



London Borough of Enfield

Report Title	Procurement legislative changes
Report to	Finance and Performance Scrutiny Panel
Date of Meeting	16 th January 2024
Cabinet Member	Councillor Tim Leaver - Cabinet Member for Finance and Procurement
Executive Director / Director	Fay Hammond – Executive Director, Resources Olga Bennet – Director of Finance, Capital and Commercial
Report Authors	Michael Sprosson – Head of Procurement Services and Claire Reilly – Head of Procurement Policy and Contract Development
Ward(s) affected	All
Classification	Part 1 Public
Reason for exemption	Not applicable

Purpose of Report

1. During October 2022, the Finance & Performance Scrutiny Panel received a briefing paper on the Government's post-Brexit response to public procurement transformation as set out in the draft Procurement Bill. The briefing paper also described transformational change to NHS led procurement set out in the Provider Selection Regime and described both draft legislations' key features & an initial assessment of implications for the Council.
2. The Procurement Bill received Royal Assent in October 2023 and is now an Act of Parliament (The Procurement Act 2023) with a proposed implementation during October 2024.
3. Subject to parliamentary scrutiny and agreement, the Department of Health and Social Care intends for the Provider Selection Regime (PSR) to come into force on 1 January 2024.
4. Given that these key milestones have now been achieved, it is timely to provide a summary of the key provisions of each Act, the government's

plans, timelines, and transition planning to go live. The report also provides details of the Council's preparatory work to transform and implement, together with an updated impact assessment and implications for the Council.

Main Considerations for the Panel

1. To receive an update on the key features of the new Procurement Act 2023 and NHS Provider Selection Regime together with details of local planning and implementation and an assessment of the key implications and impacts for the Council.

Background

2. **The Procurement Act 2023 – Overview of core provisions**
3. Coverage
4. Part one of the Act sets out which authorities and contracts the Act applies to. It covers contracts awarded by most central government departments, their arm's length bodies and the wider public sector including local government and health authorities. This also includes contracts awarded by utilities companies operating in the water, energy and transport sectors and concession contracts.
5. The Act also sets out a small number of simpler rules which apply to lower value contracts and makes provision to carve out those procurements regulated by the Health and Care Act (Provider Selection Regime), to ensure clarity about which regime applies.
6. Part two of the Act is focussed on the principles and objectives that must underlie the awarding of a public contract. Contracting authorities must have regard to delivering **value for money, maximising public benefit, transparency and acting with integrity**. The Act also includes a duty on contracting authorities to have regard to the particular barriers facing SMEs, and to consider what can be done to overcome them.
7. Public procurement should also support the delivery of strategic national priorities and the Act makes provision for a National Procurement Policy Statement (NPPS). The current priorities require contracting authorities to consider the following social value outcomes alongside any additional local priorities:
 - creating new businesses, new jobs, and new skills in the UK
 - improving supplier diversity, innovation, and resilience
 - tackling climate change and reducing waste

8. Undertaking a procurement

9. The Act sets out how a contracting authority can undertake a procurement and award a contract with competition being at the heart of the regime. The Act looks to boost flexibility for contracting authorities in the UK's procurement processes, addressing the challenge of rigid and prescriptive procedures.

10. Contracting authorities will have greater discretion over what type of procurement procedure they want to use when going out to market, offering more adaptability in their approach. This includes new procedure types like 'Dynamic Markets' and 'Competitive Flexible' processes.

11. The Act also allows contracting authorities to modify the terms of procurement even after it has commenced if these changes are made before certain critical deadlines and are publicised correctly.

12. Another key change is the flexibility in selecting award criteria, with contracts now being awarded based on the "most advantageous tender" (MAT) instead of the previous "most economically advantageous tender" (MEAT). This should allow contracting authorities greater freedom when deciding how to evaluate and choose suppliers, outside the standard lens of pricing.

13. There will continue to be a special regime for certain social, health and education services, specifically identified by forthcoming secondary legislation, which may be procured as 'Light Touch Contracts,' leaving room for authorities to design procurement procedures that are more appropriate for these types of services. These Light Touch Contracts are still subject to the necessary safeguarding requirements.

14. The Act also continues the existing ability to reserve certain contracts for public service mutuals, local voluntary and community sector and for supported employment providers.

15. There are a limited number of circumstances in which it may be necessary to award a contract without competition. The Act sets these out including new rules governing the award of contracts to protect life and public order.

16. Exclusions and debarment

17. The Act addresses the management of excluded and excludable suppliers for contracting authorities, aiming to enhance the integrity of the procurement process and ensure responsible supplier selection. The Act largely retains the existing grounds for mandatory exclusion, such as modern slavery but adds new offences for environmental misconduct and improper behaviour in relation to a procurement (such as theft, corporate manslaughter, and competition law infringements). With regard to supplier's tax conduct, it will still be difficult to enforce responsible tax conduct from suppliers, however the new transparency notices (see below) are expected to require beneficial ownership disclosure of

successful bidders. A move which will help to reduce the risk of tax avoidance and fraud.

18. A notable change is the inclusion of prior poor performance as a basis for exclusion, extending to cases where a supplier has failed to improve their performance despite opportunities to do so. Moreover, the Act allows suppliers to be excluded based on the status of their associated suppliers and subcontractors, not just their individual performance.
19. The Act also establishes a central Debarment List, where a Minister of the Crown may include the names of excluded or excludable suppliers. Suppliers on this list will be temporarily barred from bidding for public contracts. However, they have the option to seek removal if there is a significant change in circumstances. Even if a supplier is not on the Debarment List, contracting authorities must consider these exclusion grounds during tender exercises. This, combined with transparency obligations for reporting poor performance and breaches, increases the likelihood that a supplier's past conduct will impact their bidding eligibility. Suppliers may also inform authorities about their competitors' negative reports.
20. Transparency Notices
21. Running throughout the Act are requirements to publish notices. These are the foundations for the new standards of transparency which will play such a crucial role in the new regime. The Act introduces a range of new statutory notices that must be published throughout the procurement process and contract lifecycle. These new notice types include planned procurement notices, preliminary market engagement notices, pipeline notices, transparency notices for direct contract awards, contract change notices, and termination notices upon the conclusion of a public contract.
22. Contract management
23. The Act introduces a new requirement for contracting authorities to publish contract key performance indicators (KPIs) to evaluate supplier performance, addressing the need for greater accountability and transparency within the procurement process. When contract KPIs are published, contracting authorities are obligated to assess supplier performance against these indicators at least once every twelve months and make this assessment information public. This change aims to improve supplier performance monitoring and provide valuable insights into the effectiveness of procurement contracts. However, this is only required for contracts with an estimated value above £5 million, and excludes certain contract types, such as those awarded through framework agreements but does include call-off contracts awarded under frameworks.
24. Terminating contracts
25. The Act broadens the implied rights of contracting authorities to terminate public contracts, addressing the challenge of ensuring contract

compliance and integrity. Grounds for termination now include instances where the contract was awarded or materially modified in breach of the Act. Termination is also permitted when a supplier becomes an excluded or excludable supplier, and, under specific conditions, when a subcontractor of the supplier falls into the excluded or excludable category. These changes enhance the authority's ability to maintain contractual compliance and protect the integrity of the procurement process.

26. Supplier registry

27. The Act will introduce a new supplier registration system to centralise information on suppliers. The Act seeks to address a common situation whereby suppliers were required to submit information on themselves across multiple platforms and websites if they intend to bid on work spanning different contracting authorities and sectors. This was a particular time-suck for smaller suppliers. The new supplier registration system will mean suppliers should only need to submit basic profile information once; this information will be stored securely and be made accessible to other procurement systems. The system will also make it clearer what information they need to keep up to date.

28. Oversight

29. The Act gives an appropriate authority oversight over contracting authorities and the power to investigate their compliance with this new Act, as part of a new Procurement Review Unit (PRU). Operational principles are currently being developed covering compliance, public procurement review and debarment.

30. Secondary legislation

31. Whilst the Act provides the base layer of procurement reform, we are awaiting the supporting regulations contained within Secondary Legislation and Statutory guidance. This will set out the detail that is not within the content of the Act and which is necessary to implement certain provisions of the Act.

32. The Government has consulted on two sets of regulations to underpin the Act which the Council has responded to.

33. The first consultation, 'The Procurement Act 2023 (Miscellaneous Provisions) Regulations 2024' ran during June & July 2023 and these deal broadly with the scope of the new rules and define areas such as the coverage of the light touch regime and provide certain information on how certain exemptions such as Teckal (where a contracting authority contracts with a legally distinct entity – usually this will be a company that the authority has set up, either on its own or in concert with others – to provide services) will work.

34. The second set of regulations, 'The Procurement (Transparency) Regulations 202X' were consulted on during July and August 2023 and

these will contain the detail in terms of the requirements for the many and new different types of transparency notice. They will also contain the transitional provisions to inform contracting authorities whether to apply the PCR 2015 rules or the new rules under the Procurement Act 2023 which apply to a procurement exercise.

35. The Secondary legislation is expected to be laid during early 2024 with policy guidance published during February 2024. Procurement Services and the Council will have a much better understanding of the practical aspects of the Act when these are published.

36. Transformation planning

37. The government's transformation programme is structured under four main themes, Processes, Systems, People and Transition with workstreams focussing on:

- Policy & Legislation – to complete the policy design for the new regulations and to take these through Parliament with a target publication starting from February 2024.
- Learning & Development – to support practitioners and others to develop the knowledge, skills, understanding and confidence to operate effectively within the new regime. The Learning and development offer will include knowledge drops commencing in December 2023, self-guided e-learning available during March / April 2024 and deep dive webinars available from May 2024. The formal learning & development will be supported by Communities of Practice where practitioners can support each other, sharing, discussing, and reflecting on best practice, challenges, and opportunities within the new regime.
- Platform and Systems – to embed transparency by default throughout the procurement life cycle and simplify existing systems by creating a single digital platform for public procurement. Contracting authorities will publish the new notices relating to procurement processes on the new single platform and be able to access commercial data. Suppliers and the public will be able to access opportunities and data on public procurement projects.
- Procurement Review Unit – to establish a new mechanism for monitoring and investigating legal compliance with the new regime, including a central debarment list for suppliers.

38. Transition – Procuring

39. The government has established key principles for transition to the new regime as follows:

- Procurements that commence (i.e., submitting a notice for the purpose of inviting tenders) after the effective date of the new legislation

(October 2024) must be conducted by reference to the new regime only.

- Those procurements that have been conducted or have started under the current regime PCR 2015 should continue to rely on those regulations
- For non-competitive contracts, any non-competitive procurement entered into later than three months after implementation date will be subject to the rules of the new regime, unless a Voluntary Ex-Ante Transparency Notice (VEAT) has already been published for the procurement.
- Procurements under the current regulations (PCR 2015) will continue to the end of the lifecycle under those regulations until:
 - the termination of the contract that is awarded as a result of a process under the PCR 2015
 - the decision is reached that no award is to be made
 - for a framework, the termination of the last call off contract to finish as a result of an award made within the life of that framework
 - for Dynamic Purchasing Systems (DPS) the termination of the last contract awarded by reference to the DPS within its lifetime.

40. Programme delivery to support implementation

41. The chart below sets out the government's key milestones to go-live (Procurement Act 2023):



42. Local Planning & Preparation

43. Procurement Services are now developing a local implementation plan for both the Procurement Act 2023 and the Provider Selection Regime to be executed in multiple stages, including stakeholder identification and engagement strategy, training requirements analysis, development of a

training action plan, implementation, and monitoring. A steering group comprised of senior managers has been established and the transformation will be managed within Procurement Services, collaborating with key functions across the Council including legal services, finance, and cross-Council departmental leads. A project plan is in development, structured under the following key stages:

44. Stage 1: Stakeholder Identification (Week 1-2):
 - Identify key internal & external stakeholders involved in the procurement process (RACI Matrix).
 - Define roles and responsibilities of each stakeholder.
45. Stage 2: Stakeholder Engagement Strategy (Week 3-4):
 - Map stakeholder interests, concerns, and influence.
 - Develop a communication and engagement strategy tailored to each stakeholder group.
 - Assign dedicated personnel for stakeholder communication.
46. Stage 3: Training Requirements Analysis (Week 5-6):
 - Assess the current procurement process and identify skill gaps.
 - Determine training needs for stakeholders involved in the procurement process.
47. Stage 4: Training Plan Development (Week 7-9):
 - Promote external resources for the training sessions.
 - Develop and Design training materials, including presentations, handouts, and e-learning resources over iLearn (if needed for the Council Officers).
 - High Level Training / briefing for Members, senior leadership, and non-commissioning staff
48. Stage 5: Training Execution (Week 10-16):
 - Arrange training sessions for the team based on the developed training plan.
 - Gather feedback from participants and assess need for further support/additional training.
 - Record attendance, participation, and certification in a central location.
49. Stage 6: Contract Procedure Rules (CPRs) and Procurement Manual Preparation (Week 1 onwards):
 - Collaborate with legal, finance, strategy, governance, and departmental teams to schedule a review of the CPRs and identify required changes.
 - Incorporate the feedback and finalise CPRs and Procurement Manual drafts.

- Work with Proactis (the Council's e-tendering supplier) to ensure readiness of the system and arrange system training for the team (New Flexible Procedure, Notices, and other relevant changes).
50. Stage 7: Internal Review and Approval (Week 17-20):
- Circulate the Finalised CPRs and Procurement Manual draft/s for comments/implications for accuracy and compliance.
 - Circulate and obtain necessary approvals from relevant members EMT, DMT, Full Council, Directors, Heads of Service etc.
 - Review all procurement documents, templates and forms and amend as needed.
 - Update all intranet sites and test all links and documents are working as intended.
51. Stage 8: Communication and Rollout (Week 21-22):
- Develop a communication plan to announce and highlight the upcoming changes to the CPRs and Procurement Manual due to the Procurement Bill.
 - Communicate the changes, benefits, and implementation timeline to all stakeholders via Staff Matters, News Articles, Drop-in Sessions, and Yammer.
 - Address any concerns or questions from stakeholders – via a series of drop-in over one week.
52. Stage 9: Implementation and Monitoring (Week 23 onwards):
- Publish the new CPRs and Procurement Manual as per the defined timeline.
 - Monitor procurement processes and projects post-implementation to identify any issues and concerns.
 - Establish a feedback mechanism for stakeholders to report challenges or suggestions.
 - Ensure all in-flight projects are not impacted.
 - Agree all upcoming procurement projects after the cut-off date will follow the new rules and procedures.
53. The implementation plan will be monitored by the steering group where key risks and issues will be managed. Progress reports can be provided to the Finance and Performance Scrutiny Panel on request.
54. **NHS Provider Selection Regime (PSR)**
55. The PSR will replace existing procurement rules for healthcare services and set new flexible and proportionate rules for a fit for purpose decision-making process. The aim is to move away from the expectation of competition in all circumstances and encourage flexibility to promote the interests of patients, taxpayers, and the population, remove barriers to integration and collaboration and allow greater transparency of publishing opportunities and awards.

56. The PSR is set out in the Health Care Services (Provider Selection Regime) Regulations 2023, which the Department of Health and Social Care introduced into Parliament on 19 October 2023 and subject to parliamentary scrutiny and agreement, the Department of Health and Social Care intends for the PSR to come into force on 1 January 2024.
57. NHS England has published its draft statutory guidance to support implementation of the PSR regulations, setting out what relevant authorities must do to comply with them. The draft statutory guidance will sit alongside the PSR regulations supporting relevant authorities to understand and apply the PSR. Relevant authorities must have regard to the statutory guidance once the regulations are in force.
58. The PSR will be a set of new rules for procuring health care services in England by organisations termed relevant authorities. Relevant authorities are:
- NHS England
 - Integrated care boards (ICBs)
 - NHS trusts and NHS foundation trusts
 - Local authorities and combined authorities.
59. The PSR will not apply to the procurement of goods or non-health care services (unless as part of a mixed procurement), irrespective of whether these are procured by relevant authorities.
60. The PSR will be introduced by regulations made under the Health and Care Act 2022. In keeping with the intent of the Act, the PSR has been designed to:
- introduce a flexible and proportionate process for deciding who should provide health care services
 - provide a framework that allows collaboration to flourish across systems
 - ensure that all decisions are made in the best interest of patients and service users.
61. When the PSR regulations come into force, the PSR will introduce three provider selection processes that relevant authorities can follow to award contracts for health care services. These are the:
- Direct award processes (A, B, and C). These involve awarding contracts to providers when there is limited or no reason to seek to change from the existing provider; or to assess providers against one another, because:
 - the existing provider is the only provider that can deliver the health care services (direct award process A)
 - patients have a choice of providers, and the number of providers is not restricted by the relevant authority (direct award process B)
 - the existing provider is satisfying its existing contract, will likely satisfy the new contract to a sufficient standard, and the

proposed contracting arrangements are not changing considerably (direct award process C).

- Most suitable provider process. This involves awarding a contract to providers without running a competitive process, because the relevant authority can identify the most suitable provider.
 - Competitive process. This involves running a competitive process to award a contract. Relevant authorities will need to comply with defined processes in each case to evidence their decision-making, including record keeping and the publication of transparency notices.
62. Subject to parliamentary scrutiny and agreement, PSR legislation will remove the procurement of health care services by relevant authorities from the scope of the Public Contracts Regulations 2015 and therefore the Procurement Act 2023, and will revoke the National Health Service (Procurement, Patient Choice, and Competition) (No. 2) Regulations 2013 on 1 January 2024.
63. Until the PSR is in force, relevant authorities should continue to follow the current rules (the Public Contracts Regulations 2015 and the National Health Service (Procurement, Patient Choice, and Competition) (No. 2) Regulations 2013) for the procurements of health care services.
64. Where relevant authorities have started a procurement exercise **before** 1 January 2024 under the current rules, then these can continue to award.. However, all contracts covered by the PSR will be subject to it after the 1st January, and therefore any contract amendments, extensions etc will have to follow the PSR, even if procured under the PCR 2015.
65. Officers are engaging with NHS peers to understand their local planning & implementation plans and to agree and incorporate relevant and proportionate procedures into the Council's procurement policy and framework of contract procedure rules.
- 66. Summary**
67. The Procurement Act and Provider Selection Regime reforms are significant and wide ranging and will impact on any officer purchasing goods, services and works on behalf of the Council. There are significant linguistic and stylistic differences in the Act, compared to what we are used to under the current PCR 2015 with no precedent or case law on which to rely on. Under the Act, officers are faced with having to consider not only the Act, but secondary legislation, a national procurement strategy and statutory guidance rather than currently considering only the PCR 2015. There will be much greater procedural flexibility, but internal processes need to be resourced to take advantage of it, with guidance & training essential and the Council will need to be ready and braced to manage the new transparency requirements and volume of statutory notices that must be published.

68. Procurement Services have completed an impact assessment to understand the key implications for the Council and this is attached to this report – Appendix A. These will be managed by the Procurement Act Steering Group and regular updates, along with implementation progress can be provided on request.
69. Members of Procurement Services continue to keep abreast of all learning opportunities and policy developments through regular engagement and participation at the London Procurement Network (comprised of London borough Heads of Procurement), the Local Government Association Procurement National Advisory Group, subscriptions to Government’s Transforming Public Procurement department updates and law firm’s seminars and information sharing.
70. In the Procurement Services microsite, within the Council’s intranet, are pages providing information, guidance and updates on the Act for access by colleagues across the Council: [Procurement Act 2023 \(sharepoint.com\)](https://sharepoint.com)

Relevance to Council Plans and Strategies

71. Procurement Services supports delivery of the Council Plan’s objectives which align with the priorities cited within the Procurement Act 2023 and the National Procurement Policy Statement. The graphic below sets out the specific objectives that Procurement Services strive to achieve.

Clean and green places
 Ways of achieving through:

- Application of Ethical & Sustainable Procurement Policy / Embedding environmental improvement measures where possible
- Robust project planning & risk management
- LBE Strategy / Policy considerations in projects with client at outset, addressed at Procurement Assurance
- Review client service specifications & contracts – as above
- Embedding effective contract management, monitoring & reviews
- Social Value - refresh local Enfield TOMS against new National Framework
- Social Value - review approach to award criteria
- Embed / drive early market engagement

Priority One

Strong, healthy and safe communities

- Support for local SMEs / VCS – opportunities and bidding for contracts. Link with corporate grants commissioning
- Support commissioners with Market capacity building - align with forthcoming Economic Development Strategy

Priority Two

Thriving children and young people

- Support delivery of SEN provision
- Determine what is PS role in supporting schools' procurement
- Raise awareness of corporate contracts to schools
- Collaboration corporately /externally and identify synergies
- Strategic review of provision e.g., spot purchasing vs strategic sourcing

Priority Three

More and better homes

- Develop Construction / Housing Procurement Pipeline – align with Capital Programme.
- Address PS capacity to support demand
- Address use of third parties for procurement – make a requirement that procurement lead on appointing / identifying role of PS?

Priority Four

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Appendices

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Appendix 1 – Procurement Act 2023 and Provider Selection Regime Impact Assessment.

Background Papers

Report to Finance and Performance Scrutiny Panel meeting 19th October 2022 –
'Procurement update (to include update on legislative changes)'

Departmental reference number, if relevant:

**L.B.E. Finance and Performance Scrutiny Panel – 16.1.2024 : ‘Procurement legislative changes’ report
Appendix 1 – Procurement Act 2023 Local Impact Assessment**

Whilst the Procurement Act 2023 provides the base layer of procurement reform, we are awaiting the supporting regulations contained within Secondary Legislation and Statutory guidance. This will set out the detail that is not within the content of the Act and which is necessary to implement certain provisions of the Act. The table below provides an assessment of the key implications for the Council known so far. These will be reassessed, and mitigating actions developed on publication of the Secondary Legislation and policy guidance, expected during early 2024 and throughout the transition and implementation period.

The assessment also includes consideration of the implications of the Provider Selection Regime on the Council. We are awaiting Details of local implementation and planning from the local NHS Integrated Commissioning Board.

THEME	IMPLICATION	IMPACT
Compliance	<ul style="list-style-type: none"> Review and amend all current procurement policy, guidance and governance in response to transparency obligations and debarment rules ; procurement tender templates review and rewrite. 	<ul style="list-style-type: none"> Expanded publication regime will be a significant workload New requirements to estimate pipeline spend where this is over £100M, including Direct Awards Shift to Most Advantageous Tender as award criteria vs Council’s budget challenge Compliance with LBE governance & Key Decision timescales
Systems	<ul style="list-style-type: none"> The Council’s e-tendering portal must be compliant with new data and transparency requirements. 	<ul style="list-style-type: none"> Ability and range of current system to ensure compliance and provide reporting functionality. Current supplier is engaged with the Government’s online platform development function to ensure system interfaces and is compliant
People	<ul style="list-style-type: none"> Capacity and capability of 	<ul style="list-style-type: none"> Ability to maintain business as usual

	<p>procurement and legal practitioners, non-skilled staff that self-serve below threshold procurements and external organisations commissioned to carry out procurement exercises on behalf of the Council</p> <ul style="list-style-type: none"> • Training for suppliers on new processes and procedures 	<p>and delivery of priority projects whilst transforming to the new regime.</p> <ul style="list-style-type: none"> • Extensive programme of learning and development must be undertaken across the Council to all affected staff • Programme of supplier engagement on the new requirements.
<p>Contract Management</p>	<ul style="list-style-type: none"> • Requirement to publish Key Performance Indicators, change notices (variation / modification), annual performance reports for all contracts over £5M whole life value and any contract terminations. • Details of any of all contract variations (bar de minimis) will be reported in the public domain and susceptible to challenge 	<ul style="list-style-type: none"> • All new procurements / contracts should have dedicated contract management resource from the service departments • All new affected contracts must align with reporting obligations around it • All new affected contracts must be redacted as appropriate and published