

EXPLANATORY MEMORANDUM TO
THE PROCUREMENT REGULATIONS 2024

2024 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Cabinet Office and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 Alex Burghart, Parliamentary Secretary at the Cabinet Office confirms that this Explanatory Memorandum meets the required standard.

2.2 Edward Green, Deputy Director for International and Reform, at the Cabinet Office confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Tracy Pritchard at the Cabinet Office Telephone: +44 7391 412885 or email: procurement.reform@cabinetoffice.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This statutory instrument is required to implement the new public procurement regime established by the Procurement Act 2023 (“the Act”). Many of the measures in the statutory instrument set out the detailed requirements of notices which allow buying organisations regulated by the Act, known as contracting authorities, to conduct their public procurement in an open, transparent and informative manner, as well as specifying where and how these should be published. Other aspects impose requirements as to how contracting authorities should obtain specified information from suppliers and provide further detail as to how certain organisations and contracts are to be regulated, including by extending the Act to cover devolved Scottish procurement in certain circumstances, and disapplying the Act in relation to healthcare procurement.

Where does the legislation extend to, and apply?

4.2 The extent of this instrument (that is, the jurisdictions which the instrument forms part of the law of) is, in respect of almost all provisions, England and Wales, Scotland and Northern Ireland. Regulations 48 and 49 extend to England and Wales only.

4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) varies between provisions. Parts 1, 4 and 5 apply in England and Wales, Scotland and Northern Ireland. Parts 2 and 3 apply in England, other than in respect of procurement carried out under a devolved Welsh procurement arrangement (an arrangement which is led by a devolved Welsh body). Parts 2 and 3, with the exception of regulation 43, also apply in Northern Ireland, other than in respect of procurement carried out under a devolved Welsh procurement arrangement. In Wales,

Parts 2 and 3 apply to contracting authorities which are not devolved Welsh authorities. They also apply to contracting authorities which are devolved Welsh authorities in relation to procurement under a reserved procurement arrangement (an arrangement which is led by a reserved body) or a transferred Northern Ireland procurement arrangement (an arrangement which is led by a transferred Northern Ireland body). In Scotland, Parts 2 and 3 (with the exception of regulation 43) apply to contracting authorities which are not devolved Scottish authorities, and in respect of procurement carried out by devolved Scottish authorities in accordance with section 115A of the Act, as inserted by regulation 47.

5. Policy Context

What is being done and why?

- 5.1 The legislative programme to which this instrument belongs is part of a wider programme to reform public procurement in the UK since its exit from the European Union, ending the obligation for the UK to comply with EU Procurement Directives. The programme aims to improve the way public procurement is regulated in order to create a simpler and more flexible commercial system that better meets our country's needs while remaining compliant with our international obligations. The reforms open up public procurement to new entrants such as small businesses and social enterprises so that they can compete for and win more public contracts, and embed transparency throughout the commercial lifecycle so that the spending of taxpayers' money can be properly scrutinised.
- 5.2 This statutory instrument is made under the Procurement Act 2023, which sits at the centre of this programme. It exercises certain legislative powers contained in the Act and brings to life many of its provisions. To a large extent, the provisions of this instrument comprise lists and definitions which determine the scope of the Act's application and are more appropriate for secondary legislation because of their propensity to change or the need for them to do so in line with, for example, policy or machinery of government changes, as well as the detail of information which must be published in the Act's various transparency notices.

What was the previous policy, how is this different?

- 5.3 Public procurement by reserved, devolved Welsh and transferred Northern Ireland authorities is currently regulated by the Defence and Security Public Contracts Regulations 2011 (S.I. 2011/1848) ("DSPCR"), the Public Contracts Regulations 2015 (S.I. 2015/102) ("PCR"), the Concession Contracts Regulations 2016 (S.I. 2016/273) ("CCR") and the Utilities Contracts Regulations 2016 (S.I. 2016/274) ("UCR"). The Act provides a single legislative scheme which will govern all contracts which previously came within the scope of these regimes. Section 119 of and Schedule 11 to the Act revoke the existing regulations. Whilst much of the Act enacts significant reforms in respect of public procurement, in many respects the provisions of this instrument maintain the position under the existing regulations, including in respect of specifying those entities which are treated as central government authorities for the purposes of the regulations, those activities which amount to works and those contracts which are regulated by more light-touch requirements and can be reserved such that they are only awarded to public service mutuals.
- 5.4 A new transparency regime, of which the requirements in Part 2 of this instrument are a key feature, is being developed to open up more opportunities to small and medium-sized enterprises, encourage innovation and enable greater oversight (by suppliers, civil society, and governmental organisations).

- 5.5 Further detail regarding changes brought about by this instrument are provided alongside more detailed explanation of the provisions below.
- Central digital platform, supplier information and the publication of notices (regulations 5 to 14)
- 5.6 The PCR, UCR and CCR each contain a number of obligations requiring the publication of information about procurements. These include requirements to advertise contracts and to publish information about the outcomes of procurement processes and management of subsequent contracts. The foundation of transparency reforms is an improved procurement ‘noticing’ regime, covering the full lifecycle of public procurement, from planning through to contract expiry. Regulations 5 to 14 provide the foundations for this system.
- 5.7 Regulation 5 specifies that where the Act requires publication of certain information, including notices, that publication must take place on an online system which will be provided by the Cabinet Office. This will be found at www.gov.uk/find-tender. This will allow relevant procurement notices and information to be held in one place, generating clarity for suppliers and promoting fair and open competition as well as meeting related requirements in international trade agreements and providing the opportunity for meaningful analysis of public procurement data at an aggregated level.
- 5.8 A key aspect of the reforms brought about by the Act is the creation of a supplier information system, which will hold commonly-used supplier information and allow it to be shared with contracting authorities, reducing work for suppliers who have to provide the same information in relation to every procurement. Regulation 6 requires contracting authorities to obtain confirmation during the procurement process that a supplier which shares information with it as part of that procurement has done so via the supplier information system. Regulation 7 sets out various exemptions to this requirement, and regulations 9 to 12 set out the information which a contracting authority must ensure has been transmitted via the supplier information system. This information is similar to the data that was previously requested in the Standard Selection Questionnaire (SSQ) used by procurement practitioners.
- 5.9 Regulations 8, 13 and 14 define certain terms which are used throughout Part 2 of the Regulations. Almost all notices require details of the contracting authority entering into the contract, the contract’s subject matter and certain “unique identifiers”, which will be used to link together, on the central digital platform, the notices published throughout a procurement and the contracts it generates.
- Contents of transparency notices (regulations 15 to 41)
- 5.10 The regulations stipulating the contents of each notice are not a complete list of the required contents of each notice. The Act itself contains a number of requirements; for example section 83(5) requires certain notices to contain confirmation that an assessment of any potential conflicts has been prepared and revised in accordance with section 83. Furthermore, the instrument does not prevent a contracting authority from including additional information alongside the details outlined in these regulations.
- 5.11 Regulation 15 sets out the details required in the pipeline notice which a contracting authority publishes to provide the market with advance notice of certain anticipated procurement opportunities. The information requirements are set at a high level, as it is likely that available details will be limited at this early stage. The requirements around this notice (in the Act and these Regulations) place on a statutory footing

existing guidance which requires contracting authorities to publish annual plans of their procurement and commercial activity.

- 5.12 Regulation 16 sets out the requirements for a planned procurement notice or a qualifying planned procurement notice, which gives the market details of upcoming procurements and, in certain circumstances (set out in section 15(3) of the Act), allows for a reduced tendering period. Planned procurement notices replace prior information notices and periodic indicative notices under the current regime.
- 5.13 Regulation 17 sets out the details that the preliminary market engagement notice should contain when a contracting authority opts to publish one in relation to preliminary market engagement it intends to or has carried out. The notice can be used to invite suppliers to participate in preliminary market engagement and/or notify the market that this engagement has taken place. In this case the notice can be used to share outputs of the engagement to ensure a wider audience is kept informed about the contracting authority's emerging thinking, therefore supporting the objectives of section 12 and ensuring all suppliers have access to the same information.
- 5.14 Regulations 18 to 22 and 24 set out the details which the tender notice must contain when a contracting authority advertises a tendering procedure. A tender notice will act as an invitation to submit a tender for the contract or an invitation to request to participate (where a contracting authority intends to limit the number of suppliers who may submit a final tender) and may be supplemented by associated tender documents, which are provided for in regulation 23. Together these must provide all the information required for potential suppliers to tender for the opportunity. This notice replaces the Contract Notice or Concessions Notice in the current regulations.
- 5.15 The requirements vary depending on the procurement process used, but in general require details such as the procedure being used and how the contract will be awarded, instructions on how to bid and how the procurement and eventual contracts are structured.
- 5.16 Regulation 25 sets out the details that dynamic market notices must contain; this will change according to the stage of the dynamic market (a group of pre-approved suppliers), that is to say, advertising the intention to establish, establishment, modification and ceasing to operate. Regulation 25 requires the provision of information appropriate to the relevant stage, for example, details of how the dynamic market will operate, any membership requirements and, subsequently, details of the members, and what can be procured through the dynamic market.
- 5.17 The Act allows for the establishment of a qualifying utilities dynamic market ("QUDM"): this is a utilities dynamic market in which opportunities to bid for contracts need not be advertised. Regulation 25 provides that a notice confirming the establishment of a QUDM must contain certain additional information see regulation 25(2)(i)).
- 5.18 Regulation 26 sets out the details that the transparency notice, which a contracting authority is required to publish before awarding a contract without competition, must contain. This notice provides an opportunity for interested parties to consider the justification for direct award, these are set out in sections 41 to 43 and Schedule 5 of the Act. The transparency notice is a mandatory notice instead of the voluntary notice under the existing regime.
- 5.19 Regulation 27 sets out the information required in the contract award notice, published when a contracting authority intends to enter into a contract with a specified supplier or suppliers. Regulations 28 to 30 make similar provision in relation to

contract award notices published by a private utility, reflecting both the desire to minimise burdens on private utilities and that private utilities are not required to publish a contract details notice once a contract has been awarded, so the contract award notice must be used to capture certain important information.

- 5.20 Section 50(3) of the Act stipulates that an assessment summary is provided following the assessment of tenders in a competitive procedure, and aims to provide sufficient information to the supplier so it can reasonably understand why it did or did not win the contract.
- 5.21 Regulation 31 requires that the assessment summary include the scores the unsuccessful bid was awarded as a result of the assessment process and an explanation as to why the particular scores were given against each criterion. It must also contain information about the successful bid. Regulations 32 to 36 set out the information required in the contract details notice, published when a contracting authority has entered into a contract.
- 5.22 Regulation 37 sets out the information required in the procurement termination notice, published when a contracting authority decides not to award a contract after publishing a tender or transparency notice. This notice is a new concept which provides information to the market and suppliers so they understand the intentions of the contracting authority have changed, and the procurement is to be discontinued, reducing bid costs for suppliers and providing increased market certainty.
- 5.23 A payments compliance notice is a report made by a contracting authority on a six-monthly basis, setting out the extent to which it has paid its invoices in accordance with section 68(2) of the Act (being the requirement to pay invoices within 30 days). Regulation 38 requires contracting authorities to provide a variety of data intended to provide transparency as to how promptly government invoices are paid. This notice changes the frequency of the current reporting requirement from annual to every six months, and also introduces a requirement to measure the time taken to pay an invoice from the point an invoice is received, rather than the point it is validated, the requirement to provide average payment days and the number of invoices received but not paid in the period, the requirement for sign off by a finance director, and the removal of the requirement to publish late payment liability interest.
- 5.24 The contract performance notice fulfils two functions: assessment of performance against Key Performance Indicators (KPIs) and providing information relating to a breach of a public contract or failure to perform to the contracting authority's satisfaction. This notice is a new requirement.
- 5.25 Regulation 39 provides that, when used to report on performance, the notice must provide an assessment of performance against existing KPIs, using given criteria. When used to report poor performance or a breach of contract, it must give details of the relevant circumstances, including whether there has been a partial termination of the contract, an award of damages or a settlement, and any steps taken in mitigation.
- 5.26 In the current regime, there is little information available on changes made to contracts after they have been awarded. The contract change notice and the requirement to publish modifications seek to address this.
- 5.27 Regulation 40 sets out that a contract change notice must include details of the contract in question, the grounds on which the modification will be made and details of any changes in estimated value and term as a result of the modification.
- 5.28 The contract termination notice is a new concept whereby contracting authorities are required to publish a notice when a contract has been terminated. Currently, there is

no such notice making it unclear whether contracts remain extant. Regulation 41 sets out the information which must be included in such a notice.

Light touch services and reservable light touch services (Regulation 42 and Schedule 1)

- 5.29 The PCR introduced a new “light-touch regime” for contracts for certain social, health and other person-orientated services, which put in place a less onerous regulatory regime to encourage organisations such as social enterprises and mutuals to bid for these sorts of public contracts.
- 5.30 The Act continues this position by making provision for light touch contracts. The regulatory requirements in relation to these contracts are reduced: for example, they must be a higher value before the rules apply, they have more flexible award criteria to reflect their nature, and are not subject to requirements around performance management. This instrument provides, at regulation 42 and Schedule 1, a list of services which may form the subject matter of light touch contracts; the scope is the same as under the PCR. These services are identified by way of Common Procurement Vocabulary (“CPV”) Codes, a widely-recognised subject-matter classification system for public procurement.
- 5.31 As under the current regime, the Act allows for light touch contracts to be reserved such that participation in the competition for the contract is limited to public service mutuals in accordance with section 33 of the Act. Schedule 1 also sets out (again by reference to CPV Codes) which light touch contracts may be reserved and, again, replicates the position under the PCR.

Disapplication in relation to procurement by NHS in England (regulation 43)

- 5.32 Under the PCR, healthcare services are subject to the social and other specific services regime (regulations 74 to 77) (commonly known as the ‘light-touch’ regime). The Health Care Services (Provider Selection Regime) Regulations (PSR) 2023 (S.I. 2023/1348), which came into force on 1 January 2024 amend the PCR to remove the procurement of certain healthcare services to which the PSR applies. The PSR were made under powers conferred by (amongst other things) section 12ZB of the National Health Services Act 2006. In order to remove these healthcare services from the Act, regulation 43 provides that the Act does not apply to “regulated health procurement”, which is defined in section 120(2) of the Act as procurement which is governed by regulations made under section 12ZB of the National Health Service Act 2006. The effect of this is that the Act does not apply to procurement governed by the PSRs.
- 5.33 The remainder of NHS procurement will continue to be regulated by the Procurement Act.

Definitions of “central government authority” and “works” (regulations 44 and 45, Schedules 2 and 3)

- 5.34 Paragraph 5 of Schedule 1 to the Procurement Act provides that the definitions of ‘Central Government Authority’ and ‘Works’ shall be set out in regulations. This is necessary because certain obligations are triggered at set financial thresholds. The threshold for a certain obligation, such as publication of a specified notice, or, indeed, to determine whether a procurement is a covered procurement regulated by the main provisions of the Act, may vary according to the scope of the intended contract and the categorisation of the contracting authority undertaking the procurement.

- 5.35 The UK's commitments under the WTO Government Procurement Agreement (GPA) require that we have one threshold that applies to 'Central Government Authorities' for the procurement of goods and services (currently £139,688) and another for the procurement of goods and services by local government and wider public sector bodies (currently £214,904). Goods and services procurements resulting in contracts over these thresholds are required to comply with the full provisions of the Act unless any exceptions/exemptions apply. Similarly, a specific threshold applies to procurements for 'Works' (currently £5,372,609) which reflects the generally high monetary values involved with procuring construction.
- 5.36 Therefore, these concepts must be defined, which necessitates a degree of lengthy lists, both of bodies that are 'Central Government Authorities' and of construction-related services that constitute 'Works'. The entities listed as central government authorities reflect the commitments the UK has made as part of its membership of the WTO Agreement on Government Procurement, which requires the UK to specify those bodies which will be treated as central government authorities. Aspects of the list are currently out of date as they do not reflect, for example, machinery of government changes. The SI will be updated when the UK updates its commitments under the GPA during the course of 2024. The services defined as works are identified by use of CPV Codes, as described above at paragraph 40.

Defence authorities (regulation 46)

- 5.37 The Secretary of State for Defence, the Atomic Weapons Establishment, the Oil and Pipelines Agency and the National Crime Agency are specified as defence authorities in accordance with sections 7(5) and 7(6) of the Act. The Act makes special provision in respect of defence and security contracts awarded by a defence authority.

Regulation of procurement by devolved Scottish authorities (regulation 47)

- 5.38 The PCR and the Public Contracts (Scotland) Regulations 2016 (S.S.I. 2015/446) allow both reserved and devolved contracting authorities to procure jointly and to use procurement tools established under each regime.
- 5.39 The Act does not apply to devolved Scottish procurement, so regulation 47 relies on powers in section 115 of the Act to amend the Act in order to allow devolved Scottish contracting authorities to jointly procure with bodies regulated by the Act and to use commercial tools developed under the Act. The provisions inserted by regulation 47 specify the extent to which the Act applies in those circumstances, and this varies depending on the nature of the procurement. The Scottish Government will use powers in the Procurement Act to lay a Scottish Statutory Instrument to ensure that reserved bodies, devolved Welsh authorities and transferred Northern Irish authorities can access Scottish procurement tools.

Amendment of the Procurement Act 2023 in relation to private utilities (regulation 48)

- 5.40 In line with the Government's policy aim of minimising burdens on private utilities, this statutory instrument exercises the power in section 121 of the Procurement Act to disapply the preliminary market engagement notice requirements in section 17 of the Act in respect of private utilities. The Procurement (Wales) Regulations 2024 will subsequently make an equivalent amendment in respect of devolved Welsh contracting authorities. Private utilities will be encouraged to use the notice, but where they choose not to do so, they will be not be expected to explain this.

6. Legislative and Legal Context

How has the law changed?

- 6.1 The Procurement Act 2023 created a new regulatory framework for public procurement, replacing a series of statutory instruments which implemented the EU Procurement Directives.¹ These Regulations are made with the consent of the Department of Finance for Northern Ireland, in accordance with section 114 of the Act. The Welsh Ministers are bringing forward their own instrument and making provision equivalent to Parts 2 and 3 (with the exception of regulation 43) and regulation 48, in respect of procurement by devolved Welsh authorities. The Act does not apply to devolved Scottish authorities, but regulation 47 inserts into the Act provisions setting out the circumstances in which these bodies will be able to choose to come within this regulatory regime, either because they act in conjunction with a body regulated by the Act or use a procurement tool established under the Act.
- 6.2 This statutory instrument exercises a wide range of powers within the Procurement Act 2023 to provide additional detail on the functioning of various aspects of the procurement regime. This instrument sets out how calculations for various tests determining the coverage of the Act should be carried out, specifies the information that contracting authorities must publish in notices or otherwise provide to those participating in a procurement and establishes which categories of spend are subject to lighter-touch rules and which are to be categorised as spend on “works”. It disapplies the Act in relation to regulated health procurement. It also sets out which contracting authorities are to be treated as central government authorities, which in some cases are subject to stricter regulation, and how devolved Scottish contracting authorities can access procurement tools established under the Act.

Why was this approach taken to change the law?

- 6.3 The Procurement Act sets out a clear structure and framework for public procurement. It contains delegated powers in order to make detailed provision in a number of areas where this is appropriate. These Regulations provide that detail and are necessary to ensure that the procurement regime can act as a cohesive regulatory system.

7. Consultation

Summary of consultation outcome and methodology

- 7.1 During the summer of 2023, the Cabinet Office ran a public consultation in two separate parts, on draft regulations to implement certain aspects of the Procurement Act. This process formally closed on 25 August 2023.
- 7.2 The first part referred predominantly to areas of the Act which require lists, calculations or further definitions to be used in practice, such as the list of services in the Light Touch Regime, and the list of Central Government Authorities that are subject to a lower threshold wider than the public sector. The second part mainly

¹ Section 119 and Schedule 11 of the Act revoke the Defence and Security Public Contracts Regulations 2011 (S.I. 2011/1848), the Public Contracts Regulations 2015 (S.I. 2015/102), the Concession Contracts Regulations 2016 (S.I. 2016/273) and the Utilities Contracts Regulations (S.I. 2016/274). Between them, these regulations implemented Directive 2014/24/EU on public procurement, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, Directive 2014/23/EU on the award of concession contracts, Directives 89/665/EEC and 92/13/EEC as amended by Directive 2007/66/EC on remedies and review procedures for public procurement, and Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunication sectors.

addressed matters relating to transparency, such as the various notices that will be used to communicate opportunities and details about forthcoming, in-train and completed procurements. It included coverage on related matters such as the Central Digital Platform and the provision of certain Supplier Information, and some other technical matters such as proposals for transitioning to the new regime.

- 7.3 A single Government response covers both parts. The consultation evoked a good response from the various representative sectors to both parts (165 for part 1 and 187 for part 2). Both exercises confirmed that the propositions and the draft regulations generally worked as intended. There were no questions that attracted major disagreement from respondents; those disagreeing tended to be relatively small numbers, with those offering no view being more common. Many stakeholders urged for certain matters to be clarified and explained in guidance and training. This is a key part of our implementation programme and we are reassuring stakeholders. The provisions relating to calculations will now be taken forward separately.
- 7.4 Cabinet Office worked closely with the Welsh Government and Northern Ireland Department of Finance in developing and drafting the provisions in the draft regulations. They are satisfied with the outcomes. The Welsh Government has consulted separately in respect of similar regulations to be made in respect of devolved Welsh procurement.
- 7.5 The Government response demonstrates that we have listened to feedback and made some technical and clarifying refinements to improve the functioning of the proposed regulations. It was published on [gov.uk](https://www.gov.uk) on 22 March 2024.

8. Applicable Guidance

- 8.1 A comprehensive suite of guidance that covers the provisions of the Act and the Regulations will be published during the implementation period before the Act comes into force.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

- 9.1 The impact on the public sector in respect of the public procurement regime is in relation to the Procurement Act 2023 rather than these regulations.
- 9.2 An impact assessment in relation to the Act and associated reforms was published in May 2022 and can be found at <https://bills.parliament.uk/publications/46429/documents/1767>.

Impact on businesses, charities and voluntary bodies

- 9.3 There is no, or no significant, impact on business, charities or voluntary bodies.
- 9.4 The legislation applies to activities undertaken by small or micro businesses.
- 9.5 To minimise the impact of the requirements on small or micro businesses, the thresholds at which the vast majority of these regulations apply is £139,688 for goods and services, and £5,372,609 for construction, in central government.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

- 10.1 The approach to monitoring this legislation is through feedback from contracting authorities, suppliers, industry representatives and professionals using the new procurement regime (under the Procurement Act 2023) which will help inform any updates.
- 10.2 The instrument does not include a statutory review clause. Section 29 of the Small Business, Enterprise and Employment Act 2015 is not applicable as these regulations do not regulate an activity carried out by a business for the purposes of the business; rather, they place obligations on the public sector.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

- 11.1 None.

12. European Convention on Human Rights

- 12.1 The Minister of State for the Cabinet Office has made the following statement regarding Human Rights:

“In my view the provisions of the Procurement Regulations 2024 are compatible with the Convention rights.”

13. The Relevant European Union Acts

- 13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 (“relevant European Union Acts”).