EU Commission

In most regards, therefore, we are still operating an EU-style procurement law.

The UK has continued its membership of the WTO's Government Procurement Agreement on much the same terms as the EU. The UK has therefore agreed internationally to maintain a procurement law of broadly the same scope and effect as now, although there is flexibility in the design of the details.

2.5. **Government Review**

It is widely believed that current law made it much harder for us to create opportunities for innovative companies to win business and that potential for modern and innovative approaches have been bogged down in bureaucratic, process-driven procedures. Moreover, we need a progressive, modern regime which can adapt to the fast-moving environment in which business operates.

2.6. **Timetable for Reform**

Commencement is expected to be October 2024. There will be a 6-month lead-in period between the Act receiving Royal Assent in October 2023 and it being commenced as the new regime. During that period, the Cabinet Office will offer a suite of official learning and development packages, including certification.

2.7. **Procurement Act Coverage**

The Act will include all “public authorities” including Registered Providers. In 2004, following an earlier judgment of the Court of Justice of the European Union, the Government took the view that housing associations were caught by the procurement regulations. The Government has included RPs in its coverage schedules under the Government Procurement Agreement and there is no clear sign (yet) of an intention to exclude housing associations. Commercial subsidiaries are likely to be exempt but, if contracts are given to them as a group company without competition, they must follow the Act when issuing sub-contracts.

2.8. **Secondary Changes**

These relate to terminology changes or modifications from current law and include (a full overview of key changes and their impacts is contained in Appendix 1)

2.8.1. Public Information Notices (PIN's) are now “**planned procurement notices**”. These remain optional but can reduce timescales. There is a duty to avoid putting participants at an unfair advantage.

2.8.2. We must now publish a “**preliminary market engagement notice**” before advertising tender opportunity.

2.8.3. New power to **modify a procedure** once active, so long as it would not affect list of those participating.

2.8.4. Selection criteria are now “**conditions of participation**”. There is flexibility on choice of conditions but there must be proportionate means of ensuring suppliers have legal and financial capacity and/or technical ability.

2.8.5. The winning supplier is one that submits the “**most advantageous tender**” in a competitive tendering procedure. This has been renamed from “most economically advantageous tender” (MEAT) to emphasise breadth of permissible criteria.

2.8.6. We will have the option to modify contracts for a “**known risk**” which must be indicated in the tender notice.

2.8.7. Dynamic Purchasing Systems (DPS) will change to ‘**dynamic markets**’ which are essentially lists of suppliers who have met the conditions for membership.

2.8.8. **Standstill reduced** to eight days from ten days.

- 2.8.9. **Standstill** not required for dynamic market or call-offs from framework agreements but will be required **for direct awards**.
- 2.8.10. A "**contract details notice**" is published after the contract is signed together with, if the contract is worth more than £5m, a copy of the contract itself. There also must be a notice if a procurement is terminated.

2.9. **New Act Objectives**

- 2.9.1. delivering value for money.
- 2.9.2. maximising public benefit.
- 2.9.3. sharing information about policies and decision-making.
- 2.9.4. acting, and being seen to act, with integrity.
- 2.9.5. treating suppliers the same, unless a difference justifies otherwise, and avoiding unfair advantage or disadvantage.
- 2.9.6. removing and reducing barriers to SMEs.

Contracting authorities must have regard to Government's strategic procurement priorities. Current statement (2021) includes matters such as creating new businesses, tackling climate change, improving supplier diversity and innovation.

2.10. **New Procurement Act Highlights**

- 2.10.1. Many of the features of the new regime will be substantially the same as the current regime, but several significant changes are proposed.
- 2.10.2. Attempts have been made to increase flexibility and allow for more agility throughout tender processes, however this has come at a cost, as the increased focus required to meet the "**transparency agenda**" will undoubtedly lead to significantly more bureaucracy for Procurement teams and impact resourcing obligations.
- 2.10.3. The changes below relate only to procurements above UK Thresholds (Effective 1 January 2024):

Works: £5,372,609 including VAT

Services and goods: £214,904 including VAT

Light touch: £663,540 including VAT

2.11. **Key Changes:**

- 2.11.1. A "**pipeline notice**" is required where contracting authorities consider that they will spend more than £100 million on certain types of procurement in the next financial year.

- 2.11.2. There will now be just **two procedures** (a reduction from the current 5) - open procedure (anybody may submit a tender) and a competitive flexible procedure which is appropriate and proportionate to the nature, complexity, and cost. Competitive flexible procedures are designed by the authority and can include several rounds of assessment. Both will start with a "tender notice".
- 2.11.3. A "**transparency notice**" must be published whenever a direct award is made.
- 2.11.4. For **contracts over £5m**, the authority must set and **publish at least three KPIs** by which performance under the contract will be measured. KPIs must be assessed at least annually and a report on compliance published.
- 2.11.5. **Framework agreements** will have the option to be in place for up to 8 years under an 'open' framework, with the ability to open the framework at pre-determined points. Suppliers would then be able to join the framework and existing Suppliers would be able to update their original bids alongside new applicants.
- 2.11.6. Authorities must **pay undisputed invoices within 30 days**. Suppliers must pay sub-contractor invoices within 30 days.
- 2.11.7. If contract is worth more than **£5m**, the **modification must be published** alongside the contract itself.
- 2.11.8. Any payments over **£30,000 must be published**.
- 2.11.9. It will be mandatory to publish "**contract change notices**" in advance and in more circumstances.
- 2.11.10. "**Contract termination notices**" must be published on all terminations, even when contract successfully performed or simply expires.
- 2.11.11. **Notices of contract performance failures** must also be published, after an opportunity to improve. This can allow other authorities to exclude tenders from the supplier.
- 2.11.12. The Act will contain mandatory and discretionary exclusion grounds. A national '**debarment list**' to be introduced. We will have a duty to consider if a supplier is on those lists. We also have a duty to report suppliers who should be disbarred and co-operate with investigation.
- 2.11.13. **Contract award notices** will now be published **before entering into contract** – currently this is often done simultaneously.
- 2.11.14. A **Procurement Review Unit**, in the Cabinet Office, will be able to **audit** authorities' **compliance** with procurement law.

3. Risks

- 3.1. Although the above changes will offer some flexibility and agility to parts of our procurement processes, the bill will add bureaucracy around transparency notices which could increase risk for us as an organisation, both legally and reputationally.
- 3.2. The notices will add additional time to the procurement process.
- 3.3. Members will need to ensure that we have adequate resource to fulfil these increased obligations. The number of notices and obligations will put an additional burden on the current procurement team. Therefore, it's likely we will require additional procurement resource in order to ensure compliance.
- 3.4. Significant training will be required across the whole Procurement team on the new obligations.
- 3.5. Specialist training required in relation to data protection and, what information cannot be released or must be redacted. The inadvertent release of protected information could expose Members to data breach claims.
- 3.6. Members may also need to invest in software to redact contracts with ease without consuming too much resource.
- 3.7. Comms plan required to inform the business of the changes and how it will impact them
- 3.8. The Act will allow greater scrutiny by suppliers, tenants and third parties and, more importantly, shine a light on procurement practices so we need to ensure our procurement practices are robust, efficient and compliant in order to reduce legal and reputational risk.
- 3.9. In recent years UKUPC members have relied heavily on Framework direct awards in order to support the business to deliver quickly and compliantly on procurement projects. Under the procurement bill, direct awards will require a notice of intention to award and robust reason for the direct award, which must adhere to the direct award regulations - speed to award is not an acceptable reason. This will result in direct awards being used as an exception rather than the norm. This will also mean stakeholders need to engage with Procurement much earlier to plan procurement projects sufficiently well in advance and to allow time to go to market via a compliant route as opposed to using direct awards (except in exceptional circumstance and in line with the new regs).
- 3.10. Implementation will require significant process amendments, document alterations, assurance measures and reporting changes, which again will impact procurement resource.
- 3.11. There are still a lot of under answered questions around clarity for existing contracts and frameworks and whether these will fall outside the scope of the new regulations and notices for in life contracts. This will need to be reviewed again.

4. What UKUPC is doing to support

- 4.1. Please note the details above are regarding the changes we currently **expect** from the New Act and start to help us work through the practical application and impact this new set of regulations will have on UKUPC Procurement processes, policy and practices.
- 4.2. UKUPC's Joint Contracting Group is reviewing each of the key areas affected by the new Procurement Act: people; processes and policies; systems; suppliers and communications. Assessment will be carried out on the following elements:
 - Training requirements
 - Process transformation
 - Documentation requirements
 - Impact on timelines for pipeline
 - Inter-operability with Scotland/Northern Ireland and Wales
 - System requirements
 - Pipeline Visibility
 - Process for suppliers
 - Additional requirements/changes to systems for suppliers

UKUPC will communicate regularly with UKUPC members and suppliers over the coming months with advice and guidance on the above.

- 4.3. A UKUPC Procurement Act Webinar Series is in place providing member support with implementing the new Procurement Act. Webinars will take place monthly and will cover the pertinent issues of the Act. See Appendix 4 for further details.

Appendix 1 – Impact & Actions

	Current Law	Proposed Changes	Implications
1.	Not a current requirement.	A " pipeline notice " is required where contracting authorities consider that they will spend more than £100 million on certain types of procurement in the next financial year.	<ul style="list-style-type: none"> • Going forward, there will be 16 notices defined in the Procurement Bill (categorised & summarised below) with the intention of having a greater transparency. • Additional resourcing requirement to be considered. • A new Cabinet Office Digital Platform is being developed to facilitate the publishing of all notices. • The Procurement Policy and corresponding procurement documents to be updated to include these key changes. <ol style="list-style-type: none"> 1. Planned Procurement Notice 2. Preliminary Market Engagement Notice 3. Tender Notice 4. Dynamic Market Notice 5. Transparency Notices 6. Contract Award Notice 7. Contract Details Notice 8. Copies of Contracts Notice 9. Procurement Termination Notice 10. Payment Compliance Notice 11. Contract Performance Notice (KPI's) 12. Contract Performance (breach of contract/failure to perform) 13. Contract Change Notice 14. Contract Termination Notice 15. Below Threshold Tender Notice 16. Pipeline Notice

2.	<p>The following procedures currently:</p> <ol style="list-style-type: none"> 1. Open procedure 2. Restricted procedure 3. Competitive procedure with negotiation 4. Negotiated procedure 5. Innovative Partnership 	<p>There will now be just two procedures (a reduction from the current 5)</p> <ul style="list-style-type: none"> - open procedure (anybody may submit a tender) - competitive flexible procedure which is appropriate and proportionate to the nature, complexity, and cost. Competitive flexible procedures are designed by the authority and can include several rounds of assessment. Both will start with a "tender notice". 	<p>Update to the Contracting Authority's procurement process, stages and refresh of all the procurement documentation.</p>
3.	<p>Not a current requirement.</p>	<p>A "transparency notice" (TN) must be published whenever a direct award (DA) is made.</p>	<p>In addition to the Procurement Policy changes there are also process and documentation changes required (by procurement). The requirement to publish a TN each time a DA is made (via a Framework Agreement or Exception/Waiver).</p>
4.	<p>Not a current requirement.</p>	<p>For contracts over £5m, the authority must set and publish at least three KPIs by which performance under the contract will be measured. KPIs must be assessed at least annually and a report on compliance published.</p> <p>Authorities must pay undisputed invoices within 30 days.</p> <p>Suppliers must pay sub-contractor invoices within 30 days.</p>	<p>Procurement Team and Legal (tbc) to review contracts/payment terms as well as any systems (as necessary) and training to be provided for key internal stakeholders (Finance/Accounts/Other Contract Managers).</p>

5.	Not a current requirement.	If contract is worth more than £5m , the modification must be published alongside the contract itself.	Procurement Team, Contract Managers and Legal (tbc) to review contracts training to be provided for key internal stakeholders as required. Additional procurement resource will be required.
6.	Not a current requirement.	Any payments over £30,000 must be published. 1. <i>Subsection (1) obliges the contracting authority to prepare and publish a payments compliance notice within 30 days of the last day of a reporting period, where it has either made a payment under a public contract or a sum owed by it under such a contract became payable.</i>	Information about payments under public contracts. The Contracting Authority must publish specified information. The purpose of this provision is to enable citizens to scrutinise payments made by contracting authorities under public contracts. The implication would mean allocating spend to specific contracts. Finance/AP to be engaged
7.	Reg. 72 – Modification Notice (50% of the initial contract awarded)	It will be mandatory to publish “contract change notices” in advance and in more circumstances.	The Contracting Authority must publish when an above-threshold modification is made to a contract. No publication is required if the intended modification neither increases nor decreases the value of the contract by 10% or less (in the case of goods or services contracts), or 15% or less (in the case of works contracts).
8.	Not a current requirement.	“Contract termination notices” must be published on all terminations, even when contract successfully performed or simply expires.	The Contracting Authority must publish within 30 days of the date of contract termination (natural expiry or otherwise). Regular contractual meetings/actions Procurement informed by stakeholders on any issues/potential terminations and reasons.

9.	Not a current requirement.	<p>Notices of contract performance failures must also be published, after an opportunity to improve.</p> <p>This can allow other authorities to exclude tenders from the supplier.</p>	<p>Where the Contracting Authority includes certain KPIs within contract/s and the contract value exceeds £2 million, there will be an obligation to publish certain information in relation to a supplier's performance.</p> <p>For example, details must be published in relation to poor performance (or a complete failure to perform) and any breaches of contract.</p> <p>Regular contractual meetings/actions</p> <p>Procurement informed by stakeholders on any issues including Performance/Critical Default/s notices and failure to remedy.</p> <ul style="list-style-type: none"> -Contract Managers involvement - SRM process owner (tbc)
10.	Not a current requirement.	<p>The Bill will contain mandatory and discretionary exclusion grounds.</p> <p>A national 'debarment list' to be introduced. We will have a duty to consider if a supplier is on those lists.</p> <p>We also have a duty to report suppliers who should be disbarred and co-operate with investigation.</p>	<p>The Contracting Authority would need to log information on supplier contractual breaches or poor performance which will now be recorded on a central digital platform.</p> <p>To be included as part of due diligence – procurement planning (SQ/D&B/Co.Reg/onboardng. etc)</p> <p>To be included as part of SRM programme</p>
11.	Contract Award Notices Normally issued following standstill period/after contract execution.	Contract award notices will now be published before entering into contract – currently this is often done simultaneously.	<p>The Contracting Authority would now need to ensure these notices are published promptly before entering into/execution of any contracts awarded.</p> <p>We may need to (depending on procurement thresholds/procedure) publish basic disclosure information, covering the information currently required by regulation 84 of the Public Contracts Regulations with the contract award notice, including call offs under framework agreements and before contract award and commence standstill including:</p>

			<ul style="list-style-type: none"> • Bidder Identities; • Basis of award decision; • Basic disclosure of tenders submitted; • Evaluation reports; • Basic evaluation disclosure information. <p>More than we currently complete presently, requires additional resource.</p>
12.	The Public Procurement Review Service (launched 2011) sits within the Cabinet Office and allows government suppliers and potential government suppliers to raise concerns anonymously about potentially poor public sector procurement practice.	A Procurement Review Unit , in the Cabinet Office, will be able to audit authorities' compliance with procurement law.	<p>PPRS to continue/rebranded and support the implementation of the New Procurement Bill.</p> <p>The unit would have two main purposes:</p> <ul style="list-style-type: none"> • Monitoring – including of issues raised as the new rules are implemented, and to ensure understanding and compliance • Intervention – including the issue of improvement notices to individual contracting authorities. Recommendations would be enforceable by sanctions, yet to be confirmed, such as spending control measures <p>Files, folders, reports etc ready and available in the event of audit by PRU.</p>

Appendix 2 – Cabinet Office Training

- Government funded Learning and Development programme will be provided over a 12 month period.
- Registration timeframes TBC.
- Launch during 6 month transition phase.

Knowledge Drops	Online Learning	Advanced Course
Free on demand Online 60 mins each	Self-guided online 10 hours 10 modules	In-depth review of key operational areas 3 consecutive days online
Covering: General high level information on changes	Covering:- <ul style="list-style-type: none"> • Scope, definitions and general principles • Transparency • Procedures • Competitive flexible procedure • Aggregated procurement and tools (frameworks and dynamic markets) • Supplier Selection • Assessment and Award • Remedies • Contract governance and reporting (KPI's, CCN's) 	Covering:- <ul style="list-style-type: none"> • Day 1: Designing competitive processes • Day 2: Setting award criteria, assessment and award • Day 3: Frameworks, dynamic markets and contract governance



Appendix 3 – Timeline



Status above as at October 2023.

The Procurement Act 2023 received Royal Assent on 26 October 2023.

The Cabinet Office has confirmed a go live date of October 2024 (with a six month notice period ahead of that date). As with the introduction of PCR 2015, implementation may be in successive phases.

Appendix 4 – UKUPC Procurement Act Webinar Series

Webinar Title	Draft Description (Subject to re-financing)	Speaker	When
The Procurement Act 2023: Planning for the main impacts	An overview of the key elements of the new Procurement Act and the impacts it will have for members	CIPFA	18 March 14.00-15.30
Procurement Pipelines and Contract Management Requirements in the new Procurement Act 2023	<p>In the part of the Procurement Act containing the obligation to publish a procurement pipeline, the financial year is deemed to start on 1st April. This is obviously out of synch with the financial year of a university and therefore, the university will have to decide how it can include this requirement within its annual budgets. What can and should universities be doing to get ready for this?</p> <p>For all regulated contracts with a value of more than £5million, the contracting authority will need to agree with the contractor 3 KPIs that will be reported against annually. Where KPIs are not met, this may lead to contractors being excluded from future tender opportunities. Universities need to ensure that they have both the people and the processes to adhere to this obligation.</p> <p>This session will cover the need for: early preparation of updated template documents; and, convening a meeting with all key contract managers within universities' estates teams, ensuring everyone understands the obligations and agrees a process by which to manage them.</p>	Browne Jacobson LLP	April
The new Notices regime in the Procurement Act 2023 – obligations, risks and opportunities for Authorities	<p>A practical discussion around the extensive new transparency requirements set out in the Procurement Act 2023. It will highlight:</p> <ul style="list-style-type: none"> • The way that the Act and secondary regulations work in tandem to set out the new regime; • The key new notices and requirements; • How the market may make use of the new notices and the likely impact on procurement in practice; • Challenges for Authorities around resourcing and technology; • Legal risk to Authorities around the publication of new notices; 	Mills & Reeve	May

	<ul style="list-style-type: none"> • Opportunities for Authorities to use the transparency regime to drive best and fearless practice; • The essential link required between procurement and contract management teams, in order to comply with the Act. 		
Procurement Act 2023: Spotlight on the selection stage	<p>Focusing on the new rules for assessing suppliers' financial standing and technical ability at the selection stage of a procurement.</p> <p>Identifying which suppliers would be "Excluded" and "Excludable".</p> <p>Understanding the new centralised debarment system, and its implications.</p>	Eversheds Sutherland	June
Balancing direct award and transparency under the Procurement Act	<p>We will:</p> <ul style="list-style-type: none"> • Discuss the HE context for sourcing directly - the ability of the HE sector to source directly is an important tool to meet HE requirements for research and innovation and specialist equipment and supplies; • Consider when a direct award can be made, including the new grounds for direct award; • Highlight the new transparency obligations and requirements for standstill; • Discuss the impact of the changes on building a business case to justify the use of the route, the timescales for procurement and risks of challenge and how to balance the competing interests. 	Veale Wasbrough Vizards	July
Social value in the Procurement Act 2024	<p>How to address social value through the procurement lifecycle under the Procurement Act. In particular, we will look at how to decide upon social value criteria, how much weight can be given to them in procurement exercises, and how they can be measured once the contract has been entered into.</p>	Weightmans	Sept

Sources

- <https://www.gov.uk/government/collections/transforming-public-procurement>