
Procurement Act 2023 Contract Management UKUPC

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30th April 2024

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Why are we here?

- Contract management given much more prominence in the Procurement Act 2023 (the Act)
- Section 52(1): Before entering into a public contract with an estimated value of more than £5 million, a contracting authority must set at least three key performance indicators in respect of the contract.
- Section 52(3): A contracting authority must publish any key performance indicators set under subsection (1).
- Section 71(2): At least once in every period of twelve months during the life-cycle of the contract and on termination of the contract the contracting authority must —(a) assess performance against the key performance indicators, and
(b) publish information specified in regulations under section 95 in relation to that assessment.

What will we cover today?

- Planning your contracts for the year – the “big clash” for the education sector
- When should you start thinking about KPIs?
- How to agree KPIs
- How to monitor KPIs and manage contracts well?
- Reporting
- Performance management

Transparency

The golden thread?

Transparency Requirements

What is changing?

- Transparency requirements are embedded in every stage of the procurement process
- Consultation on secondary legislation closed in August 2023
- Transparency SI – The Procurement (Transparency) Regulations

- Wider range of notices must be published (14 in total)

Pipeline Notice, Planned Procurement Notice, Preliminary Market Engagement Notice, Tender Notice, Dynamic Market Notice, Transparency Notice, Assessment Summary, Contract Award Notice, Contract Details Notice, Payments Compliance Notice, Contract Performance Notice, Contract Change Notice, Contract Termination Notice

- The notices in the draft SI reflect policy intentions of the Act
- Transitional provisions
 - Procurements started after go live date will be subject to the Act
 - PCR will continue to apply to those procurements started before that date

Pipeline Management

What are the requirements

- Section 93 requires a pipeline notice to be published setting out details of all proposed contracts valued at over £2 million
 - Only applies to authorities that consider that they will pay more than £100million under “relevant contracts”
 - What is a “relevant contract”? “means any contracts for the supply of goods, services or works to the contracting authority other than exempted contracts”
 - Includes those contracts the authority expects to direct award without competition
- Positive for suppliers lets the market plan for upcoming opportunities
- How to prepare? Authorities can start to do this now to help plan procurements and resources. No requirement to publish but encourages best practice

The “big clash”

- Issue for HE? When does a financial year start? Section 93(4)
- "financial year" means—
- (a) the period of twelve months beginning with the 1 April following the day on which this section comes into force, and
- (b) each successive period of 12 months;”

How do we square this circle?

- Currently no answer
- Can we take a purposive approach to interpretation? Financial year has been chosen because it’s what Government uses, can HE follow its own?
- Good news – we have until next April to work this one out

Contract Management

Factoring this into the procurement

KPIs/ Contract Management

But is this a procurement issue?

- Not helpful to look at Procurement and Contract Management in isolation
- A difficult balancing act - inappropriate and burdensome KPIs could have significant impact on procurement process and contract delivery:
 - Due to monitoring and publishing requirements, Suppliers likely to push back if not reasonable
 - Potential delays to process
 - Could lead to post award negotiations with successful supplier at a risk to the Authority
 - Potential for “in term” modifications to correct problems

Key Performance Indicators

Measuring and reporting on contract performance

- Requirement to include minimum of three KPIs in contracts, unless:
 - Contract value is less than £5 million; or
 - Contract cannot be appropriately assessed by KPI (unlikely to apply to most contracts due to value)
- Required to annually (at least) assess and publicly report on KPIs
- To comply with obligation Authorities must proactively monitor its contracts against these KPIs
- Consequences for supplier, this information could be used to exclude for poor performance. So it is important to get it right!

Key Performance Indicators

Measuring and reporting on contract performance

When is it not required? Doesn't apply to:

- Framework agreements
- Utilities contracts awarded by private utilities
- Concession contracts
- Light touch regime contracts – helpful for HE

Framework agreements – this doesn't mean that call-off contracts don't need to include them, they are a public contract in their own right, but query what needs to go into the call-off contract at the point of establishing the framework?

Let's start at the very beginning

Pipeline notice

- Can you at this point give indication of KPIs for contracts over £5million?
- Can you suggest market engagement to discuss?

Market engagement

- Perfect time to start to introduce potential KPIs and see how market reacts
- Better to have suppliers on board but you can't be entirely led by them, you have to do what's right for your organisation

Considerations at planning stages

Should our approach change under the Act?

- Still no set format depends on the nature and complexity of the contract and the pool of suppliers
- Pre- market engagement more important under the Act?
 - Competitive Flexible Procedure, helps you get the best out of it
 - Contract performance management, getting those KPIs right and proportionate is crucial
 - Reduce need for “in-term” modifications
 - Can establish at this stage how the procurement can assist in achieving your strategic objectives or key policy points

Tender stage

- Which procedure to use?
- What should you have in your procurement documents?
- Can you change your documents during the procurement?

New Procedures

- Two competitive procedures (section 20(2)):
 - Single-stage tendering procedure without a restriction on who can submit tenders (Open Procedure)
 - Such other competitive tendering procedure as the contracting authority considers appropriate for the purpose of awarding the public contract (competitive flexible procedure)
- No default procedure, but choice of procedure must be proportionate
- No justification required for competitive flexible procedure
- Must use competitive flexible in a Dynamic Market procurement

What are the rules governing CFP?

- *“Implicitly this will operate within the bounds of the provisions of the Bill (such as procurement principles, publication and other requirement applicable to a competitive procedure) but can be **designed around what would work best for the specific procurement**”* – Explanatory Notes to the Bill [Emphasis added]
- Proportionality appears to apply both to the choice between open and “other” and to the process designed for the “other” form of procurement
- Proportionality assessed by reference to the nature, complexity and cost of the contract

***Key Issue* – Compliance with principles rather than detailed rules**

- In the absence of a detailed set of rules, adherence to principles will be the touchstone of the competitive flexible procedure
- Challenge to award decisions in competitive flexible procedure are likely to be based around adherence to principles
- What are those principles?
 - Not actually defined
 - EU freedoms no longer relevant
 - No equivalent to Regulation 18 BUT the Act does mention proportionality an awful lot
 - There is reference to both the National Procurement Policy Statement and the Objectives

Procurement Objectives (section 12)

- Must have regard to the importance of:
 - delivering value for money
 - maximising public benefit
 - sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions
 - acting, and being seen to act, with integrity
- In carrying out a procurement, a contracting authority must treat suppliers the same unless a difference between the suppliers justifies different treatment
- If a contracting authority considers that different treatment is justified in a particular case, the authority must take all reasonable steps to ensure it does not put a supplier at an unfair advantage or disadvantage
- Removal or reduction of barriers to participation for SMEs

Refinement (Section 24)

- Tender Notice or associated tender documents must provide for the refinement of any criterion
 - Refinement can be in relation to the criteria or the relative importance (weighting)
 - Refinement cannot happen once tenders submitted
 - Effect of refinement cannot be such as would have altered any earlier assessment -
 - Necessary to republish tender notice and any associated tender documents affected by the refinement

Awarding your contract

- Nothing to prevent negotiations with preferred bidder around KPIs BUT
- You must keep within the boundaries of what the Act allows
- This means ensuring that the principles and objectives set out under the Act are adhered to e.g. treating all bidders the same – can you do that if you change the KPIs?
- Would the change to the KPIs meet the test for modification?
- Would the change to KPIs be seen as proportionate?

Importance of preparation and documentation

- Without clear process driven rules, contracting authority and bidders may not be sure about what is going to happen
- Clarity needed in documenting the proposed process
- Be clear in advance about where your flexibility lies
- Use any flexibility to change course with caution
- Make the most of preliminary market engagement
- Flexibility doesn't mean making it up as you go along

Contract Performance Notices

- Annual reporting against the relevant KPIs – section 71(2)
- Transparency regulations now in draft – regulation 29 (Contract performance notices)
 - Assessment of performance against KPIs
 - Breach of public contract or failure to perform
 - Sets out information that must be shared – assume that most of this will be in standard notices, you won't have to remember it!

Contract Performance Notices

How do you rate performance?

- Good - Performance is meeting or exceeding the key performance indicators
- Approaching target - Performance is close to meeting the key performance indicators
- Requires Improvement - Performance is below the key performance indicators
- Inadequate - Performance is significantly below the key performance indicators
- Other - Performance cannot be described as good, approaching target, requires improvement or inadequate

Where not performing to the KPIs the contracting authority must set this information out – regulation 29(6)

Not required when under performance results in full termination

Consequences of Poor Performance

- Under PCR it is difficult to exclude due to “poor past performance”
- The Act widens the scope beyond termination of a contract to include situations where a supplier has “failed to remedy”
- Schedule 7 (12)(3)- Discretionary Ground, gives Authority a wide margin of discretion – if “sufficiently serious”
- Authority must comply with procurement objectives- must be fair and proportionate
- Publishing performance data makes poor performance more visible!

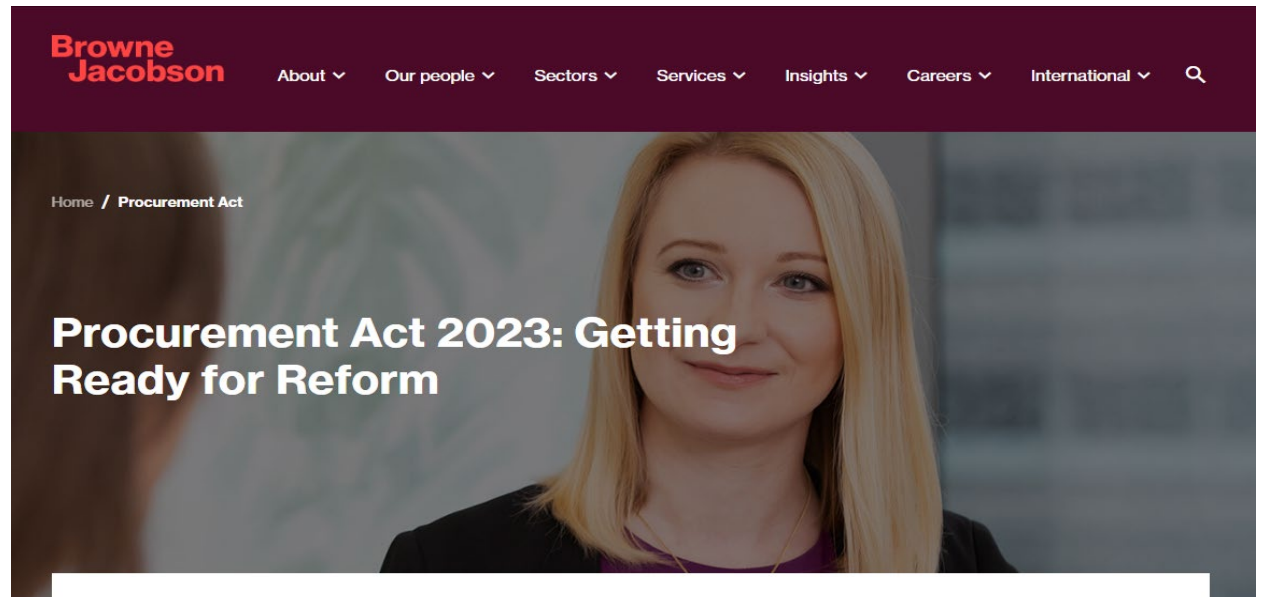
Key Performance Indicators

What can we do now to prepare?

- Getting on Top of Contract Management
 - Gap analysis- do you have the resources and skill sets available to actively monitor the contracts?
 - Start training programmes now:
 - Drafting effective KPIs
 - Contract management skills
 - Review of Contracts in pipeline
 - Look at KPIs in existing contracts, can we do better. Have they helped to address performance issues

Sign up for further updates and insights

- <https://www.brownejacobson.com/procurement-reform>



The public procurement law landscape is changing and the transformation could be a significant shift for public sector bodies and suppliers. The Procurement Bill received Royal Assent on 26 October 2023 and now is the time to get ready for the new Procurement Act 2023.

Product
Managing procurement risks and →

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