Application of the Procurement Act 2023 to the Energy & Utilities Sector

The Procurement Act 2023 repeals the current set of rules governing utilities procurement in the UK. Other than for utilities operating solely in Scotland and not in reserved areas, all UK utilities procurement will now be governed by the new regime. This new regime enters into force from 24 February 2025.

Key issues to be aware of include the extent of coverage of the new regime to both public and private sector utilities, new provisions regarding forms of notices, new award procedures (including the use of frameworks and dynamic marketplaces), expanded exclusion and debarment rules and new rules governing debriefing and standstill.

Coverage and scope

The Act repeals the Utilities Contracts Regulations 2016 ("**UCRs**"). Once the Act enters into force later this year, the new regime will apply to the procurement of a 'utilities contract', which is defined as a contract that relates to a 'utility activity'.

A 'utility activity' is defined broadly to reflect the current position under the UCRs. Part 1 of Schedule 4 of the Act sets out a list of activities that are deemed utility activities. These largely replicate the activities under the UCRs. Part 2 then goes on to list certain activities within that list that are excluded, effectively reflecting the exclusions as recognised currently by the European Commission under the EU Utilities Directive 2014/25/EU.

The activities listed in Part 1 of Schedule 4 are the following:

— gas and heat;

— electricity;

— water;

— transport;

— ports and airports; and

— extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels.

Part 2 of Schedule 4 then applies the existing exclusions covering:

— electricity generation and production in England, Scotland or Wales;

— wholesale or retail sale (supply) of electricity in England, Scotland or Wales;

— wholesale or retail sale (supply) of gas in England, Scotland or Wales;

— exploration for or production of oil or natural gas in England, Scotland or Wales; and

— development of infrastructure for the production of oil or natural gas in England, Scotland or Wales.

Accordingly, in the energy sector the rules continue to apply largely to the incumbent energy network businesses and the rules do not apply at all to upstream oil and gas activities in Great Britain.

Coverage of the other utilities activities also remains largely unchanged. Heat networks that are connected to the main energy networks are also caught unless the supply to the network is ancillary to the main purpose of the heat network (with threshold tests set out in the Act and to be elaborated on in secondary legislation). The application to the water sector is also largely unchanged, though perhaps with more scope for exemptions to be applied. As a result of certain rules on transport not being carried over as retained EU law, the Act appears to provide for a more 'open-ended' list of transport services. Whilst the Act refers to the activity of the provision or operation of a network for the provision of public transport services by rail, tram and bus, it also refers to 'other means' of public transport.

Application to utilities in Scotland

The Act applies to the UK but does not seek to amend the separate public sector procurement rules applying in Scotland under devolved legislation. That said, it does have specific implications as regards the relevant rules under which certain utilities will now be required to conduct their procurement activities. Section 2 of the Act excludes 'devolved Scottish authorities'. These are defined as authorities having functions that are 'exercisable only in or as regards Scotland', and none of which relate to reserved matters or some of which do and some of which do not. Section 2(7) then similarly provides that an authority that is a public undertaking or a private utility is to be treated as devolved Scottish authority if it 'operates only in or as regards Scotland', and where either none of its activities relate to reserved matters or some do and some do not.

The implications of this are that utilities with functions solely related to reserved matters (as defined in the Scotland Act 1998, for example energy and certain transport functions and most ports and airports) will now be subject to the Act and not to the current utilities procurement legislation applying in Scotland (the Utilities Contracts (Scotland) Regulations 2016, as amended).

It is also important to note that where a utility is a devolved Scottish authority, but carries out a procurement under a 'reserved procurement arrangement', such as a call-off from a framework or utilities dynamic market that has been established under the Act, then some of the rules in the Act will apply to that procurement.

Exceptions for private utilities

The Act introduces the concept of a 'private utility'. Although this is a new term, it simply distinguishes entities who are not public bodies but who are carrying out a utility activity pursuant to a 'special or exclusive' right as were previously covered under the UCRs.

The way the Act works is that certain rules do not apply to private utilities (by way of exception). The main exceptions private utilities should be aware of are as follows:

— there is no need to have regard to the National Procurement Policy Statement;

— there is no maximum term on frameworks, which means that they can extend beyond the standard eight-year limit that otherwise applies to utilities frameworks;

— there is greater discretion when it comes to dealing with "excluded suppliers";

— there are specific exceptions regarding publication of certain notices (see below);

— there is no requirement to specify or assess performance against KPIs;

— the implied payment terms do not apply to contacts procured by private utilities; and

— there is no requirement to publish redacted copies of awarded contracts valued over £5 million.

New transparency requirements (publication of notices)

Transparency was a key principle under the UCRs. While the principle is not explicitly mentioned in the principles and objectives part of the Act, there are a number of new requirements in the Act as regards the publication of notices. This includes a number of additional forms of notice. While the requirement to publish these applies to all public sector utilities (other than for below-threshold tender notices) there a number of exceptions for private utilities, which are exempt from having to publish:

- preliminary market engagement notices;
- annual pipeline notices;
- contract details notices (though much of the detail will be provided for in the new contract award notice);
- below-threshold tender notices (noting that all utilities contracts are exempt from the rules on below-threshold contracts);
- contract change notices;
- contract performance notices;
- payment compliance notices;
- contract termination notices;
- procurement termination notices; and
- cessation of a dynamic market notices.

Simplified and more flexible contract award procedures

Under the UCRs, utilities can apply six award procedures (open, restricted, negotiated procedure with prior call for competition, innovation partnership, competitive dialogue, and negotiated procedure without prior call for competition).

Under the new regime, utilities will be able to select from three award procedures (open, competitive flexible procedure, and direct award). Utilities are used to operating under the negotiated procedure, which is likely to be seen as similar to the new competitive flexible procedure. An important feature of the new regime for utilities 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 utilities to better design and run their tender processes.

Grounds for direct awards are largely unchanged

The existing grounds for direct awards (i.e., awards without any form of open competitive tendering) are generally replicated within the Act. In addition, direct awards can now 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 utilities to respond to extreme situations similar to those which arose during the COVID-19 pandemic.

For utilities who are public bodies, there will be increased transparency around direct awards. When making direct awards under the new regime, utilities who are public bodies will in many cases have to publish a transparency notice and a contract award notice and observe the new eight-working day standstill period from the publication of the contract award notice before the contract can be entered into. In comparison, private utilities will have to publish a transparency notice and contract award notice before entering into the contract, but are not required to observe the standstill period.

A more flexible approach to framework agreements

The Act introduces the concepts of "closed" and "open" frameworks. Closed frameworks are essentially frameworks as we know them under the current rules (with the additional flexibility now for private utilities to have frameworks longer than eight years).

Open frameworks are entirely new. They are defined as a '*scheme of frameworks that 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 will need to 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, replacing qualification systems

The Act introduces a new commercial tool intended to replace qualification systems, which are commonly used for utilities procurement. The provisions for utilities dynamic markets allow utilities to limit participation in competitive flexible procedures to suppliers that are registered on the market. Suppliers are able to apply to be admitted to the market at any time and utilities can then shortlist suppliers to be invited to tender by issuing tender notices to the eligible suppliers on the relevant dynamic market. For utilities dynamic markets, fees can only be charged in connection with obtaining and maintaining membership of the market (for other public sector dynamic markets fees can only be charged to suppliers that are awarded a contract under a dynamic market and not for membership).

New provisions on exclusion grounds and debarment

One of the major new changes is the introduction of a public procurement debarment list. This is a centrally maintained list which categorises suppliers as 'excluded' or as 'excludable'. Contracting authorities **must** prohibit excluded suppliers from competing for contracts and **may** disregard tenders from excludable suppliers. However, private utilities are only required to consider an excluded supplier as an excludable supplier, so retain a discretion rather than a duty to exclude.

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 in the UCRs. However, additional offences like cartel participation and corporate manslaughter 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.

New provisions on debriefing and standstill

There are significant changes to the debriefing, standstill and contract award rules. Utilities 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 is currently known 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 (The Procurement Regulations 2024, regulation 31). 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 is no longer any requirement to provide the 'characteristics and relative advantages' of the winning tenderer.

Under the Act, authorities must publish a 'contract award notice' and a 'contract details notice'. It is important to distinguish clearly between these two types of notices to prevent any confusion with the current rules. Authorities must publish a contract award notice before entering into the contract and before publishing the contract award notice must provide an assessment summary to each supplier that submitted an assessed tender. It is therefore important to consider the sequencing of the issuing 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 we currently think of as the contract award notice and has to be published within 30 calendar days after a contract has been entered into. As already explained, there is an exception for private utilities who do not have to publish a contract details notice, only a specific form of contract award notice.

Position on remedies largely unchanged

The position on both pre-contractual remedies and post-contractual remedies remains largely unchanged. The Act provides clearer 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 current rules continue to apply, with proceedings having to be commenced within 30 calendar days of being deemed to have been aware of the circumstances giving rise to the claim. There are also a number of changes to terminology that may be confusing to those familiar with the current remedies regime. For example, the grounds for seeking 'declarations of ineffectiveness' now being termed 'set aside conditions'.

While the Act creates a new authority within the Cabinet Office that will have certain investigation and enforcement powers in relation to public sector procurement activities, the new Procurement Review Unit (the "**PRU**") does not have any powers to investigate private utilities' procurements.

New provisions on contract management (post-award)

Part 4 of the Act 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.

While these provisions apply equally to public sector utilities they are of limited application to private utilities: the provisions on electronic invoicing and implied payment terms, assessment of contract performance and sub-contracting do not apply to utilities contracts awarded by private utilities.

Generally, the approach to modifying contracts remains the same as that under the UCRs, i.e., contracts can only be modified without a new procurement procedure in a certain exhaustive set of circumstances. However, a key change from the current regime is that authorities will now have to publish:

— a 'contract change notice' setting out that they intend to modify the contract; and

— they will have to publish the amended contract (where the relevant thresholds for publication are met).

For private utilities, there is an exception to this, and they will **not** have to meet either of these transparency 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 Act 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 Act;

— procurements commenced before 24 February 2025 will continue to be governed by the UCRs 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 UCRs will continue to be governed by the UCRs 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 new regime comes into effect).

Useful links

The Procurement Act 2023

The Procurement Regulations 2024

Cabinet Office on Guidance on Utilities Contracts

Cabinet Office Guidance Documents

You can also find more information on our Procurement Cube

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