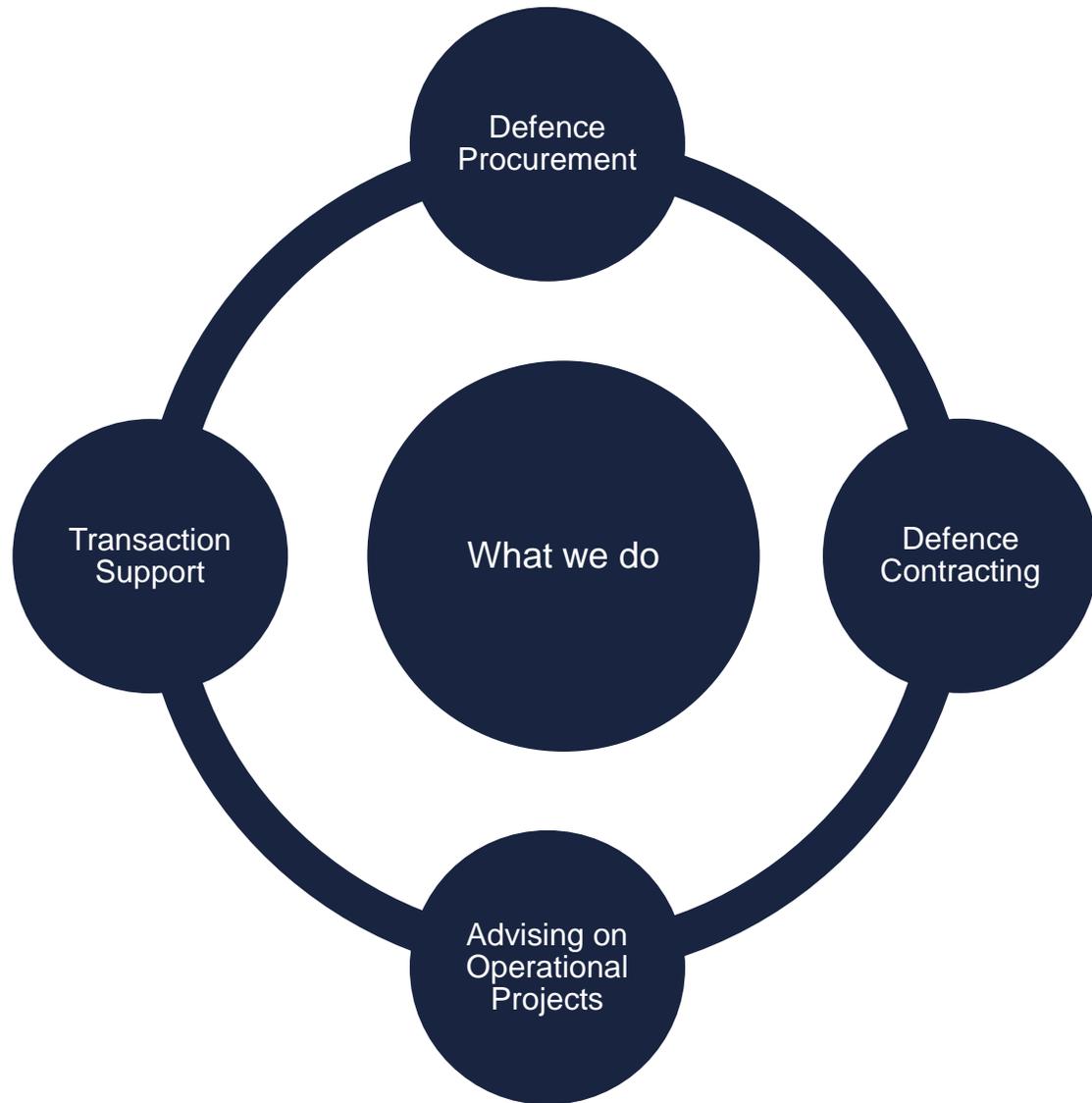


Procurement Act 2023

UK Public Procurement Reform Webinar
Impact of the Procurement Act on UK Defence
Procurement

15 May 2024

Our Defence Practice



Speakers



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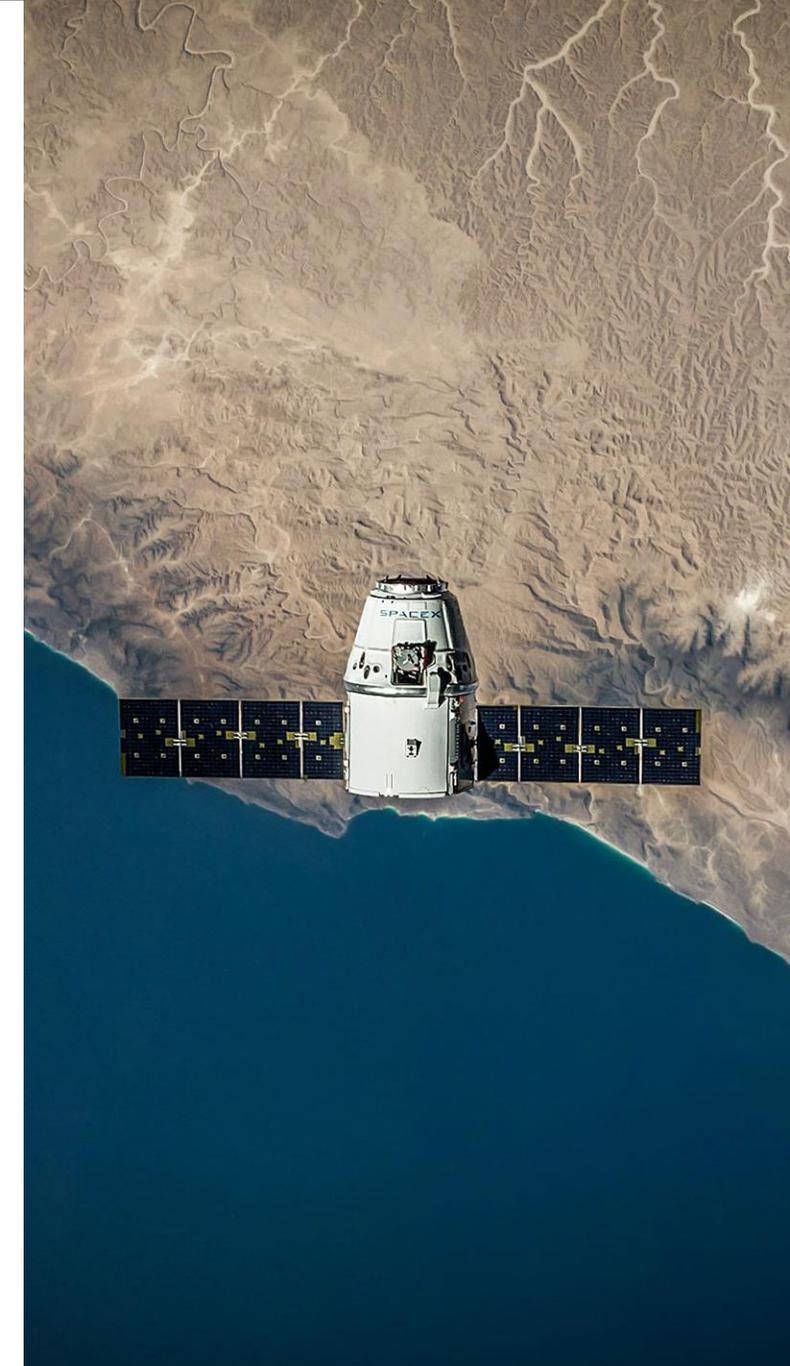
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Today's Topics

Overview of current regulatory regime

Overview of impact of the Procurement Act

**Overview of some of the key changes under the Procurement Act
(with reference to the current regulatory regime)**



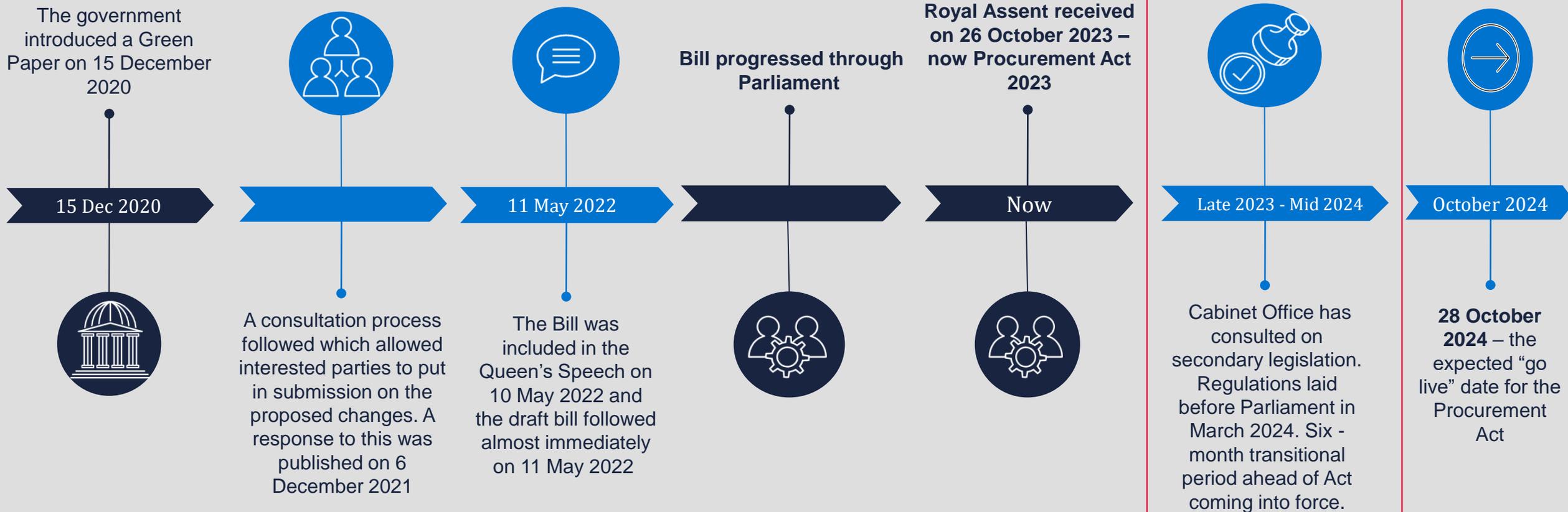
Introduction

The Procurement Act – why are we here?

- Brexit viewed as offering a “once in a lifetime opportunity” to reform the UK procurement regime
 - Simpler, more flexible commercial system
 - Remain compliant with international obligations (e.g. WTO GPA)
 - Open up public procurement to new entrants – SMEs and innovators
 - Transparency throughout the commercial lifecycle
 - Consolidation of the rules on procurement to create a single, consistent regime – reduce red tape
 - Tougher action on underperforming suppliers
 - Protecting national security
- Change in a lot of the legislative language (intentional move away from EU legislation) – may seem unfamiliar at first but much remains fundamentally the same

Timeline for the Procurement Bill/Act

166 days to go



Current regulatory regime

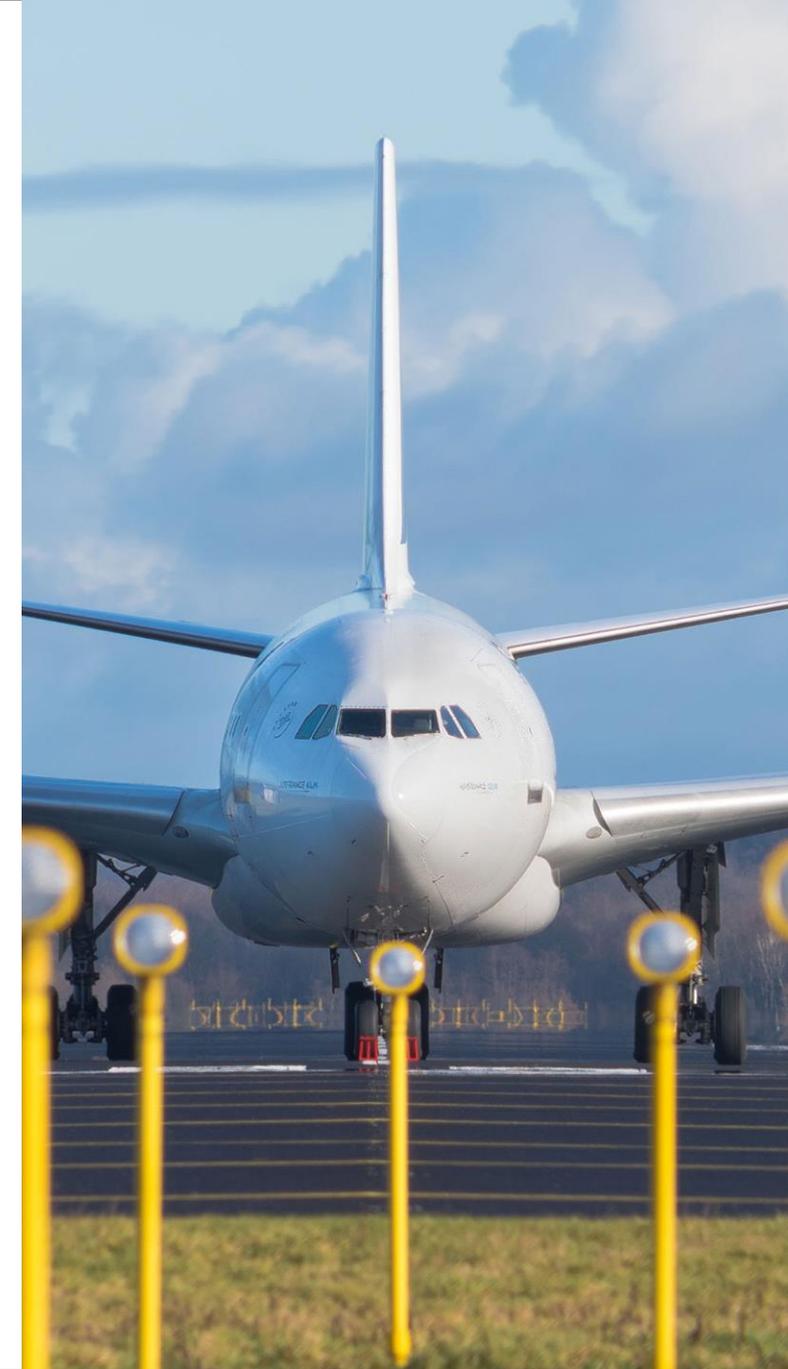
The Defence and Security Public Contracts Regulations 2011 (DSPCR)

**The Defence Reform Act 2014 (DRA)
Single Source Contract Regulations 2014 (SSCR)**



Impact of the Procurement Act

- The Act envisages that defence procurement in the UK will be overhauled
- The Defence and Security Public Contracts Regulations 2011 (DSPCR) will be repealed
- Consolidation into a single legislative framework; thereby, ensuring greater harmonisation and consistency
- Specific provisions/derogations relating to defence and security will be incorporated into such framework, and secondary sector-specific guidance will be issued
- Steps have been taken to assist with the delivery of the Defence and Security Industrial Strategy



Key Changes under the Procurement Act



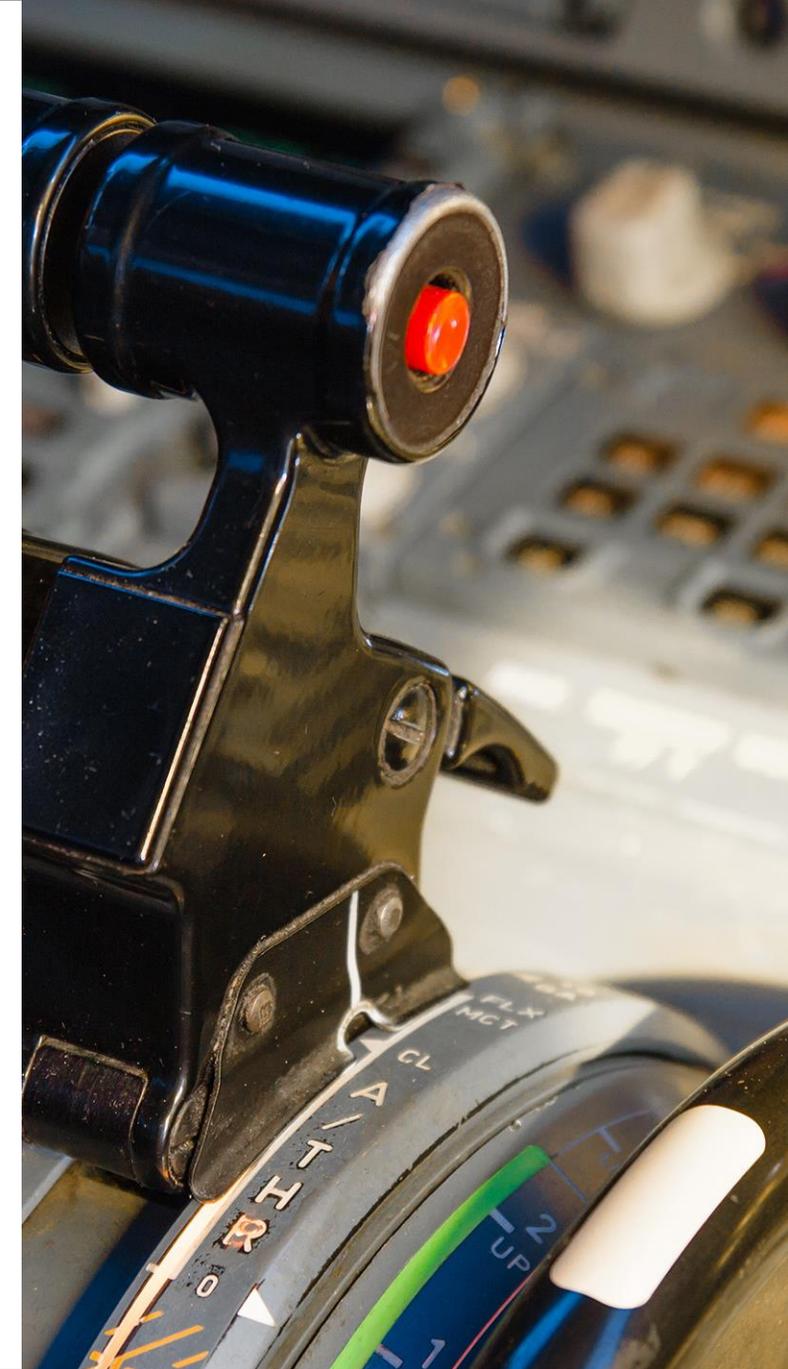
Key Changes

Territorial Extent

- The Act extends to England and Wales, Scotland and Northern Ireland
- Majority of provisions in the Act apply equally to English, Welsh and Northern Ireland contracting authorities
- Does not make provision for all public procurement in Scotland

Thresholds

- Threshold for works contracts continues to be consistent regardless of whether the contract is a defence and security contract. To be updated when the Act comes into force.
- Threshold for defence and security contracts for services is higher than for general services contracts. To be updated when the Act comes into force.



Key Changes

Application

- DSPCRs position transposed into the Procurement Act but subject to:

Further detail has however been provided which provides clarity to terms and concepts previously referred to in the DSPCRs

Wider application such that more contracts are likely to be captured by the definition of “defence and security contract”

Key Changes

Application

Regulation 6(1), DSPCRs

- (a) the supply of military equipment, including any parts, components or subassemblies of military equipment**
- (b) the supply of sensitive equipment, including any parts, components or subassemblies of sensitive equipment**
- (c) work, works, goods or services directly related to equipment referred to in sub-paragraph (a) or (b) for any and all elements of its life cycle**
- (d) work, works or services for specifically military purposes or**
- (e) sensitive work or works or sensitive services**

Clause 6(1), Procurement Act

- (a) military equipment**
- (b) sensitive equipment**
- (c) goods, services or works necessary for the development, production, maintenance or decommissioning of military equipment or sensitive equipment**
- (d) logistics services relating to military equipment or sensitive equipment**
- (e) goods, services or works for wholly military purposes**
- (f) sensitive services or sensitive works**
- (g) goods, services or works that are otherwise relevant to the operational capability, effectiveness, readiness for action, safety or security of the armed forces**

Key Changes

National Security Exemption

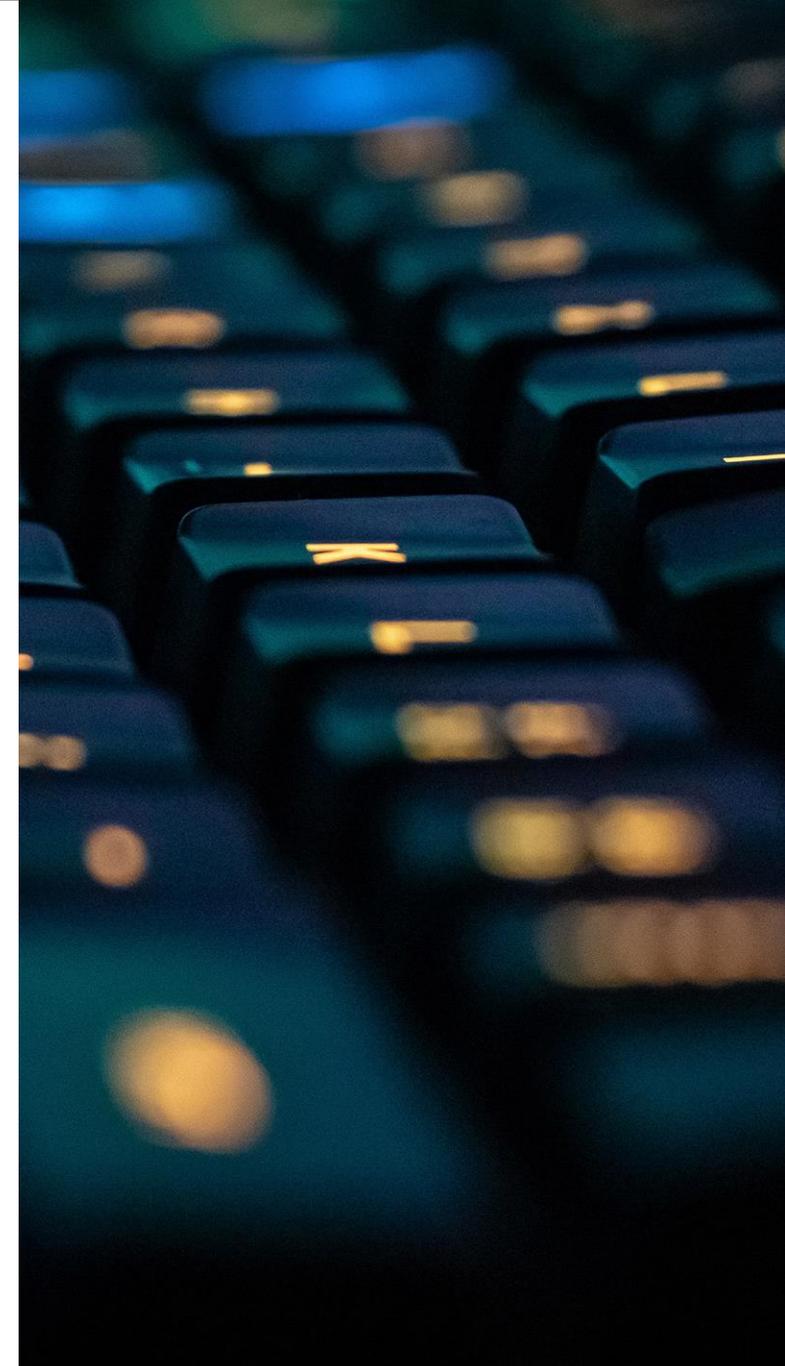
- The Act contains a wide provision to exempt a procurement from its regulation on the basis that: *“the contracting authority determines should not, in the interests of national security, be subject to this Act or a part of this Act”*
- Wide discretion afforded to contracting authorities
- Exemption is in addition to the general exemption of the Security Service, the Secret Intelligence Service and the Government Communications Headquarters from the Procurement Act



Key Changes

Exclusions

- The Procurement Act provides for a broad range of both mandatory and discretionary grounds for exclusion of suppliers from procurements
- Discretionary ground to exclude supplier from procurement process if it is determined *“that the supplier of connected person poses a threat to the national security of the United Kingdom”*
- Mandatory exclusion ground on the basis of national security if supplier is on debarment list due to being deemed to be a risk to national security
- No definition of national security provided in the Act



Key Changes

Supplier's Past Performance

- The Act contains a discretionary ground to exclude a supplier for breach of contract and poor performance. This includes if a supplier:
 - a) has not performed a relevant contract to the regulated authority's satisfaction;
 - b) was given proper opportunity to improve performance; and
 - c) failed to do so
- Previous concerns have been raised about the lack of account for suppliers' previous poor performance when awarding defence contracts
- The Public Accounts Committee has noted the lack of risk associated with underperforming under the current regime:
“suppliers understand that poor performance on one contract will not stop them winning the next”

Key Changes

Debarment List

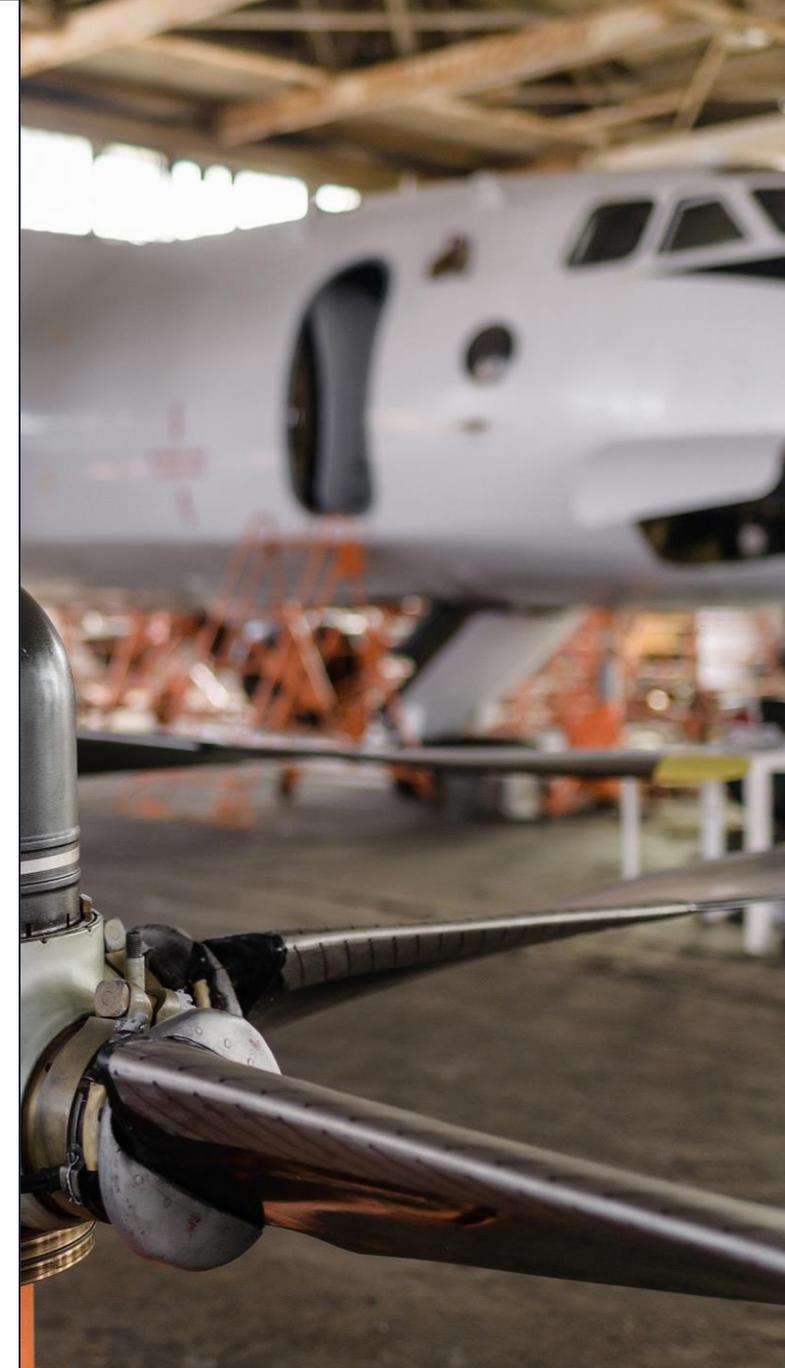
- An entirely new feature of the Act is the provision for the Government to operate a centrally-managed and published debarment list of suppliers
- Suppliers may be included on the debarment list on the basis of mandatory or discretionary grounds for exclusion
- In the event a supplier is debarred on national security grounds, the debarment list will specify the types of contracts from which the supplier is mandatorily debarred. The supplier will be free to bid for other types of contracts
- Separate process for investigation and inclusion on the debarment list



Key Changes

Termination: National Security

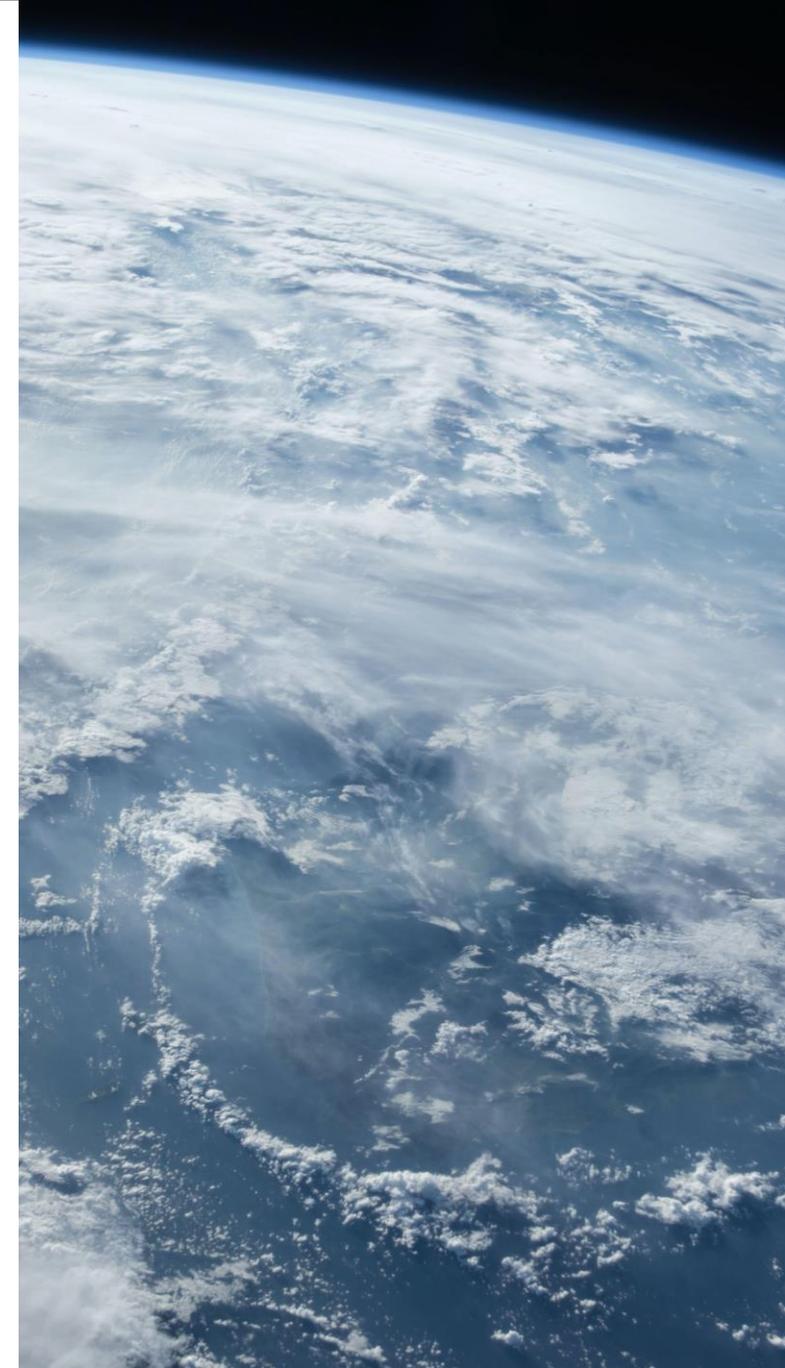
- The Act provides a new mechanism to enable the termination of a contract due to an implied right to termination in the event that there is a change in circumstances relating to the threat posed to national security



Key Changes

Procurement Procedures

- The MoD will be able to select from three procedures when running a procurement:
 - i. a competitive flexible procedure
 - ii. an open procedure for “off the shelf” competitions
 - iii. a direct award procedure
- These will replace the existing procedures: under the DSPCRs:
 - i. Restricted procedure
 - ii. Negotiated procedure
 - iii. Competitive dialogue procedure
 - iv. Negotiated procedure without prior publication



Key Changes

Framework Terms

- The Act extends the maximum duration of a “closed framework” to eight years for defence and security frameworks (from seven years under the DSPCRs)
- Increased flexibility to extend the maximum term beyond eight years if the contracting authority considers that “*the nature of the goods, services or works to be supplied... means that a longer term is required*” provided that such reasons are set out in tender or transparency notice for the framework. This replaces the “*except in exceptional circumstances*” drafting in the DSPCRs
- Introduction of “open frameworks” for all contracts – allows new suppliers to be added to the scheme across a period of up to eight years



Key Changes

Direct Awards

- The Act increases flexibility to enable award defence and security contracts directly to specific suppliers
- A Minister may directly award a public contract if:
 - a direct award justification applies, and the direct award is to a supplier that is not an excluded supplier (unless there is an *overriding public interest*) or
 - they consider it “necessary” to “(a) protect human, animal or plant life or health, or (b) protect public order or safety.”
- Defence and security-specific justifications
 - Supply of air and transport services
 - Award of a new QDC (in lieu of permissible modification)
 - Operational capability, effectiveness, readiness for action, safety or security of armed forces



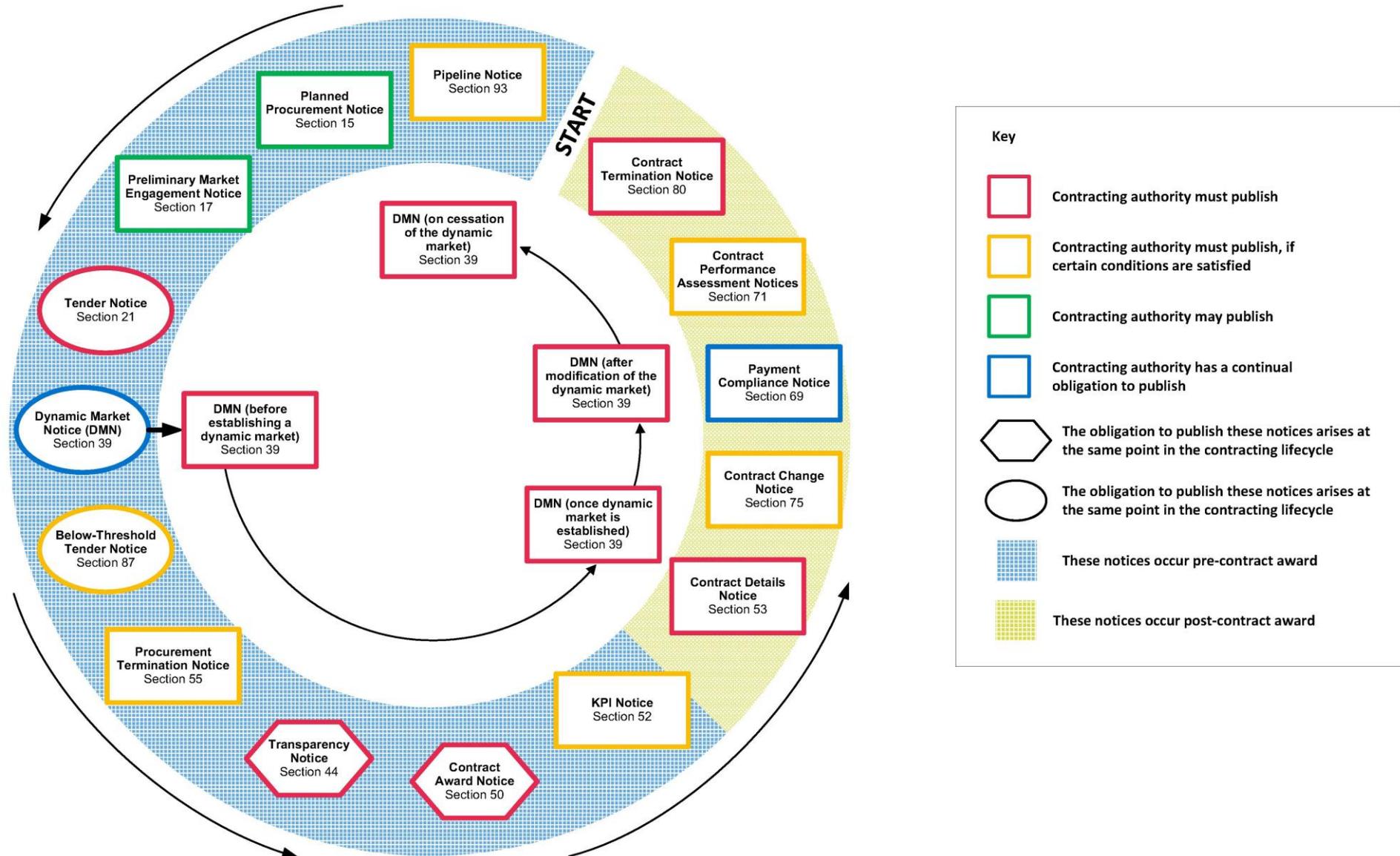
Key Changes

Transparency/Confidentiality

- Wide transparency requirements under the Act
- There is a general exemption from duties to publish or disclose information which, for example, enable a contracting authority to withhold information from publication or redact information for the purpose of safeguarding national security
- The contracting authority is required to disclose the reasons for withholding or redacting information, unless in doing so this would be contrary to national security
- There is a similar general exemption for commercially sensitive information
- There are also more specific exemptions



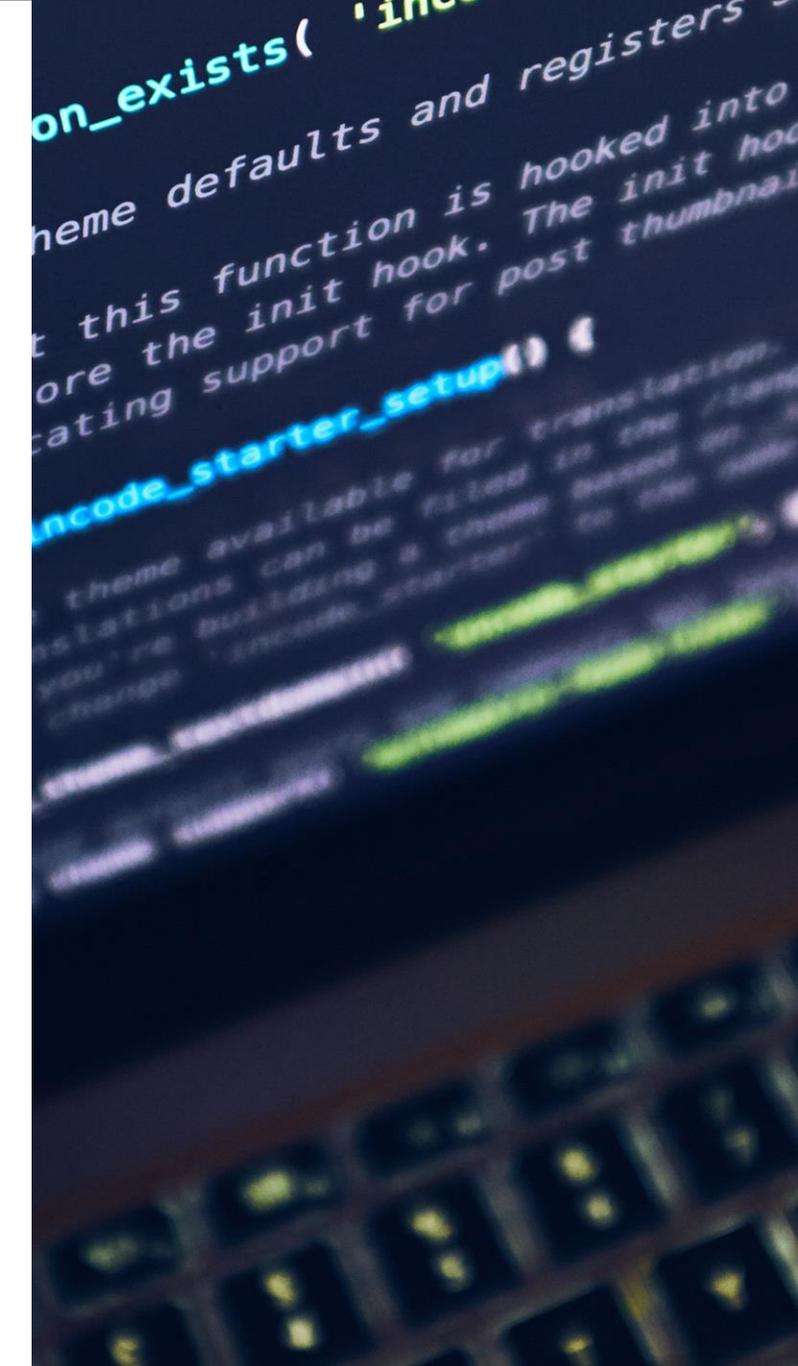
Transparency across the Contract Lifecycle



Key Changes

Contract Modifications

- The Procurement Act allows for increased flexibility relating to modifications in defence contracts
- Modifications of a defence authority contract are permitted “*where it is necessary to enable the contracting authority to –*
 - (a) Take advantage of developments in technology, or*
 - (b) Prevent or mitigate an any adverse effect of those developments”*
- Modifications are also permitted to ensure there are no gaps in the provisions of goods, works or services which could have an operational impact
- Contract change notices not required to be published in respect of defence and security contracts.



Key Changes

Other Key Changes

Key
Performance
Indicators

MAT

Standstill

Objectives

Transition to the Procurement Act

- Expected that the Procurement Act 2023 will enter into force on 28 October 2024
- Government response to consultation has begun – the Procurement Regulations (2024) were laid before Parliament at the end of March. It is expected that these regulations to become law by mid-June
- Six months transition period to the new regime has begun
- It is expected that the DSPCRs will continue to apply to procurements commenced under these rules, regardless of the new regime – as is precedent following the PCR 2006 / 2015 transition



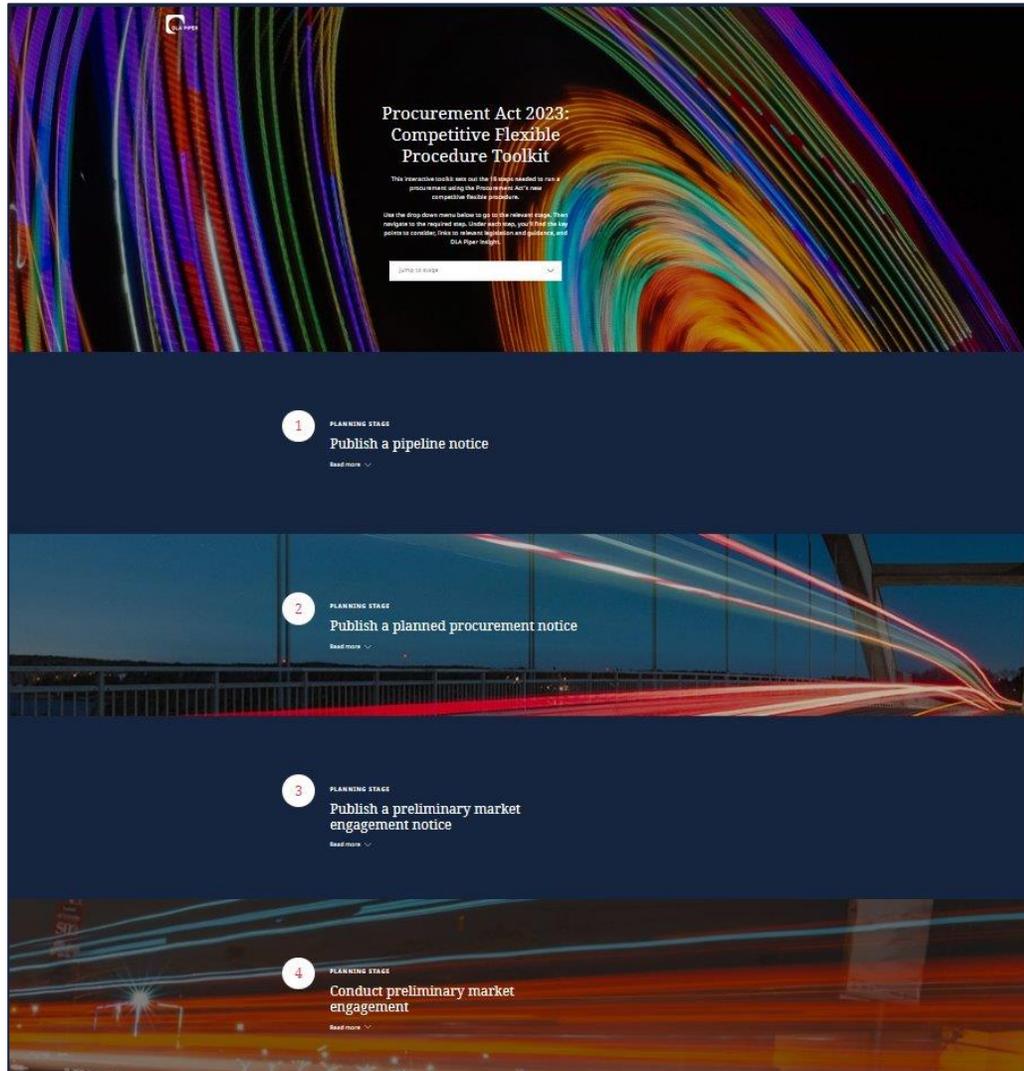
Single Source Contract Regulations: Proposed Reforms

- The Act contains a separate schedule of amendments to the single source regulatory regime, although these are a relatively minor part of the Act
- Overview of changes in the Act
 - To give the SoS powers to specify the circumstances in which an agreement to enter into new work is or is not to be treated as a new contract for the purposes of the single source regulatory regime
 - To give the SoS a power to specify when a contract is to be treated as “substantially for defence purposes”
 - Expands the definition of QDCs to include cross-Government contracts
 - Changes to the profit rate calculation
 - Increased flexibility in relation to the pricing formula to ensure a fair price is established, particularly in relation to “non-traditional” contracts
 - Increased reporting flexibility
 - Widens range of referrals to the SSRO, and powers of the SSRO

Poll

How ready do you feel for the go-live date of the Procurement Act?

Procurement Act 2023: Competitive Flexible Procedure Toolkit



Scan the QR code to visit our new
Competitive Flexible Procedure
Toolkit:



UK Public Procurement Reform Hub

United Kingdom | EN-GB

UK Public Procurement Reform

The Procurement Bill

The Procurement Act sets much of UK public procurement on a new path. Public bodies (including defence) and utilities will have greater flexibility buying goods, works and services. To help them and suppliers prepare, this page brings together our expert analysis and insight.

HOME | TIMELINE | ABOUT | CONTACT

Introducing our new Competitive Flexible Procedure Toolkit

PSR regulations coming into force from 1 January 2024

The New Procurement Act 2023 Exclusion and debarment of suppliers: What's new?

The UK Procurement Bill - An Overview

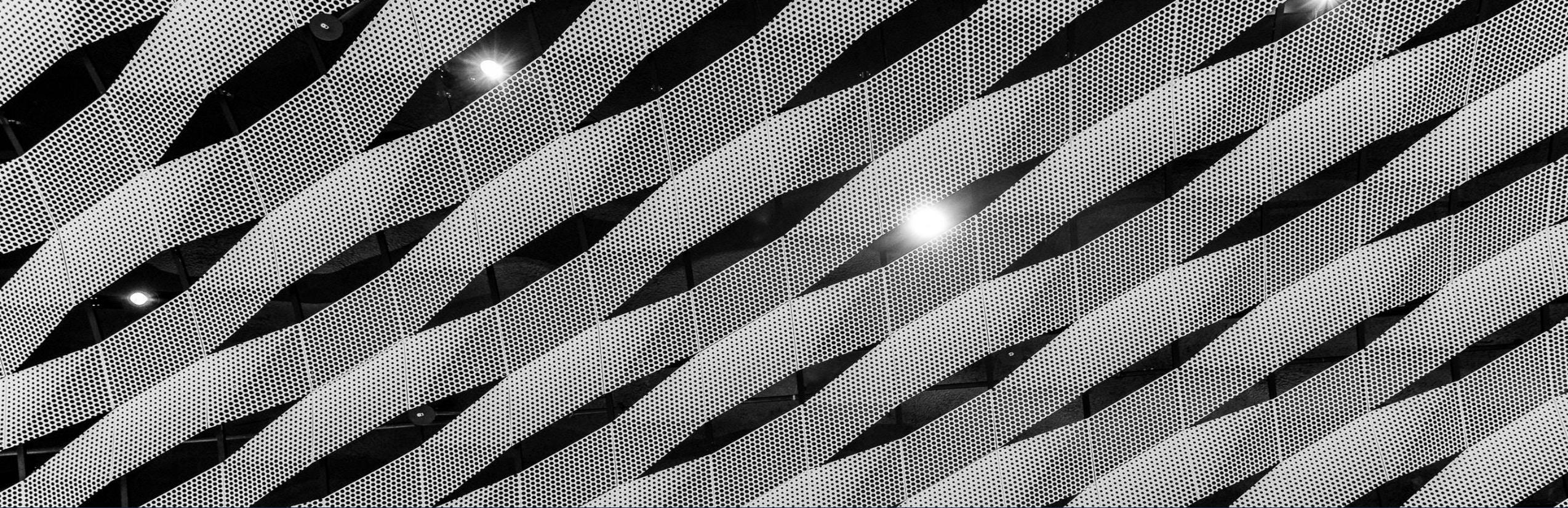
Timeline

The Procurement Bill

- December 2020
- December 2021
- May 2022
- December 2022
- June 2023
- July/August 2023
- October 2023
- 1 April 2024
- 1 October 2024

Scan the QR code to visit our dedicated Procurement Reform Hub for the latest insights including webinar replays and blogs.





Upcoming Webinars

- Exclusions and Debarment
- Regulations and Guidance

Questions?



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**Please get in contact if you have any queries regarding
Defence Contracting and Procurement**

Thank you

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