



Roche Procurement Training: New Procurement Act 2023

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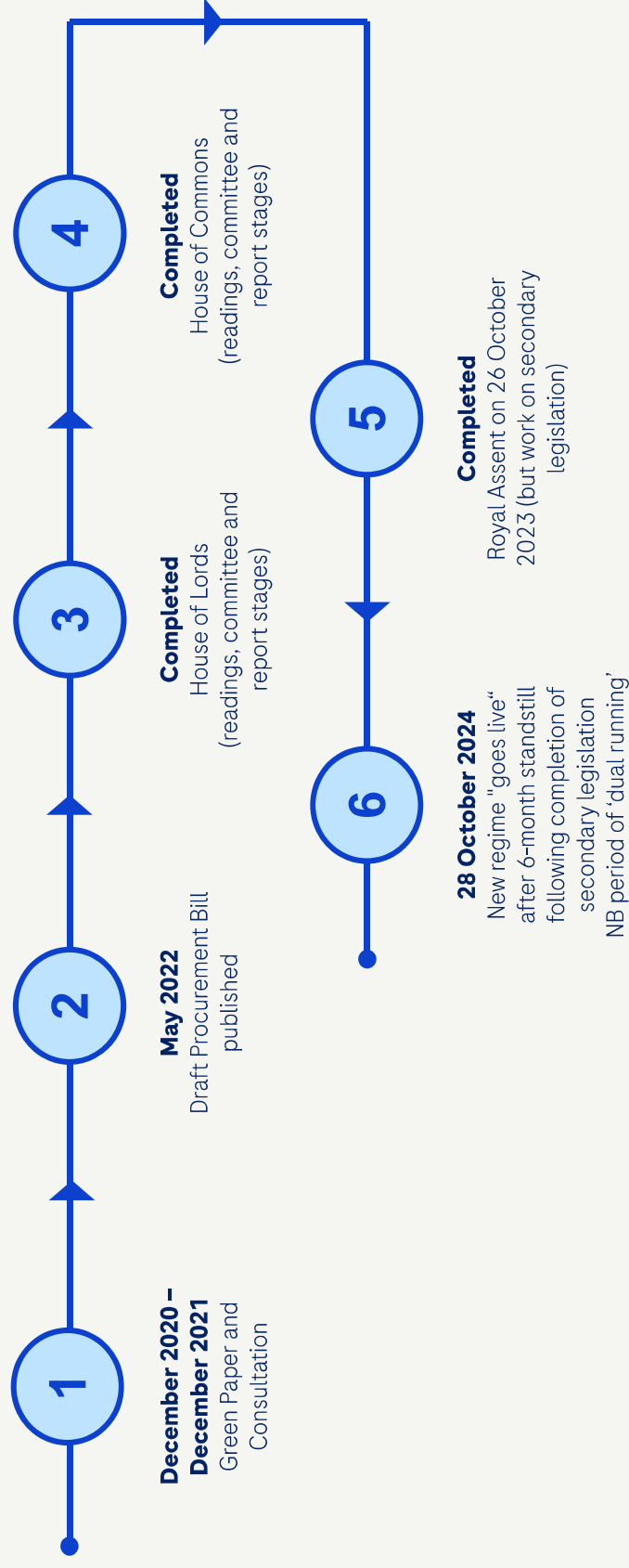
Table of contents



What we will cover today:

1. Procurement landscape (current and new)
2. Introduction to key aspects of the regulations:
3. What are the new 'Procedures',
4. What does increased 'Transparency' mean
5. What are the changes in the management of contracts.
6. Conclusion
7. Glossary

Timeline



Procurement Reforms | Timeline

New rules will alter how we do business in the UK



New Rules Go Live

Will apply to any new procurement exercise started after this date

Change for:

- England
- Wales
- Northern Ireland

No impact to:

- Republic of Ireland
- Scotland

Why is it important?

- Changes how public customers tender and manage their contracts with suppliers
- Potential to change the dynamics of the market you operate in and new expectations on suppliers to deliver in accordance with new requirements

Procurement Reforms | Key changes

What do you need to know today



Simplified procedures

Reduced number of procedure types to enable simplification and innovation



New Procedures:

1. open
2. competitive flexible
3. direct award
4. competitive selection process for frameworks

Procurement Reforms | Key changes

What do you need to know today



Increased transparency

For buyers and suppliers across **all** stages of the contract lifecycle

Contract lifecycle stages:

1. Planning
2. Tender
3. Award
4. Implementation

Procurement Reforms | Key changes

What do you need to know today



3

Contract Management

Increased transparency will see suppliers proactively managing and mitigating reputational and operational risks

Action:

1. Change notices
2. KPI performance
3. Contract performance

Current Law



Derives from EU Directives



Purpose is to open up public sector procurement to competition



Catches public bodies and private utilities



Apply to supplies, services and works contracts which exceed certain thresholds



Competition in accordance with prescribed processes



Consequences if public bodies get it wrong

The **Old** Procedures

- **Open**
 - One stage process
 - All interested parties can submit a tender
 - No negotiation
 - Suitable for straightforward procurements
- **Restricted**
 - Two stage procedure
 - Only those meeting selection criteria invited to tender (may involve shortlisting)
 - No negotiation of bids just clarification
- **Negotiated and Competitive Dialogue**
 - Multi-stage procedures
 - Free to devise bulk of procedure provided it is compliant with EU Treaty principles
 - May be one or more stages of negotiations/dialogue (negotiated: can award contract based on initial tenders)
 - Only used for complex procurements
- Various other specific procedures (design contest, innovation partnership, negotiated without prior publication)

The **New** Procedures

- Open (same as old procedure) – single stage regime
- Competitive Flexible – a **“build your own” procedure**
 - Multi-stage procedure
 - Only those meeting selection criteria invited to tender (may involve shortlisting)
 - Can provide for refinement of award criteria during procedure (but this can be done under old rules)
- Direct Award (same as old negotiated procedure without prior publication) – new ground where government can decide it is necessary to protect life/health/public order or safety. Schedule 5 of the Act lists these

Key Quotes from the Consultation on Procurement Law Reform

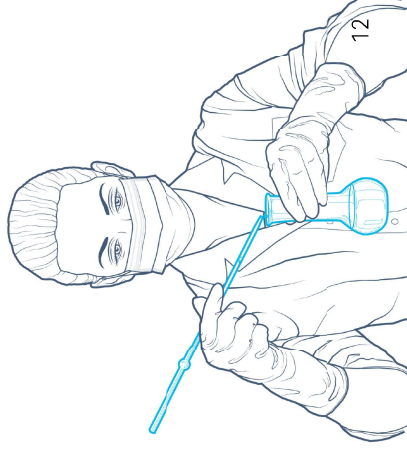
“modern and innovative approaches to public procurement have been bogged down in bureaucratic, process-driven procedures” “At the moment it is often the choice of procedure that drives the procurement, not the needs of the procurement that drives the procedure”

“The current open and restricted procedures, which do not allow for negotiation with bidders during the process, are the most commonly used”, “the four procedures which allow for negotiations or competitive dialogue... accounted for less than 10% of all advertised contracts awarded in the UK between 2016 and 2018 across PCR, UCR and CCR”

“key concern raised by respondents was that the new competitive flexible procedure could introduce more complexity into procurements as it requires design and tailoring... creating variances in procedures which could lead to increased cost and complexity for suppliers [and] concerns about a consequential increase in legal challenges”

Simplification and Flexibility

- A single set of rules
- Sector-specific exemptions
- Reduction in number of available procedures
- Reforms guided by core principles - value for money, public good, transparency, integrity, equal treatment and non-discrimination.
- The Act is much lighter on detail as to what is needed to have a compliant procedure. More focus will therefore be on the general principles
- Role of guidance and templates
- Market Engagement - The sections that deal with it are permissive (i.e. the authority “may” engage in such engagement) rather than them being required to. In our experience, more early engagement from Authorities would be beneficial –



How Flexible is the Flexible Procedure

What the authority has to do is:

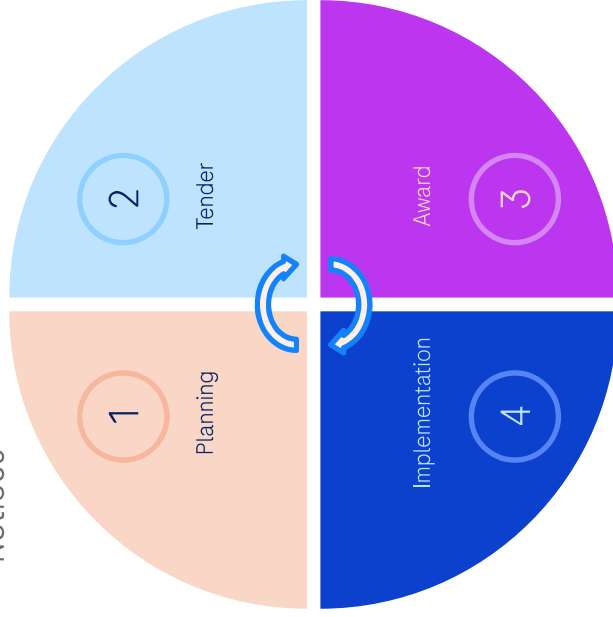
- Have regard to the objectives (S12) – Value for money; public benefit etc
- Ensure the procedure is a “proportionate means of awarding the contract” (having regard to nature, complexity and cost of contract) (S20(3))
- Treat suppliers the same (unless justified and having taken steps not to put any supplier at an advantage or disadvantage) (S12(2) and (3))
- Make sure the tender notice and documents are sufficiently clear and specific (S21(6))
- Make sure the Tender notice describes “the process to be followed during the procedure”, including whether it may include negotiation at any stage (T-Regs 14(3))
- Ultimately award the contract to the “most advantageous tender” (s19) – note, no longer most economically advantageous tender.

Timescales

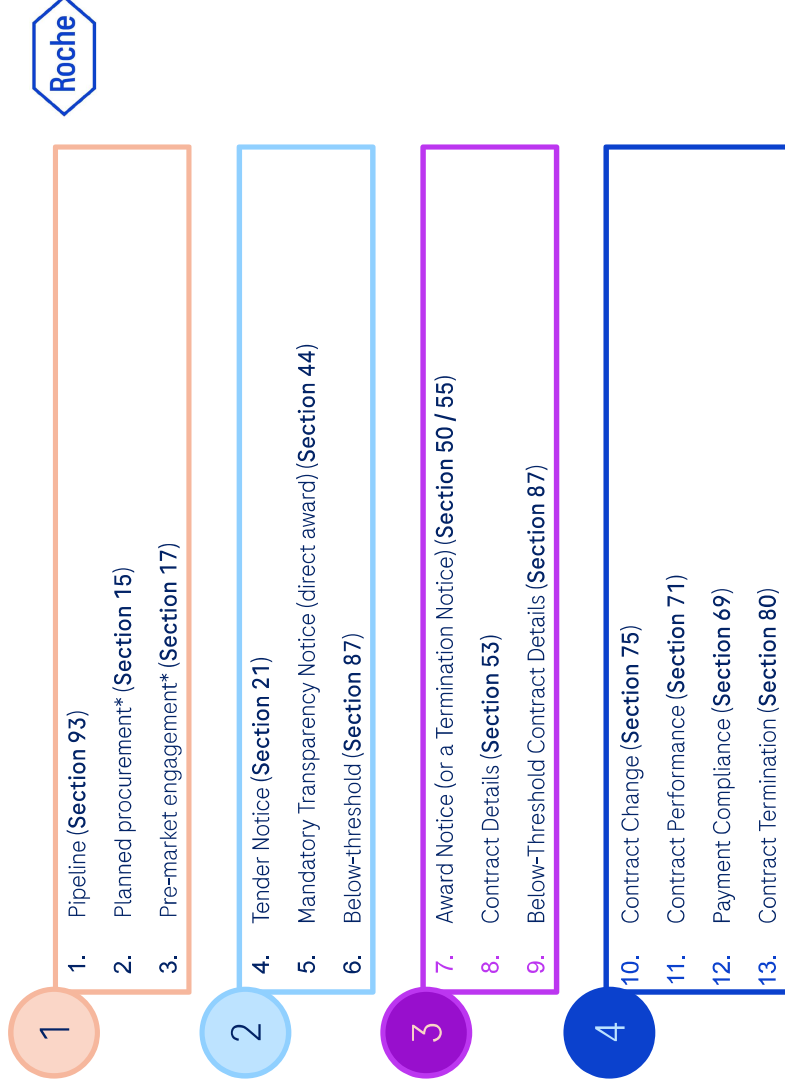
			Light Touch (old)	Light Touch (new)	Open (old)	Open (new)	CD	Restricted /Negotiated	Competitive Flexible
SQ	Urgency		No minimum	No minimum	n/a	n/a	n/a	15 days	10 days
	Other		No minimum	No minimum	n/a		30 days	30 days	25 days
Tender Return	Qualifying PIN (old) / Planned Procurement Notice (new)		No minimum	No minimum	15 days	10 days	No minimum	10 days	10 days
	Urgency		No minimum	No minimum	15 days	10 days	No minimum	10 days	10 days
	Tender documents are published with contract notice		No minimum	No minimum	30 days	25 days	No minimum	25 days	25 days
	Tender documents not published with contract notice		No minimum	No minimum	30 days	30 days	No minimum	25 days	30 days

- Assumes electronic submission
- Old subject to overarching need to account for complexity, site visits and updated info.
- New subject to overarching need to account for complexity, site visits, updated info, subcontracting, importance of avoiding delay

Transparency Notices



Those with * are voluntary.



Notices

- **Pipeline notice** - plan to procure more than £100 million of works, goods and services in a given financial year must publish information on potential future procurements they expect to conduct that year (where the estimated contract value exceeds £2 million for the particular contract)
- **Planned Procurement Notice:** This optional notice, similar to the current Prior Information Notice (PIN), may be published to inform the market that a public body intends to publish a Tender Notice at a future date.
- **Preliminary Market Engagement:** This notice must be published when a public body chooses to carry out preliminary market engagement. Under the current regime, details of a preliminary market engagement would typically be included in a PIN but the new regime splits this into two separate notices.
- **Tender Notice:** This is the re-naming of the current "contract notice" which must be published to commence a competitive procurement and invite tenders.
- **Mandatory Transparency Notice:** This notice replaces the current voluntary transparency notice and must be published where a public body makes a direct award.
- **Contract Award Notice:** This must be published when a public body intends to make a contract award (i.e. following conclusion of the procurement but before the contract has been executed).
- **Procurement Termination Notice** if a public body decides to abandon a procurement which has been initiated. This is a change from the current position which does not require a public notice when a procurement is abandoned.
- **Contract Details Notice:** This must be published within 30 days of contract execution (i.e. in the period following publication of the Contract Award Notice) or 120 days in the case of Light Touch Contracts. It is envisaged that this notice will contain details on the final value, duration, and extension options within the contract. Where a contract has a value exceeding £5 million, a copy of the contract must also be published.
- The content of some notices (e.g. Contract Termination; Contract Details) is to be confirmed in secondary legislation

National Procurement Policy Statement

- A central part of the regulatory framework – sets out key principles (values) which will drive procurement decisions.
- Intention is to update it regularly (but no set cadence or requirement to do so).
- Principles which each NPPS should reflect set out in the Act:
 - Promoting public good (social value and climate change)
 - Value for money
 - Transparency
 - Integrity
 - Fair treatment of suppliers
 - Non-discrimination
- Contracting authorities must have regard to NPPS in procurement (there are some exceptions including call-offs from frameworks and membership of dynamic markets).
- Current NPPS (not technically in force as subject to secondary legislation) centres on the following key features:
 - Benchmarking (of contracting authority performance) and pipelines (of future contracts).
 - Being set up for “better procurement” – right people, systems and data reporting capabilities, etc.
 - Better for society – grow the economy; tackle climate change; supply-chains (diversity/innovation/resilience)
- Not following NPPS is not a breach which can be enforced in civil proceedings.
- What does this mean if authorities do not follow it? Unclear...

Conclusion on Procedures

- Broadly the same as before
- Less prescriptive but unlikely to lead to significant change (possible to do a lot within the old rules)
- Will result in a perception change – more confidence to be creative – could lead to some change
- Contracting authority must ensure that a whatever procedure chosen/designed is a proportionate means of awarding the public contract, having regard to the nature, complexity and cost of the contract
- Importance in reading rules of process (and clarifying where not clear – cannot rely on regulations to as much)
- Pipeline notices will provide a level of advanced notice

Top tips:

1. Need to be aware of these new procedures for success in your procurement strategy
2. Work with your customers in pre market consultation, thinking about which procedure would work best for the type of contract
3. Review the procurement documents carefully as increased flexibility means different Trusts may work differently and have different procedures – don't be afraid to seek clarification

Glossary

OLD terminology	Meaning / impact /change	NEW terminology	Meaning / impact /change
Open procedure	Single stage procurement for simple requirements.	Open procedure	No change.
Direct Award (not in the context of frameworks)	Entering into contract without following a competitive procurement – available in select circumstances.	Direct Award (not in the context of frameworks)	Same, but new ground where government can declare an emergency (arguably no real change).
The other procedures	Restricted / Competitive with negotiation / competitive dialogue / innovation partnership / design contest.	Competitive flexible	Broad discretion to design appropriate competition based on contract / authority requirements.
Framework	A marketplace which is competitively procured by a contracting authority that allows it to call-off contracts (direct award or mini-competition) without going back out to wider market.	Framework	No change.
Values	Equal treatment of suppliers, non-discrimination, transparency, proportionality.	Principles	Integrity, value for money, promoting public benefit, sharing information, fair treatment of suppliers, and non-discrimination.

Glossary continued...

OLD terminology	Meaning / impact /change	NEW	Meaning / impact /change
Transparency	Fundamental principle of procurement law – to tell the market what the contracting authority will do and tell the market what it has done.	Sharing information	'Transparency' but without the 'Eurospeak'
Equal treatment	Treating the same situation the same and different situations differently.	Treat suppliers the same	'Equal treatment' but without the 'Eurospeak'.
MEAT – Most Economically advantageous tenderer	Fundamental principle of procurement – contracts are awarded to the 'best' bidder.	MAT – Most advantageous tenderer	No real change – underlines that procurement is not always about lowest price.
Standstill period	= 10 days	Standstill period	= 8 working days
CRAT	Characteristics and relative advantages of successful tenderer – received by unsuccessful bidder(s) and is a comparison of how their tender did worse than the successful one.	Assessment summary	Provision of the full feedback of successful bidder rather than comparison.



QUESTIONS?