

Defence Procurement in the UK

Application of the Procurement Act 2023



Contents





What do defence contractors need to know about the PA23?

The Procurement Act 2023 (the **PA23**) which now governs the procurement of defence and security contracts and introduces specific flexibilities for the award of these contracts.

The PA23 replaces the Defence and Security Public Contracts Regulations 2011 (the **DSPCR**), which had implemented in the UK the EU's defence procurement directive (Directive 2009/81/EC). The PA23 also provides for changes to the separate Single Source Contracts Regulations 2014 (the SSCR).

The PA23 and amended SSCR provide the legal framework for the award of defence contracts in the UK.

In this Expert Guide we outline how this new regime applies to UK defence procurement and the key changes to the legal framework as it was before.



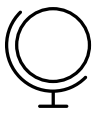
UK ambitions for increasing defence procurement

The reforms introduced by the PA23 will be key to the delivery of the UK Government's ambitions for increasing the scale and pace of defence procurement. These ambitions have been set out following the UK Government's recent Strategic Defence Review (the **SDR**) and adoption of a new Defence Industrial Strategy.

Whilst many public sector budgets remain restrained, the UK Government has made commitments to increasing core defence spending to spend 2.5% of GDP by 2027 and has pledged to meet the new NATO target to spend 5% of GDP on national security by 2035.

Initiatives are underway to reform defence procurement practices and to develop deeper partnerships with industry and supply chains. This new "industrial partnership" is intended to build on the Ministry of Defence's current Integrated Procurement Model and changes to the Defence Equipment & Support Operating Model. The SDR has advocated a segmented approach, increasing the range of suppliers by tailoring processes and timelines to the type of acquisition, supplier and risk involved. This would involve moving away from the customer-vendor relationships and creating conditions under which high-IP companies can scale and grow. This envisages new major modular platforms for the procurement of tanks, frigates and aircraft, with competition only where deemed appropriate and to get to contract within two years rather than the current average of six years. More competitive procurements are envisaged for communications systems, sensors and weapons allowing for modular upgrades supported by common digital architecture and platform requirements. There is also an increased emphasis on technology and rapid commercial exploitation using scalable contracts, with at least 10% of the MOD's equipment procurement budget to be spent on novel technologies each year.

In order to deliver on these ambitions, careful thought will need to be given to how these initiatives can be structured within the new processes and procedures provided for in the PA23 and the amended SSCRs, leveraging the flexibilities they have introduced to ensure these procurements are planned and executed effectively.



Coverage and scope

Overview

The PA23 introduces a number of key changes to be aware of, including new provisions regarding transparency requirements, publication of notices, expanded exclusion, debarment rules, and rules governing debriefing and standstill.

Although the PA23 largely reflects the basic provisions in the existing legislation around competitive tendering of contracts, it also builds on the recent reforms introduced to the Single Source Contract Regulations 2014 (**SSCR**) and amends provisions in the Defence Reform Act 2014 (**DRA**) which sets out the regulatory framework for single source defence contracts. Schedule 10 of the Act lists the amendments to the DRA including changes to the definition and pricing of a qualifying defence contract (**QDCs**) and how those rules are to be applied to qualifying defence sub-contracts (**QSCs**).

The new regime has broadened the scope of what falls within a “defence and security contract”. The defence and security provisions in the PA23 apply to these types of public contracts, where (a) the estimated value of the contract exceeds the threshold for defence and security contracts; and (b) the contract is not an exempted contract. The PA23 defines defence and security contracts as a contract for the supply of:

- military equipment;
- sensitive equipment;
- goods, services or works necessary for the development, production, maintenance or decommissioning of military equipment or sensitive equipment;
- logistics services relating to military equipment or sensitive equipment;
- goods, services or works for wholly military purposes;
- sensitive services or sensitive works;
- goods, services or works that are otherwise relevant to the operational capability, effectiveness, readiness for action, safety or security of the armed forces.

Exemptions for defence and security contracts

Schedule 2 of the PA23 sets out the types of defence and security contracts which are exempt. There are specific exemptions that apply to defence and security contracts and others which apply to all types of contracts, but may be particularly relevant to contracts in the defence sector.

The main exemptions for defence and security contracts are where:

- contracts are between a contracting authority and the government of another state or territory, where the authority procures directly from that government;
- the supplier is located in an area outside the UK where the armed forces are deployed and operational needs require the contract to be awarded to that supplier;
- the supplier is located in a state or territory outside the UK in which the armed forces maintain a military presence, that state or territory requires that the supplier delivers the goods, services or works to which the contract relates;
- contracts are awarded under a procedure adopted by an international organisation of which the UK is a member, e.g. NATO or OCCAR; and
- contracts are awarded under international arrangements to jointly develop or exploit new products.



Defence and security contracts can also be treated as exempt due to the subject matter of the specific contract. For instance, contracts may be exempt if they relate to:

- national security interests;
- the procurement of research and development services; and
- stationing of military personnel which a contracting authority is obliged to award in accordance with international agreements.

More limited transparency and noticing requirements for defence and security contracts

There are also more limited transparency and noticing requirements for those defence and security contracts that are not exempt:

- there is no requirement on an authority to publish a contract award notice before entering into a defence and security call-off contract awarded under a defence and security framework;
- there is no requirement on an authority to publish a contract change notice before modifying a contract that is a defence and security contract; and
- there is no requirement for an authority to keep records explaining material decisions taken in respect of a defence and security contract (although it is sensible for them to do so).

Additional flexibilities for “defence authority contracts”

The PA23 includes a special category of defence and security contract called a “defence authority contract”, to which certain direct award justifications and permitted contract modifications apply.

The following contracting authorities are currently classed as a “defence authorities” under the PA23: the Secretary of State for Defence (MOD); AWE plc; the National Crime Agency; and the Oil and Pipelines Agency. The PA23 provides that these authorities can:

- directly award defence and security contracts where necessary to enhance or maintain the operational capability, effectiveness, readiness for action, safety, or security of the armed forces (other new grounds for direct award in the defence sector are listed below); and
- take advantage of additional permitted modification grounds, meaning contract modifications are permitted where necessary to:
 - i. advance developments in technology; or
 - ii. mitigate adverse effects of developments in technology; or
 - iii. to ensure the ability of the Armed Forces to maintain their operational capabilities, effectiveness, readiness for action, safety, security or logistical capabilities, and the modification is necessary to ensure there is a continuous supply of those goods, services or works.

There is also another flexibility offered specifically to the MOD (not the other defence authorities). While the MOD has a statutory duty to have regard to the NPPS, the NPPS makes clear that its strategic priorities on social value do not apply to the exercise of procurement functions by the MOD for defence and security contracts.





Contracts covered by the new regime

New transparency requirements (publication of notices)

Transparency was a key principle under the previous rules. While the principle is not explicitly mentioned in the principles and objectives part of the PA23, there are a number of new requirements as regards the publication of notices. This includes a number of additional forms of notice.

Generally, the transparency and noticing requirements apply to defence and security contracts as they apply to all other types of contracts/procurement under the PA23.

There are only a handful of specific exceptions (see above).

There is also an exemption from the duty to publish or disclose information if the authority is satisfied that withholding the information is necessary for the purpose of safeguarding national security.

Simplified and more flexible contract award procedures

Under the DSPCR, contracting authorities could apply one of four award procedures (restricted, negotiated, competitive dialogue and negotiated procedure without prior publication of a contract notice). Where a defence procurement fell outside the scope of the DSPCR and was governed by the regular public sector rules, contracting authorities can apply six award procedures (open, restricted, negotiated procedure with prior call for competition, innovation partnership, competitive dialogue, and negotiated procedure without prior publication).

Under the new regime, contracting authorities will be able to select from one of three award procedures (open, competitive flexible procedure, and direct award). An important feature of the new regime for contracting authorities will be redesigning their procurement procedures to accommodate both the single-stage (open) procedure and the new look two-stage competitive (flexible) procedure. Both procedures should provide opportunities for contracting authorities to better design and run their tender processes.





Grounds for direct awards

The familiar grounds for direct awards (i.e., awards without any form of open competitive tendering) from the previous regime are generally replicated within the PA23.

There are new direct award justifications that specifically relate to certain contracts in the defence sector. These are:

- where the contract is a defence and security contract and is for the supply of air or maritime transport services to the armed forces or security services while they are deployed outside the UK or in order for them to be deployed outside the UK. The nature of the services must be such that a reasonable supplier would not be able to guarantee its offer for 10 days;
- where, in certain circumstances, it is more appropriate to directly award a new public contract rather than amend an existing contract. This justification can only be used where the new contract would be a QDC under the DRA14. This is to deal with contracts which were originally competitively awarded, but are in effect being amended using a separate contract to allow the SSCRs to apply to the amended part of the contract; and
- where the contract is a specific type of defence authority contract, and it is necessary for the contract to be directly awarded in order to enhance or maintain the operational capability, effectiveness, readiness for action, safety or security of the armed forces.

In general, a contract cannot be awarded directly to a supplier who is an “excluded supplier”. However, provided one of the direct award justifications apply, then a contracting authority can directly award a contract to a supplier that is an excluded supplier if the authority considers there is an “overriding public interest” in awarding to that supplier.

The PA23 provides that this will be the case if, ‘it is necessary in order to ensure the proper functioning of a sector on which the defence, security or economic stability of the UK relies’, or failure to do so would ‘prejudice the conduct of military or security operations, or the effective operation of the armed forces or intelligence services’.

Direct awards can also be made where necessary to protect life or public safety during an emergency situation, even where the circumstances leading to that situation could be regarded as foreseeable. This seems intended to enable contracting authorities to respond to extreme situations similar to those which arose during the COVID-19 pandemic.

In addition, there will be increased transparency around direct awards. Before a contract can be entered into, contracting authorities will, in many cases, need to publish a transparency notice and a contract award notice, as well as observing the new eight-working day standstill period from the publication of the contract award notice.



Framework agreements

The PA23 introduces the concepts of **closed** and **open frameworks**.

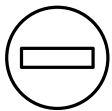
Closed frameworks are essentially frameworks as they operated under the previous rules. The maximum term of a defence and security framework will be eight years, rather than seven years under the DSPCR. A longer term is permitted where an authority considers there is a justification by reference to the nature of the goods, works or services to be supplied under call-off contracts.

Open frameworks are entirely new. They provide for “the award of successive frameworks on substantially the same terms”. Key features of these new open frameworks will be the requirement to “re-open” the framework at certain points during their maximum eight-year term (at least every three to five years). Careful thought should be given to setting these up and managing these re-openers, at which point commercial and contract terms can be amended and suppliers swapped in and out based on a re-evaluation exercise.



New dynamic markets

The PA23 also introduces a new commercial tool intended to replace both dynamic purchasing systems, which are commonly used by the public sector for purchasing certain types of goods and services, and qualification systems, which are commonly used for utilities procurement.



Exclusion grounds and debarment

One of the major new changes is the introduction of a public procurement debarment list; a centrally maintained list which categorises suppliers as “excluded” or as “excludable”. Generally, contracting authorities must prohibit excluded suppliers from competing for contracts and may disregard tenders from excludable suppliers. However, contracting authorities will be permitted to directly award contracts to an excluded supplier in special cases relevant to the defence sector, as explained above.

The new debarment regime is linked to a new more expanded exclusion regime. The exclusion grounds under the new rules are not dissimilar from those under the previous rules. However, additional offences such as cartel participation and corporate manslaughter will now also give rise to mandatory exclusion grounds. There are also new discretionary exclusion grounds for improper behaviour in relation to a procurement, environmental misconduct, breach of contract and poor contractual performance, and threats to national security.



Debriefing and standstill

Significant changes have been made to the debriefing, standstill and contract award rules. Contracting authorities will be required to provide an “assessment summary” to each tenderer providing information about the assessment of their tender and (if different) the most advantageous tender.

The assessment summary generally functions in the same way as what was previously referred to as a “standstill letter”, except that providing an assessment summary does not start the standstill period. The information to be included in the assessment summary is set out in secondary legislation. This includes the scores of the tenderer to whom the letter is addressed and, if different, the scores of the most advantageous tender, together with an explanation for those scores by reference to the tenders submitted and the evaluation criteria. There will no longer be any requirement to provide the “characteristics and relative advantages” of the winning tenderer.

Under the PA23, Contracting authorities must publish a “contract award notice” and a “contract details notice”. It will be important to distinguish clearly between these two types of notices to prevent any confusion with the previous rules. Contracting authorities must publish a contract award notice before entering into the contract and before publishing the contract award notice and must provide an assessment summary to each supplier that submitted an assessed tender. It will therefore be important to consider the sequencing of both the assessment summaries and the contract award notice, which now triggers the new eight-working day standstill period. The contract details notice is what was previously referred to as the contract award notice and must be published within 30 calendar days of the contract being entered into.



Challenges and remedies

The position on both pre-contractual remedies and post-contractual remedies remains largely unchanged. The PA23 provides previous rules governing the remedies available when challenging a modification to an existing contract and also provides for a more specific statutory test for lifting of the automatic suspension where legal proceedings are commenced during the standstill period. The strict limitation periods under the previous rules continue to apply, with proceedings having to be commenced within 30 calendar days of deemed awareness of the circumstances giving rise to the claim. There are also a number of changes in terminology to be aware of. For example, the grounds for seeking “declarations of ineffectiveness” will be now termed “set aside conditions”.

The PA23 also introduced a new authority within the Cabinet Office titled the Procurement Review Unit (the **PRU**) which has certain oversight, investigation and enforcement powers in relation to public sector procurement activities.



Contract management

Part 4 of the PA23 contains a series of provisions on the management of public contracts. These provisions include:

- terms to be implied into public contracts (electronic invoicing, payment terms including terms to be flowed down into sub-contracts, and termination rights);
- assessment of contract performance where authorities are required to set KPIs into public contracts;
- rules on sub-contracting; and
- revised provisions on permitted modifications to public contracts.

The PA23 introduces a new mechanism which enables contracts to be terminated for national security reasons. The PA23 also allows an authority to terminate a contract on the basis of an implied termination right where there is a change in circumstances with reference to the mandatory or discretionary exclusion ground relating to a threat to national security. Where a contracting authority intends to terminate a contract using this implied term, it must first notify a Minister of the Crown and, in certain circumstances, receive the Minister's approval to terminate.

Generally, the approach to modifying contracts remains the same as under the PCRs, i.e., contracts can only be modified without a new procurement procedure in a certain defined sets of circumstances. Defence authorities are given additional flexibility to modify contracts.

However, one key change under the PA23 is that there will generally be more transparency around contract changes. In many circumstances authorities will be required to publish a contract change notice, stating that they intend to modify the contract, and a copy of the amended contract. Importantly, authorities modifying a defence and security contract will not have to comply with these requirements.



Transitional arrangements

The Cabinet Office has published guidance for transitional arrangements. The guidance sets out how the changeover from the previous legislation to the PA23 should be managed and effected by authorities, confirming the position that has been trailed by the Cabinet Office over the last few months.

Key points to note are as follows:

- procurements commenced on or after 24 February 2025 will be governed by the PA23;
- procurements commenced before 24 February 2025 will continue to be governed by the previous sets of regulations until the contract ends (note this will also extend to the modification of any such contract, even where the modification is made after 24 February 2025); and
- similarly, framework agreements, dynamic purchasing systems and qualification systems that have been established under the previous sets of regulations will continue to be governed by those until such time as they expire or are discontinued with a sunset provision being applied to them at the end of February 2029 (four years after the PA23 comes into effect).



Reforms to the Single Source Contracts Regulations

Schedule 10 of the PA23 makes provision for significant reforms to the Single Source Contract Regulations 2014 (the **SSCRs**), which it does via Part 2 of the Defence Reform Act 2014 (the **DRA**).

Part 2 of the DRA created a framework for regulating single source contracts, with the detail being set out in the SSCRs. The SSCRs have a different purpose to the PA23 rules on the award of defence and security contracts.

The SSCRs are engaged when a defence contract is awarded with a value above a threshold specified in the SSCRs (currently £5 million) without any competition, unless one or more of the specific exclusions set out in the SSCRs apply. These contracts are known as qualifying defence contracts (**QDCs**), with non-competitive sub-contracts made in connection with them and above a specified value threshold known as qualifying sub-contracts (**QSCs**).

The DRA does not specify whether a contract should be competed. Where a contract is not competed and the SSCRs are engaged, they make specific provision for the pricing of QDCs and QSCs with a view to being able to demonstrate value for money. The DRA also make provision for transparency and record-keeping requirements, from the beginning of a qualifying contract through to its completion and include provisions on the variation of such contracts. The DRA also creates the Single Source Regulations Office (the **SSRO**) which issues guidance on the application of the regime and adjudicates between the MOD and contractors.

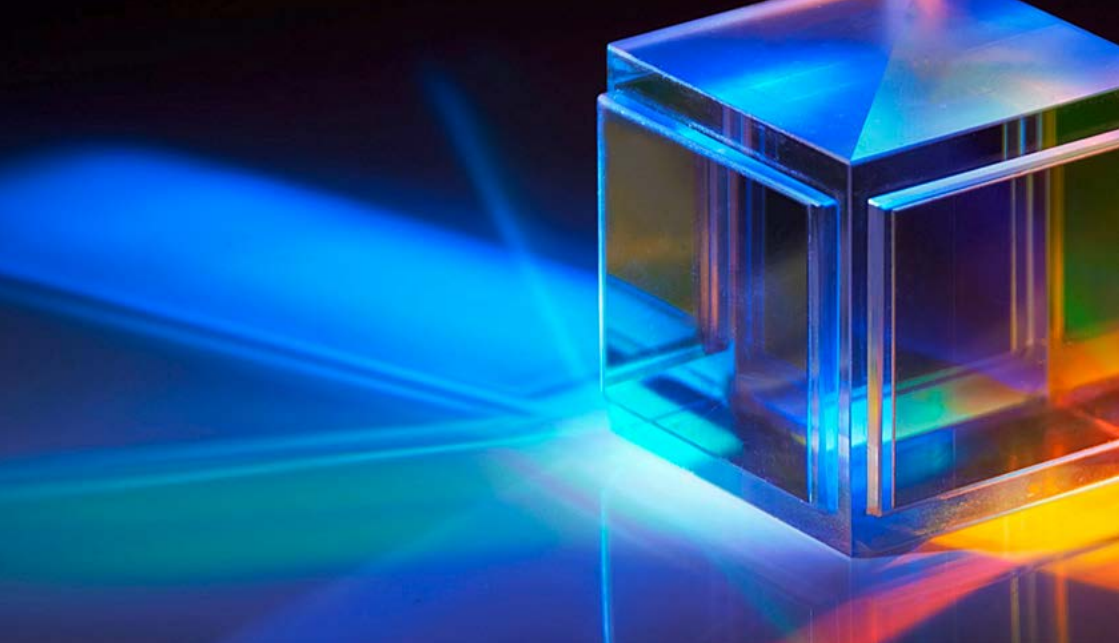
The reforms to the SSCRs were effective from 1 April 2024. The key changes aim to provide more choice and flexibility both for the procuring bodies and the contractors, to speed up and simplify the application of the framework, and to stimulate innovation. This includes the introduction of alternative pricing mechanisms, enabling componentisation of contracts, widening the definition of a QDCs, and simplifying processes for calculating profit rates.



Useful links

- [Cabinet Office Guidance on Defence and Security Contracts](#)
- [The Procurement Act 2023](#)
- [The Procurement Regulations 2024](#)
- [Defence Reform Act 2014](#)
- [The Single Source Contract Regulations 2014](#)
- [Strategic Defence Review 2025 – Making Britain Safer: secure at home, strong abroad](#)
- [Defence Industrial Strategy 2025 - Making Defence an Engine for Growth](#)
- [Cabinet Office Guidance Documents](#)
- [Single Source Regulations Office](#)
- [House of Commons Research Briefing on the Single Source Contract Regulations](#)

You can also find more information on our [Procurement Cube](#).



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We provide proactive solutions, guiding our clients through critical decisions and helping them mitigate risks in a rapidly changing global environment. including on both competitive procurement processes and on single sourcing. This includes advising on variations to contracts, direct awards, the application of PA23 and the SSCRs and where necessary on pursuing legal challenges to contract award decisions or the unlawful variation or extension of existing contracts.

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