



# Procurement Reform Update – what you need to know

UK Public Procurement Reform Webinar

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# Speakers



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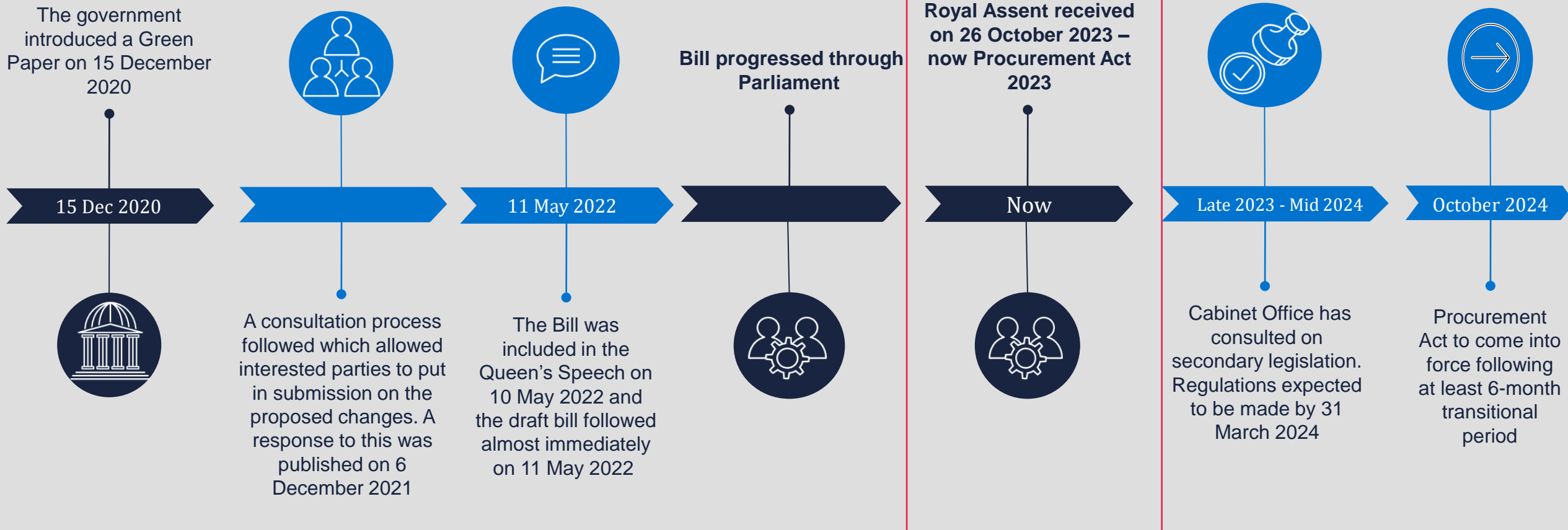
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# Introduction

## The Procurement Bill/Procurement Act 2023 – why are we here?

- Brexit - “once in a lifetime opportunity” to reform the UK procurement regime:
  - Simpler, more flexible
  - International compliance (e.g. WTO GPA)
  - Open up markets to new entrants – SMEs and innovators
  - Transparency throughout the commercial lifecycle
  - Consolidation - single, consistent regime
  - Tougher action on underperforming suppliers
  - Protecting national security
- Change in much of the language (intentional move away from EU legislation)

# Timelines for the Procurement Bill/Act



# Today's topics

1. Running a procurement (including routes to market)
2. Transparency obligations/notices
3. Contract management including variations
4. Exclusion and debarment of suppliers

# Running a procurement

# What's covered?

- “Covered procurement” – award, entry into and management of public contracts
- Financing and/or management oversight – similar to “bodies governed by public law”
- Utilities = same activities/sectors
- Single consolidated framework
- Exceptions and caveats e.g. utilities, defence sector and "light touch"

## Transition

- Existing regime (PCR etc.) will continue to apply to all existing procurements and any started before October 2024 – in practice if published a PIN or contract notice on Find a Tender
- Direct awards entered into after 1 January 2025 under new regime

# Choice of procedure

Public contracts to be awarded via:

- Competitive award – open procedure or competitive flexible procedure
- Direct award (aka limited tendering procedure)
- Frameworks

Open procedure = as per current legislation

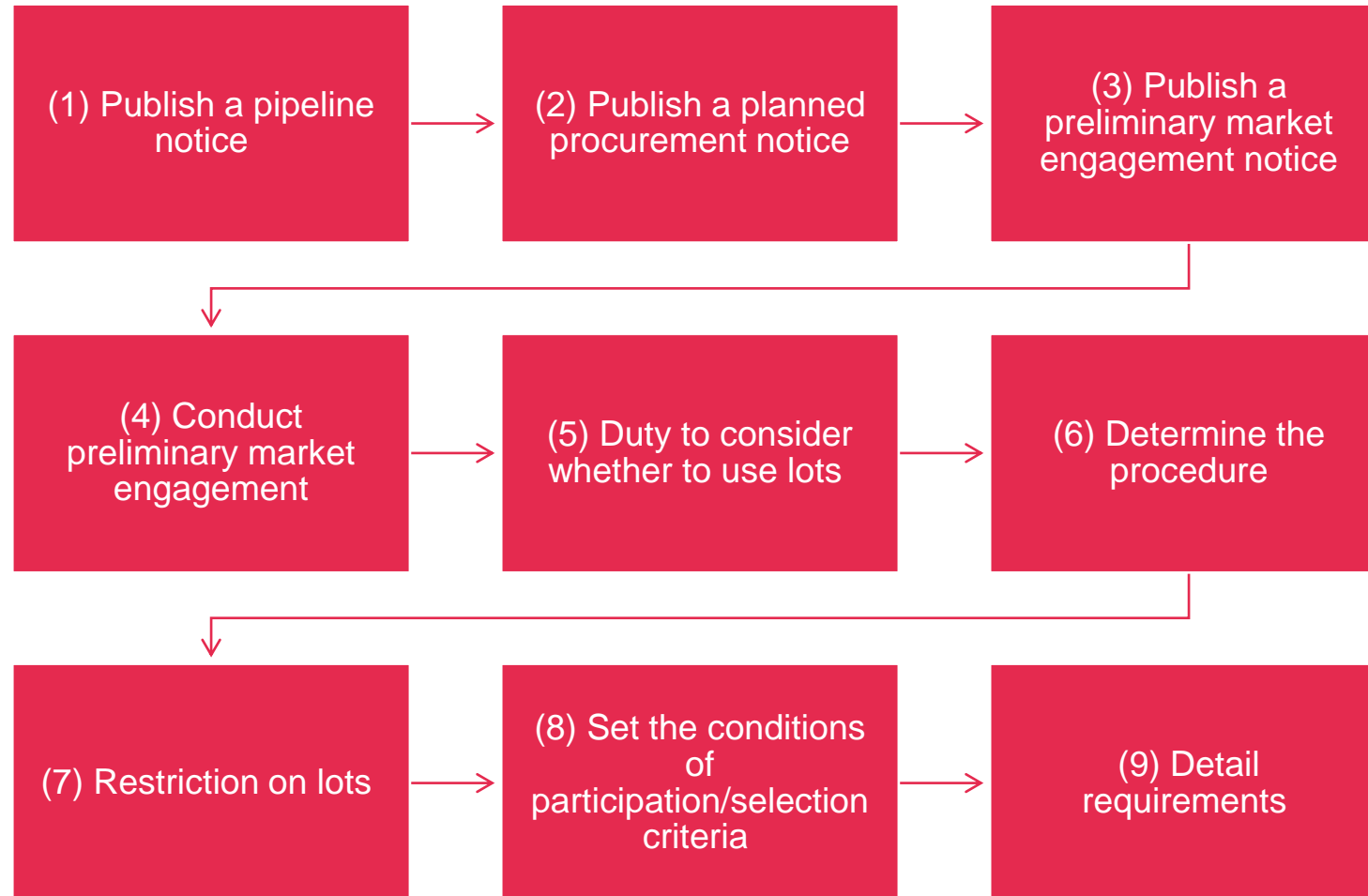
Competitive flexible procedure:

- wide discretion to design own procurement process
- reduction in specific rules
- replacement for a number of existing procedures
- increased focus on planning stage



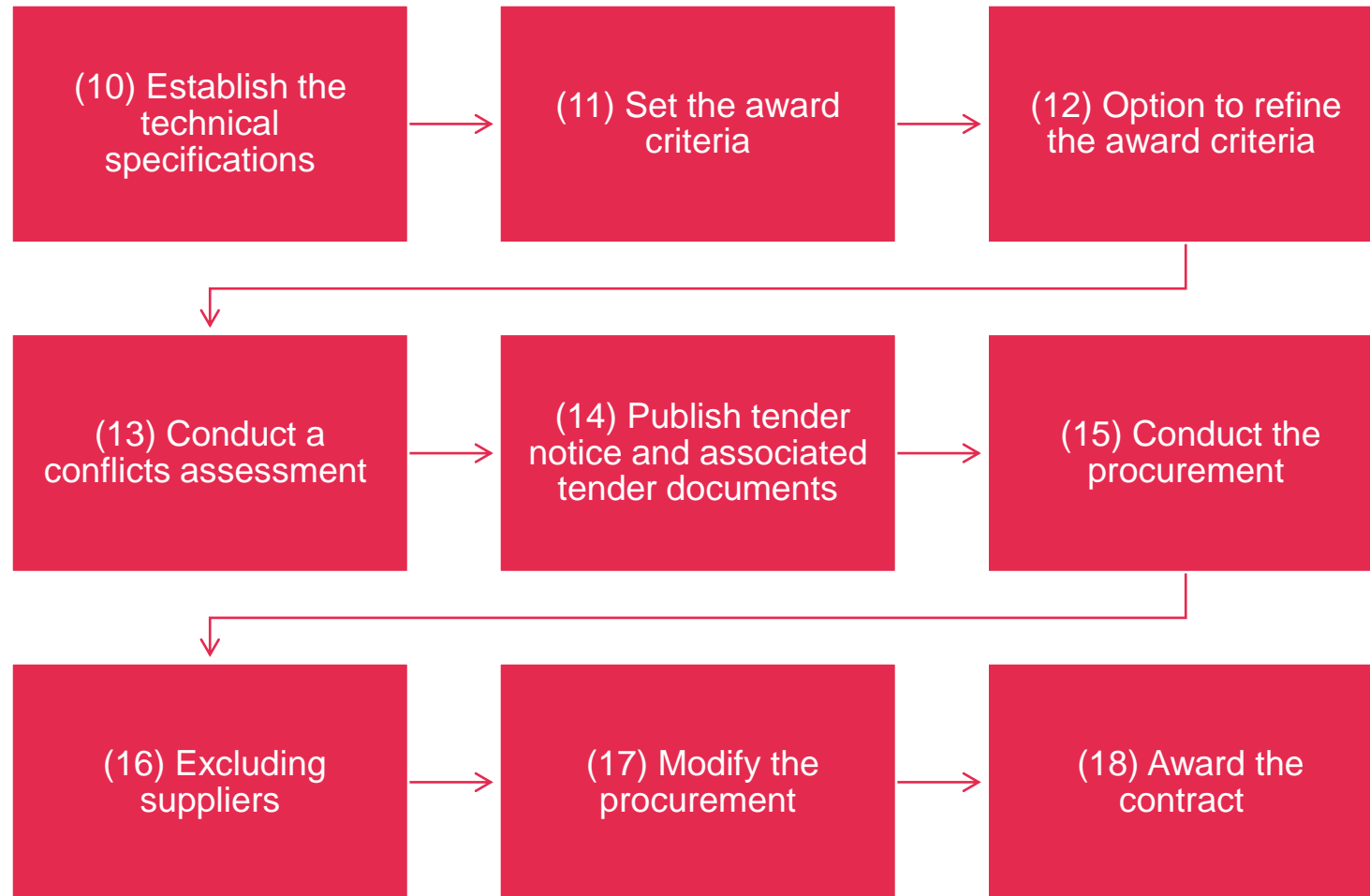
# Competitive tendering – 18 Step process

Steps 1-9 preparation



# Competitive tendering – 18 Step process

Steps 10-14 preparation, step 15 conducting procurement, steps 16-18 running procurement through to award



# Direct Awards

## **Existing regime - Regulation 32 of the PCR**

- Very prescriptive and limited grounds for direct award are difficult to meet
- Significant criticism and legal challenge over lack of transparency of their use

## **New regime**

- Largely familiar grounds
- Increased risk of challenge
- New ground - protect human, animal or plant life, or public order or safety

# Direct Awards

## Section 41 - Direct award in special cases

- Direct award justifications set out in Schedule 5 of the Act
- Mainly reflect existing grounds
- **May** carry out down-selection prior to direct award

## Section 42 – Direct award to protect life

- Where necessary to protect human, animal or plant life or to protect public order or safety – reflects WTO GPA
- Catch all provision to allow for temporary measures for specific issues, e.g., pandemic

# Direct Awards

## Section 43 – Switching to direct award

- If no suitable tenders/responses and a competitive procedure is not possible - equivalent to existing ground where no tenders/suitable tenders
- Not suitable includes:
  - failure to meet award criteria
  - abnormally low tender

## Section 44 – Transparency notices

- Transparency notice and contract award notice required for direct award (except for user choice contracts)
- 8 working day standstill period (except for user choice contracts or direct award to protect life or public safety or extreme urgency)

# Commercial Purchasing Tools

## Frameworks and dynamic markets

- The current regime largely replicated in the new “**closed framework**”:
  - maximum term = 4 years for public contracts, 8 years for utilities and defence (up from 7 for defence sector)
- A **new more flexible “open framework”** - allows new suppliers to be added at pre-identified intervals (at least once during term – max 8 years)
- **Dynamic Markets:**
  - not limited to commonly used purchases
  - no limit on number of members
  - may apply fees
  - no standstill for call-offs

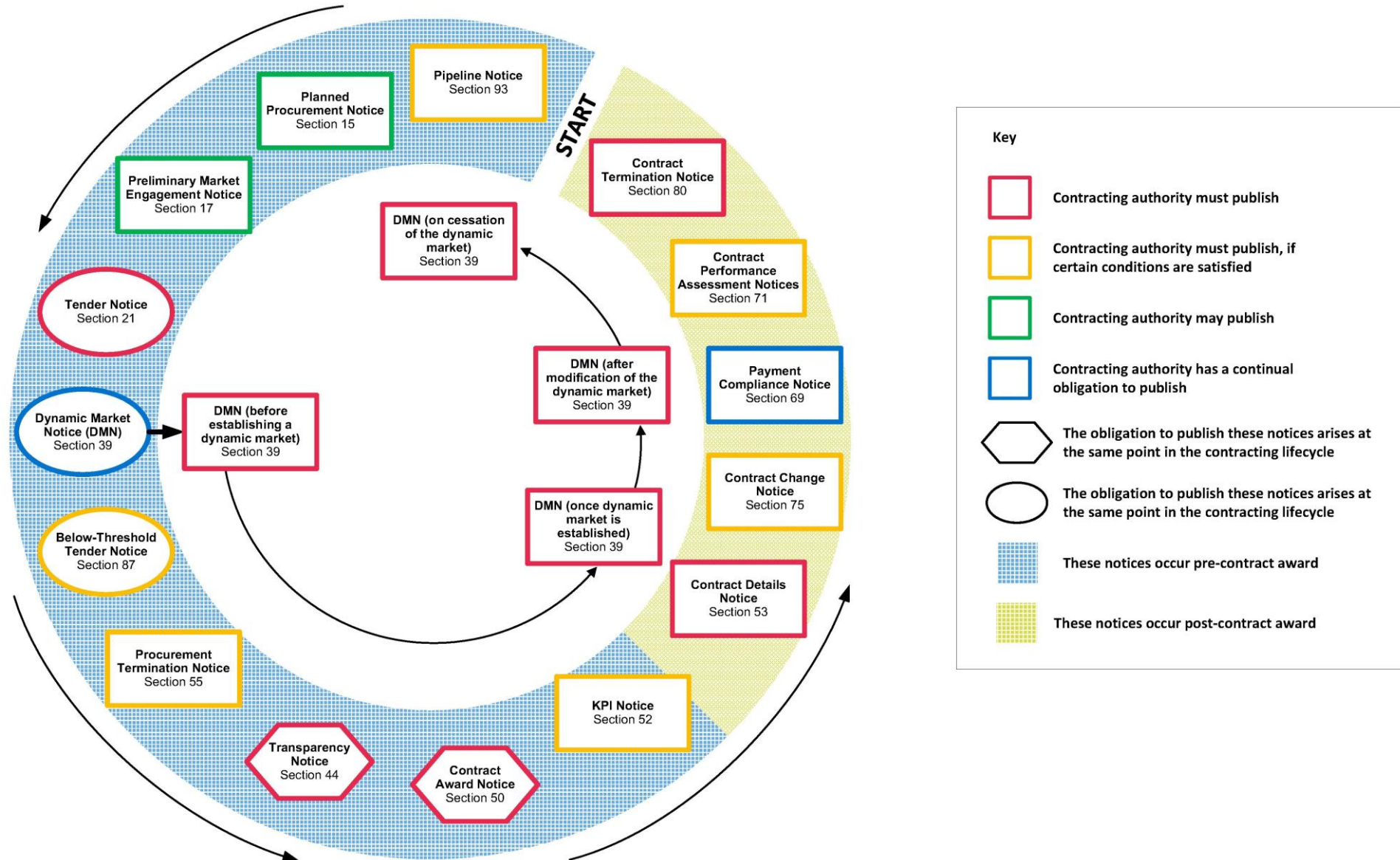
# Transparency obligations/notices

# Transparency

- New transparency notices aim to embed transparency in the contracting lifecycle
- Differs from the principle of transparency in the Public Contracts Regulations 2015
- Designed to ensure openness at each stage, allowing the public and suppliers to understand contracting authorities' decision making
- Impact remains to be seen as much will depend on:
  - how far contracting authorities comply
  - the quality of information included notices
- One aim is to hold suppliers who fail to perform to a satisfactory standard to account. This will cause tension as some notices could significantly impact on:
  - existing contracts
  - future opportunities
- The Cabinet Office consulted on regulations setting out the contents of notices.



# Transparency – Contract Lifecycle



# Transparency – Procurement Stage

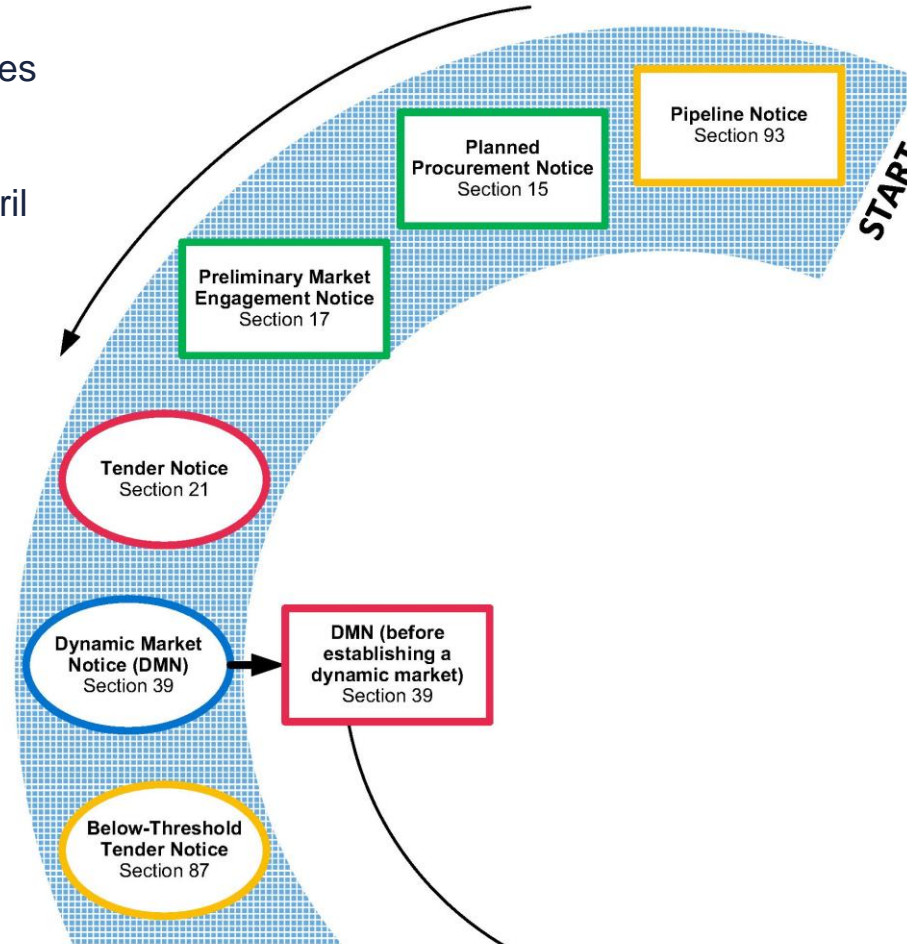
## Pipeline Notice

- Published by all contracting authorities that will pay >£100m under public contracts
- Published by end of May for year April to March
- Includes information on all planned contracts with value >£2m

## Preliminary Market Engagement Notice

Where a contracting authority carries out preliminary market engagement, it must:

- must publish a preliminary market engagement notice before the tender notice
- give reasons for not doing so in the tender notice



## Planned Procurement Notice

- A contracting authority may publish a planned procurement notice before the tender notice
- Can reduce the time limit for tender submission to 10 days

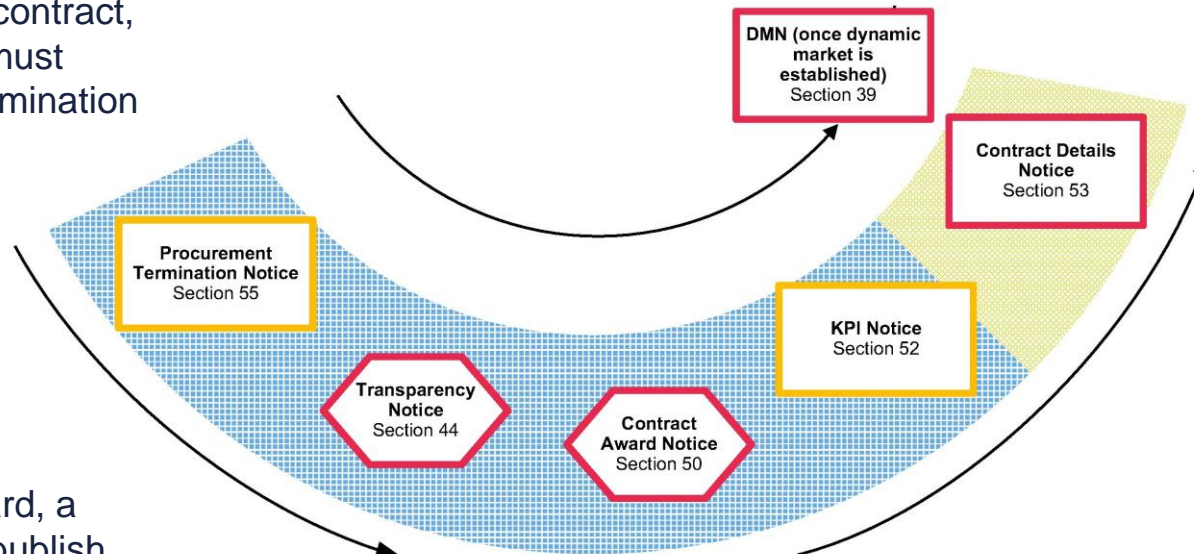
## Below Threshold Tender Notice

- Before advertising for tenders for a “notifiable below-threshold contract”, contracting authorities must publish a below-threshold tender notice
- “Notifiable below-threshold contract” means a contract valued at:
  - $\geq$ £12,000 for central government
  - otherwise,  $\geq$ £30,000

# Transparency – Contract Award

## Procurement Termination Notice

Where it has published a tender or transparency notice, but later decides not to award the contract, the contracting authority must publish a procurement termination notice.



## Transparency Notice

Before making a direct award, a contracting authority must publish a transparency notice.

## Contract Award Notice

Before entering into a public contract, a contracting authority must publish a contract award notice.

## Contract Details Notice

A contracting authority must publish a notice that it has entered into a contract, within:

- 120 days for light touch contracts
- otherwise, 30 days

For contracts with an estimated value of  $\geq$ £5m, contracting authorities must publish the contract within:

- 180 days for a light touch contract
- otherwise, 90 days

## KPI Notice

Before entering into a public contract with an estimated value of  $\geq$ £5m, contracting authorities must set and publish at least three KPIs.

# Transparency – Contract Management

## Contract Termination Notice

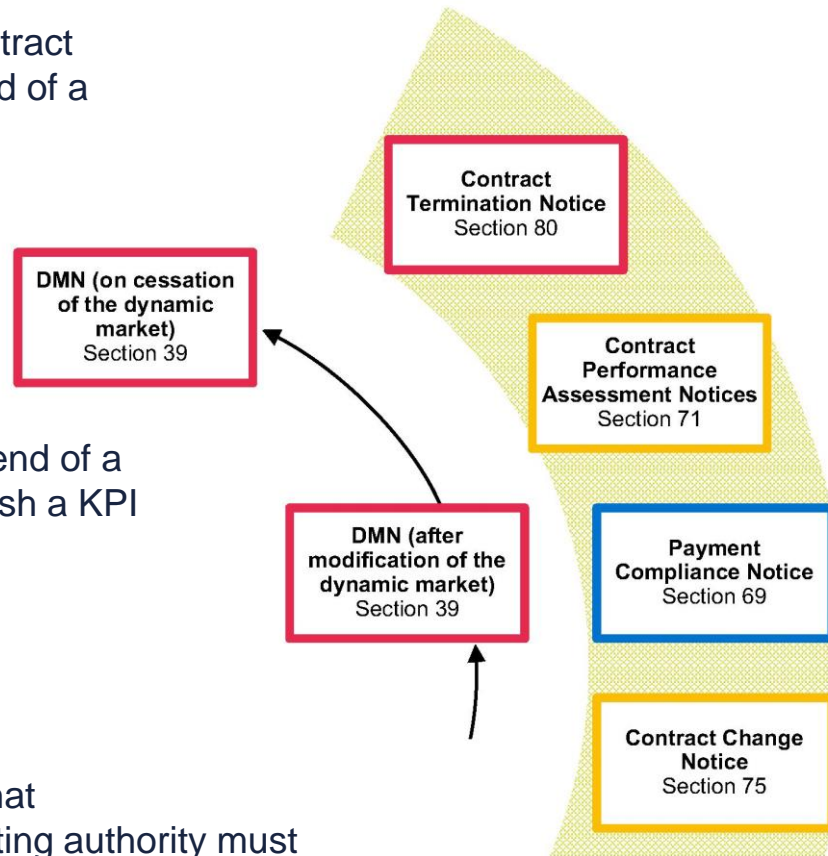
A contracting authority must publish a contract termination notice within 30 days of the end of a public contract, for any reason.

## KPI Assessment Notice

At least once every 12 months and at the end of a contract, contracting authorities must publish a KPI assessment notice.

## Breach or Poor Performance Notice

- If a supplier breaches a contract and that breach sufficiently serious, the contracting authority must publish a notice within 30 days of the breach
- Contracting authorities must also publish notices in the case of unsatisfactory performance that is not remedied



## Payment Compliance Notice

Every 6 months, contracting authorities must publish a notice setting out compliance with the obligation to pay undisputed invoices within 30 days.

## Contract Change Notice

Before modifying a public contract, a contracting authority must publish a contract change notice.

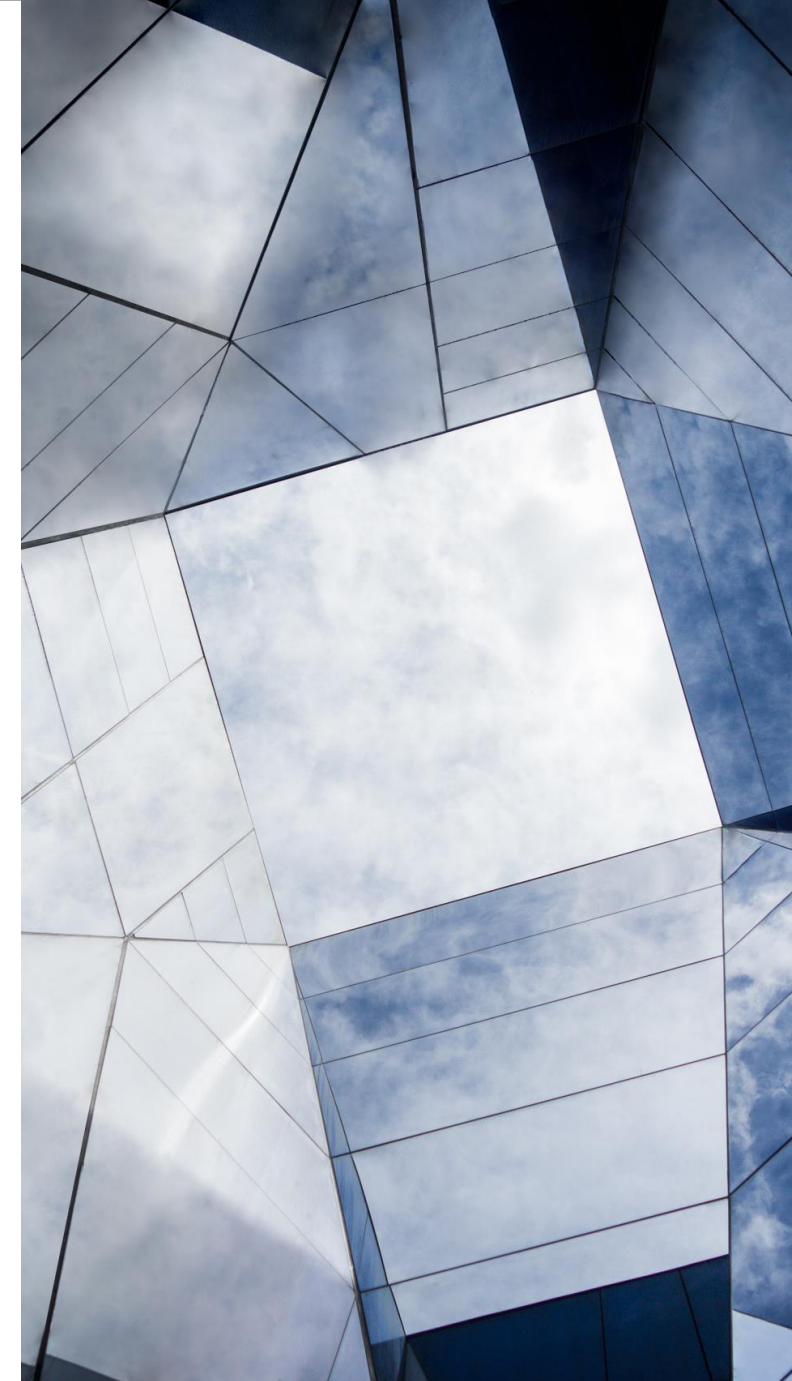
# Contract management

# General contract management

The Act confirms requirements from the current Regulations and Procurement Policy Notes, and introduces new ones.

Contracting authorities must:

- set and publish at least 3 key performance indicators (KPIs)
- accept electronic invoicing
- pay (or dispute) invoices promptly
- public bi-annual payments compliance notices
- assess and publish KPI and contract performance notices
- monitor sub-contracting arrangements (in some circumstances)
- consider termination of contracts where termination grounds apply
- publish contract termination notices



# Modifying contracts

# Modifying public contracts: overview

## The Procurement Act:

- continues the approach that contracting authorities can only modify most public contracts in certain circumstances (the **safe harbours**)
- maintains the existing safe harbours, with changes
- adds additional safe harbours
- adds additional procedural requirements (the contract change notice)





# Is the contract or modification caught?

## Is the contract in scope?

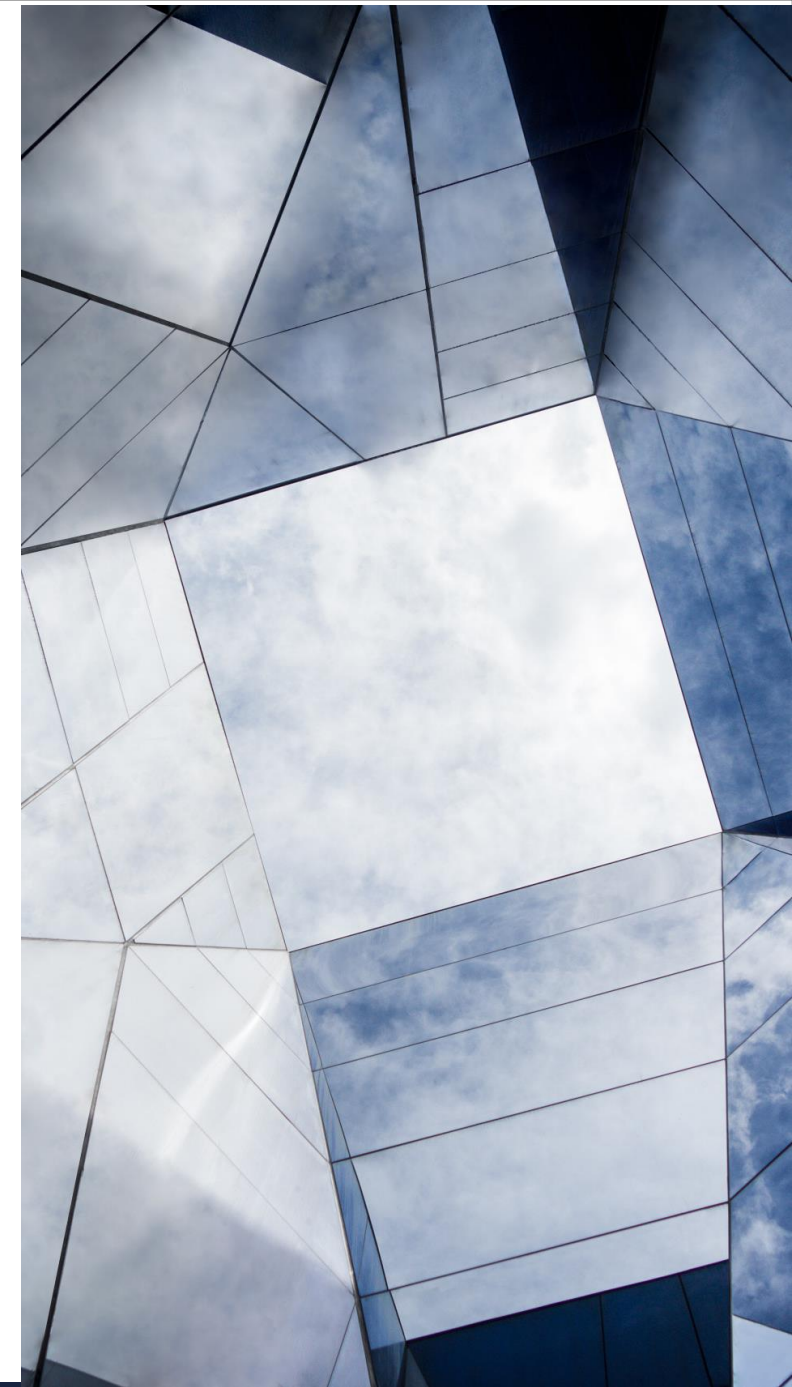
The contract modification rules apply both to:

- public contracts
- contracts that after the modification would be a public contract

But, the rules do not apply to light touch contracts.

## Combine with previous modifications

If a contracting authority considers that a specific change could reasonably have been made with an earlier change, it must consider those two changes together.



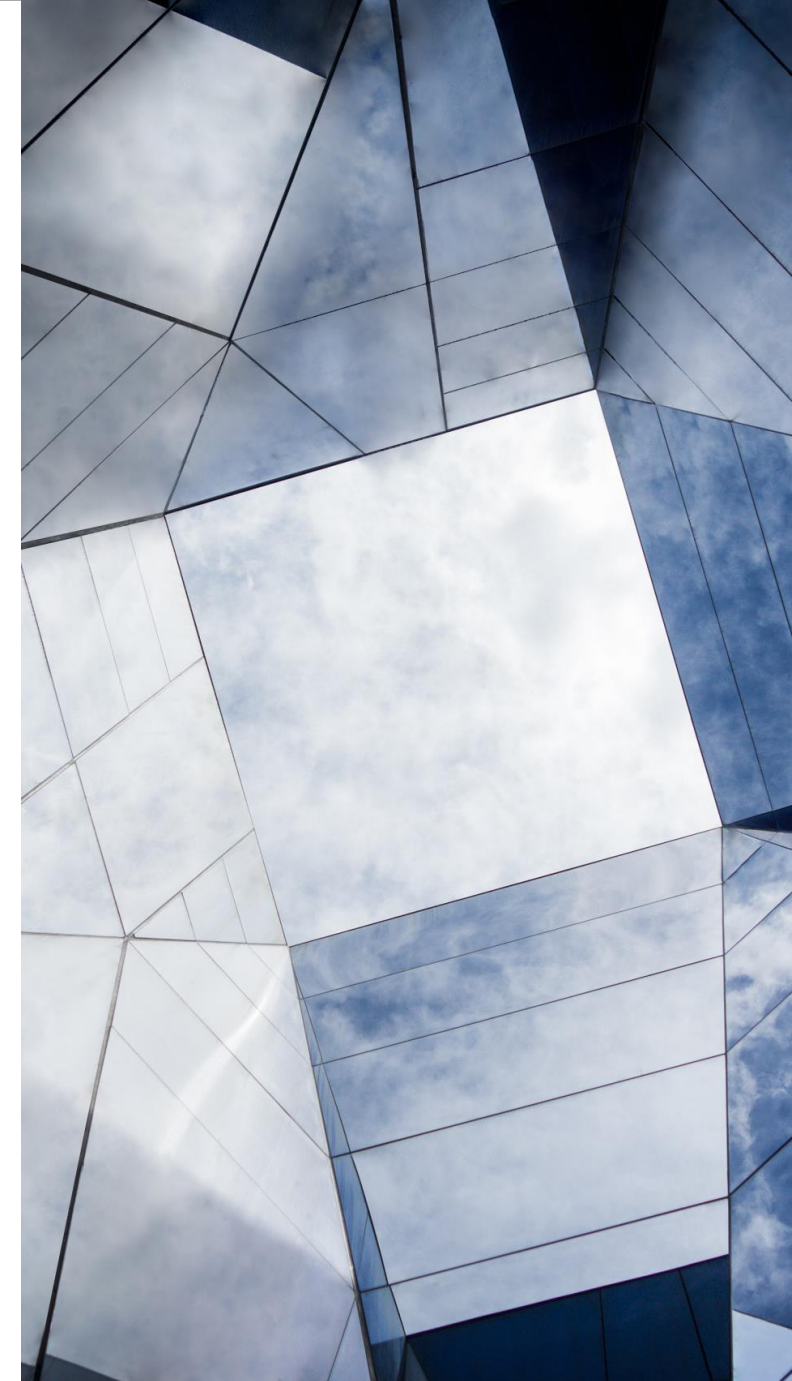
# Modifying contracts: safe harbours

# Provided for in the contract

Schedule 8, paragraph 1

The modification is permitted if:

- the possibility is provided for unambiguously in both:
  - the contract as awarded; and
  - either:
    - the tender notice (the contract notice); or
    - the transparency notice (the notice published before making a direct award); and
- the modification would not change the overall nature of the contract.



# Urgency and the protection of life, etc

Schedule 8, paragraphs 2 and 3

The modification is permitted if:

- the requirement could otherwise have been met through a direct award; and
- the relevant direct award justifications are either:
  - urgency; or
  - regulations for the protection of human, animal or plant life or health, or the protection of public order or safety.

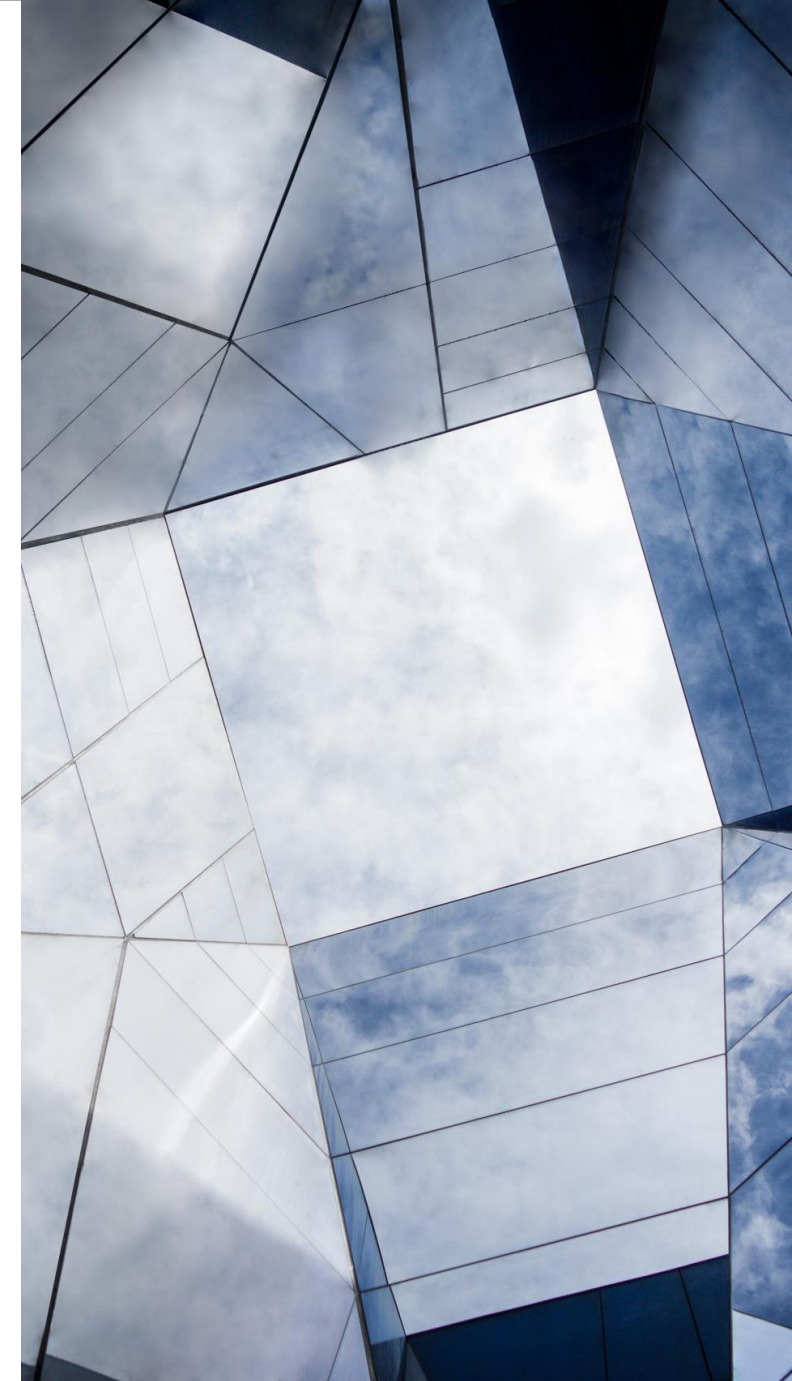


# Unforeseeable circumstances

Schedule 8, paragraph 4

The modification is permitted if:

- the circumstances requiring the modification could not reasonably have been foreseen;
- the modification would not change the overall nature of the contract; and
- the modification would not increase the estimated value by more than 50%.



# Materialisation of known risk

Schedule 8, paragraphs 5, 6 and 7

A known risk is a risk that the contracting authority considered:

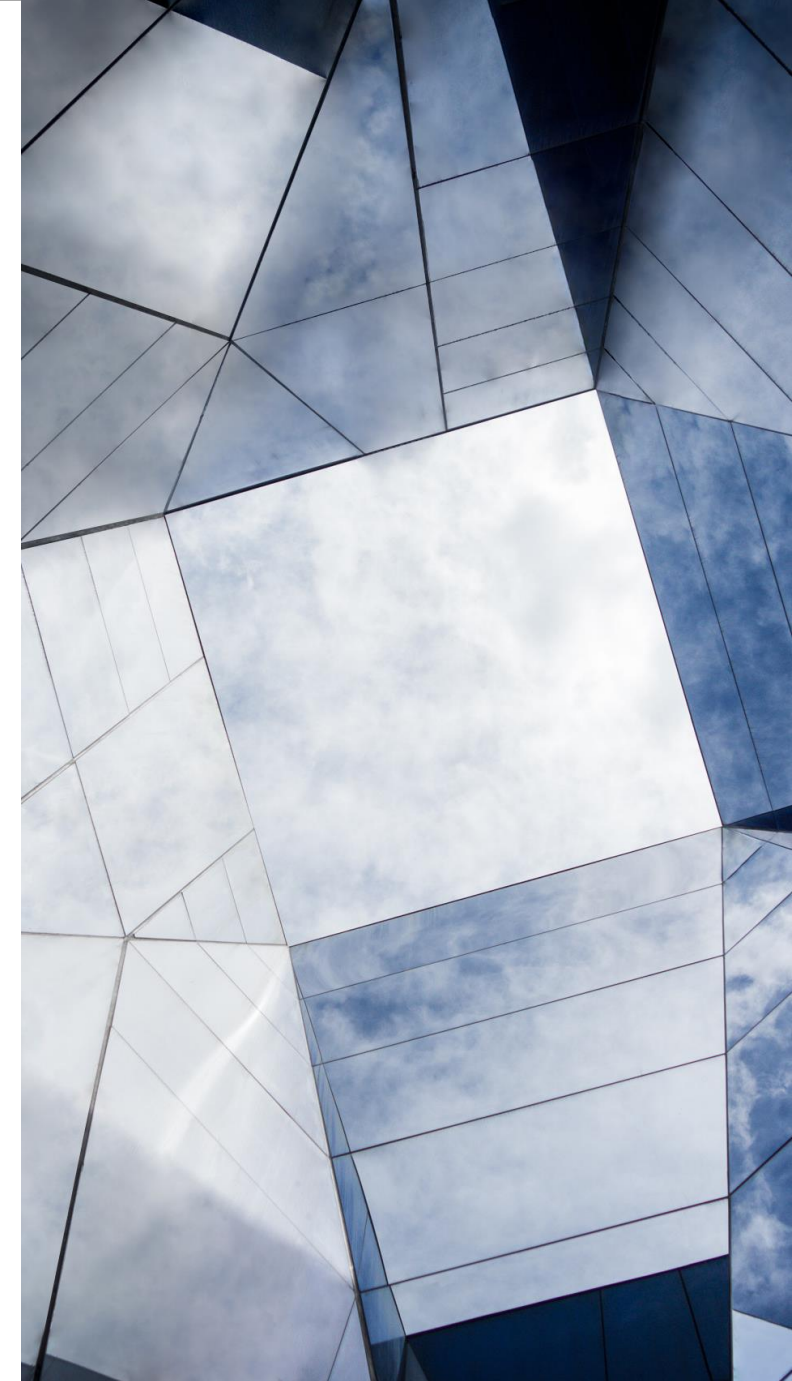
- could jeopardise the contract; but
- because of its nature could not be included in the awarded contract.

The known risk must be included in either:

- the tender notice (contract notice); or
- the transparency notice (direct award notice).

A modification is permitted if:

- the contracting authority considers:
  - the known risk has eventuated;
  - the contract cannot be performed to the contracting authority's satisfaction;
- the modification goes no further than necessary;
- it would not be in the public interest to award a new contract; and
- the value of the contract does not increase by more than 50%.

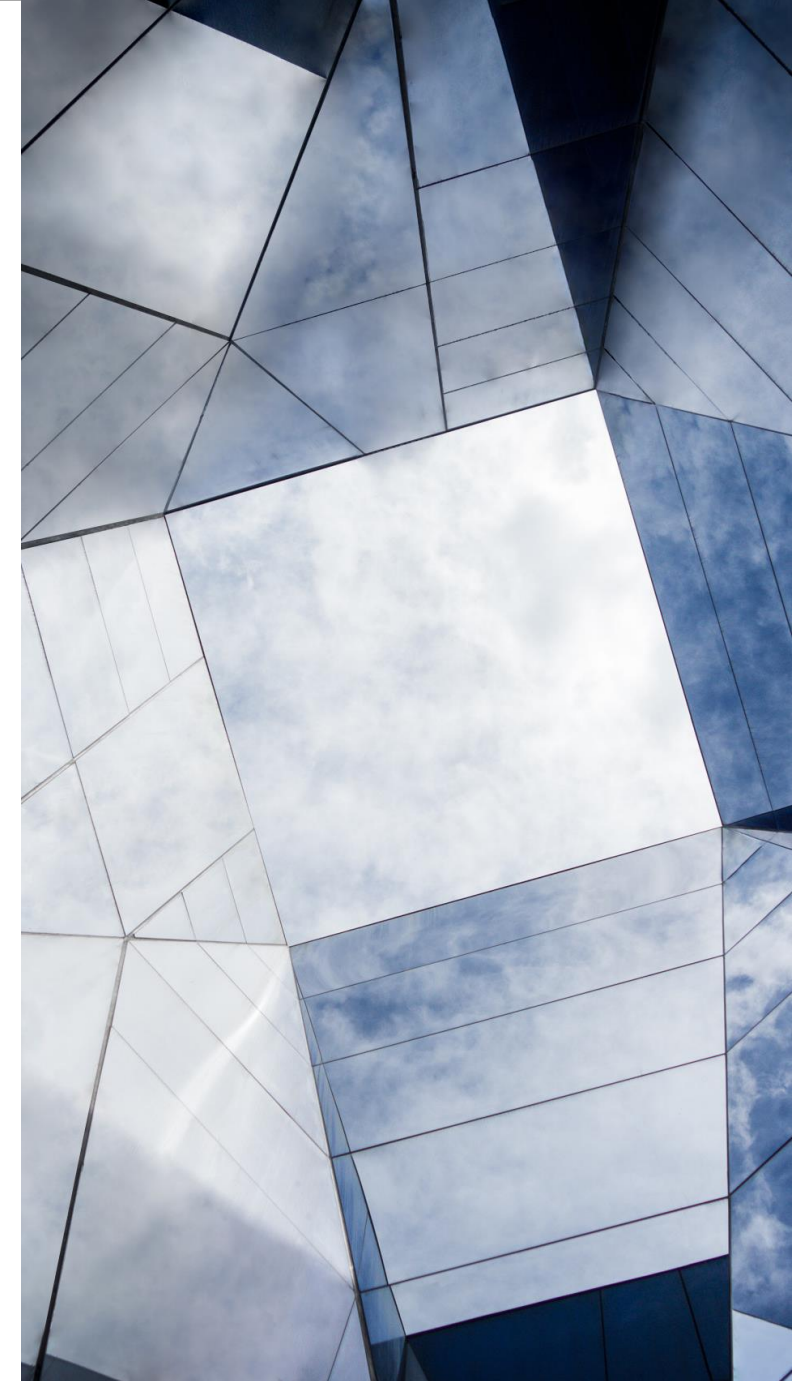


# Additional goods, works or services

Schedule 8, paragraph 8

A modification is permitted if:

- for additional goods, works or services;
- another supplier would provide different or incompatible goods, works or services;
- the contracting authority considers would result in:
  - either:
    - disproportionate technical difficulties in operation or maintenance; or
    - other significant inconvenience; and
  - substantial duplication of costs; and
- the value of the contract does not increase by more than 50%.

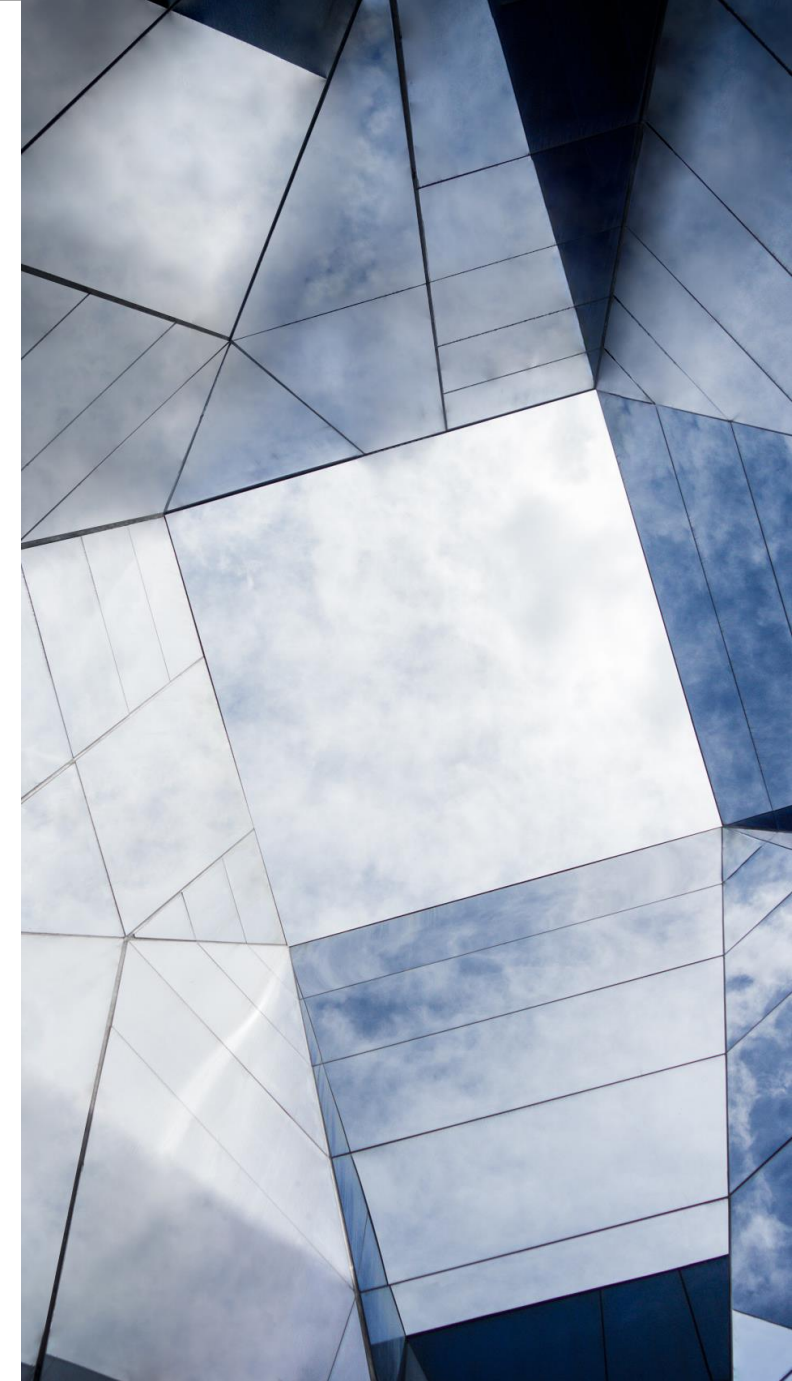


# The modification is not substantial

A substantial modification is one that:

- increases or decreases the term of the contract by more than 10% of the maximum term provided for on award;
- materially changes the scope of the contract; or
- materially changes the economic balance of the contract.

A change in scope is the provision of goods, works or services of a kind not already provided for in the contract.



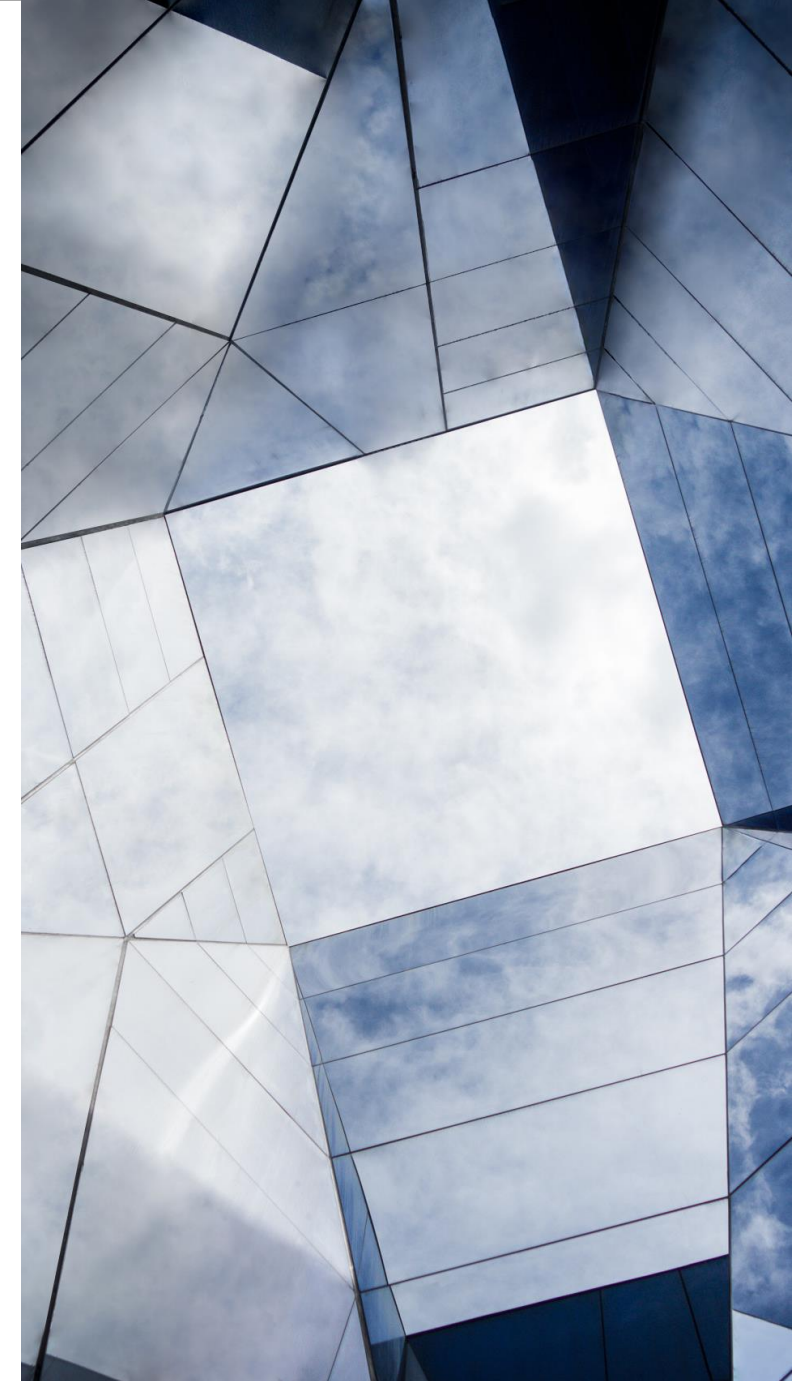


# Below threshold modification

A below threshold modification is one where:

- the modification would not change the total value by more than:
  - 10% for goods and services; or
  - 15% for works;
- the total value of all below threshold modifications is below the threshold;
- the modification does not materially change the scope of the contract; and
- the modification is not otherwise a permitted modification

A change in scope is the provision of goods, works or services of a kind not already provided for in the contract.



# Other grounds

Corporate restructuring and defence

## Corporate restructuring

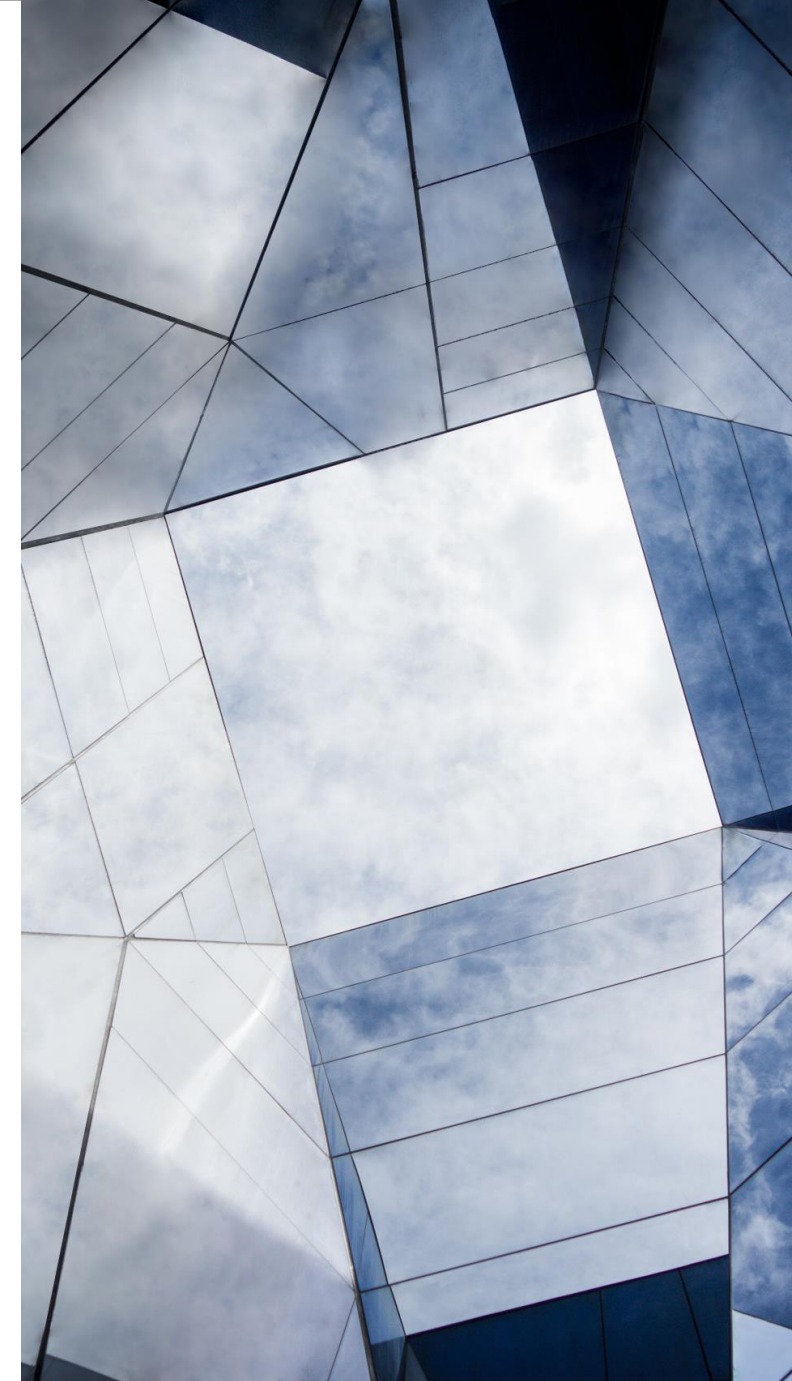
Change permitted where an assignment or novation of a public contract following corporate restructuring or similar.

The new supplier cannot be an excluded supplier.

## Defence contracts

Changes to defence and security contracts awarded by a defence authority allowed if:

- the change required to:
  - take advantage of developments in technology; or
  - prevent or mitigate any adverse effects of those developments; or
- the change ensures Armed Forces operational capability.



# Modifying contracts: process

# Publish change notice and modification

Sections 75, 76 and 77

## Before making the change

Contracting authorities publish a contract change notice before modifying a public contract or a convertible contract.

Contracting authorities can include a voluntary standstill period of at least eight working days in a contract change notice.

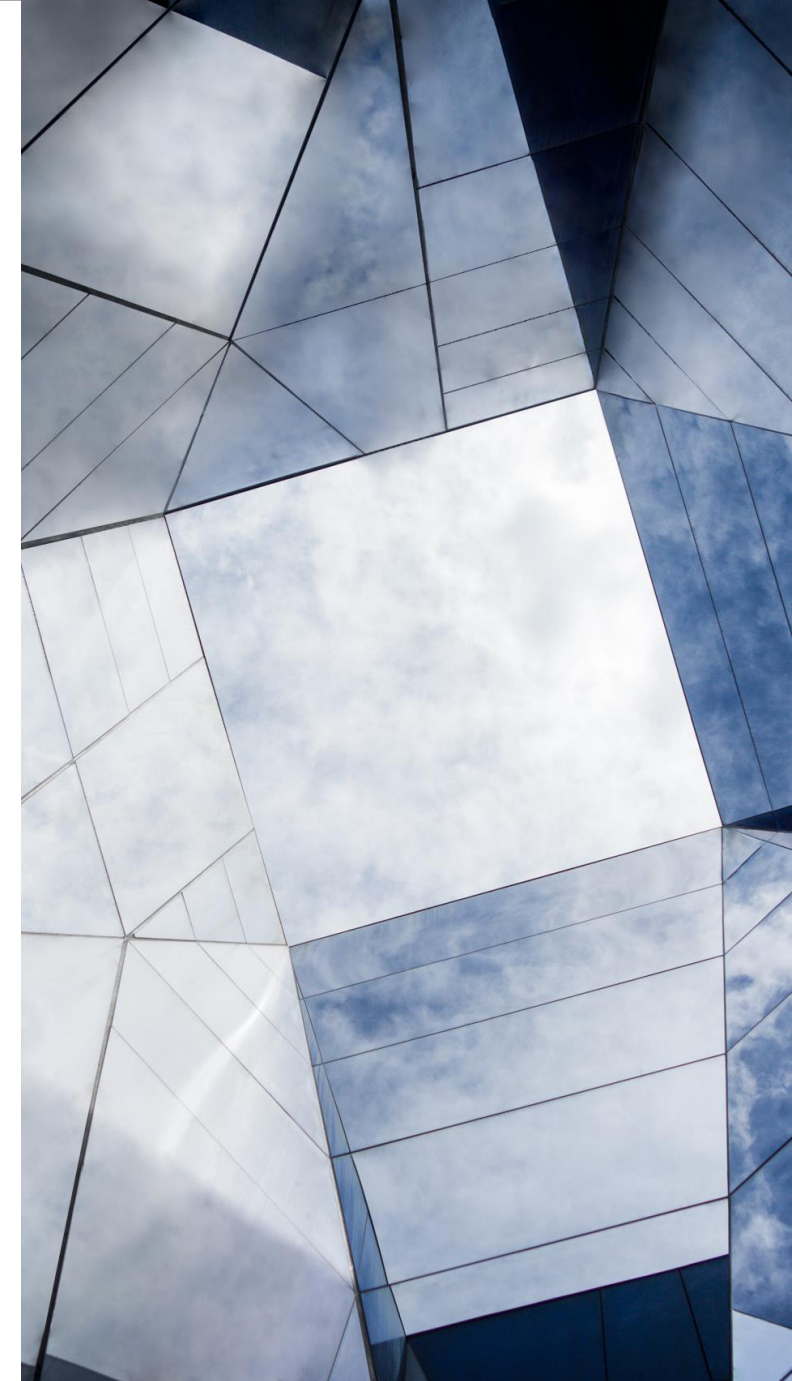
## After the change

Contracting authorities must publish a copy of

- the contract as modified; or
- the modification,

within 90 days where:

- it published a contract change notice; and
- the contract has, or will have, a value of more than £5m.



# Exclusions

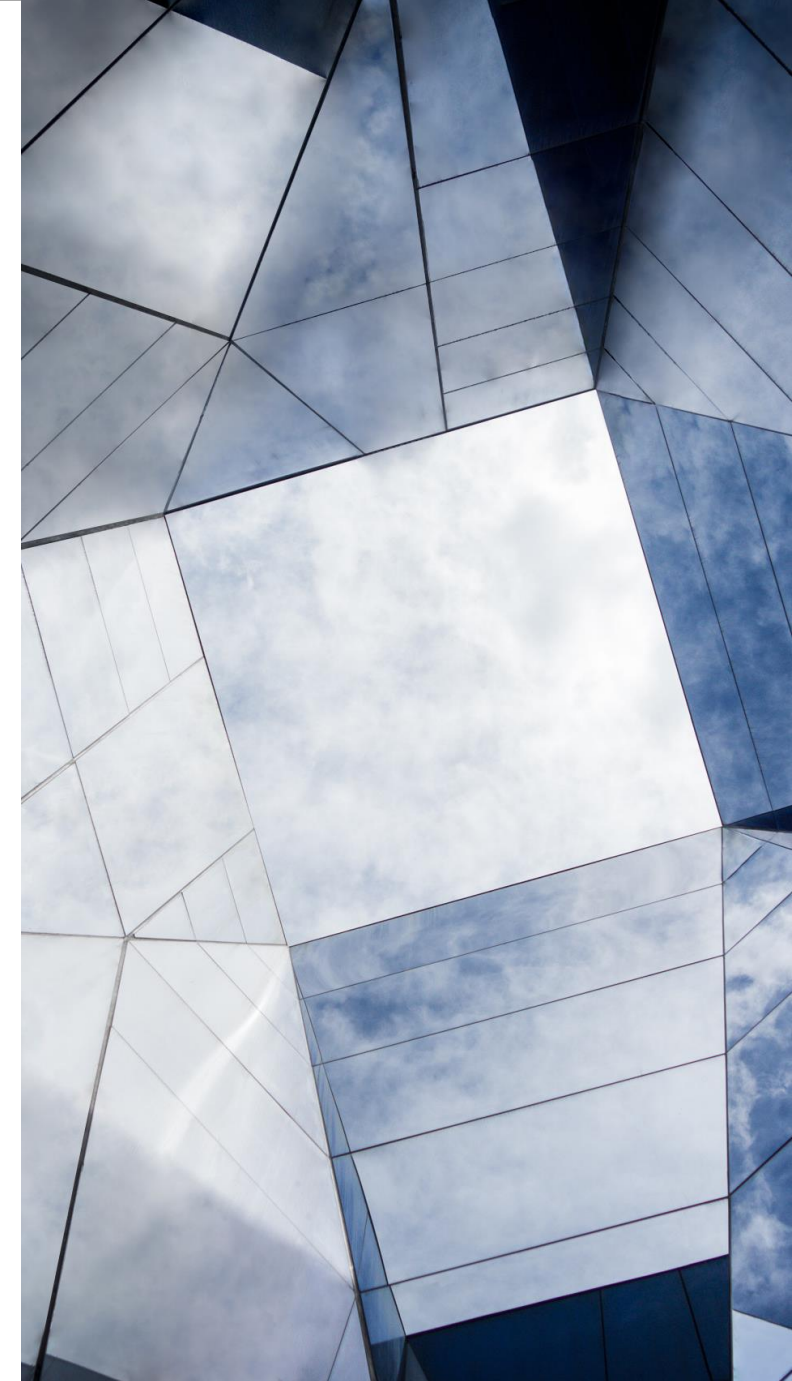
# Exclusions

## Contractual Performance

- Aim is to have a mechanism to penalise suppliers who perform badly.

The discretionary grounds for exclusion to achieve this include:

- a breach which is sufficiently serious (meaning leading to termination, damages or a settlement)
- a court judgment confirming a sufficiently serious breach
- the supplier has not performed to the Authority's satisfaction, was given the opportunity to improve and failed to do so
- a notice is published relating to breach or poor performance



# Exclusions – implications of a notice

- It makes contractual poor performance about more than just that one contract
- Reputational and practical consequences
- Potential for other existing contracts to be terminated
- Other authorities may elect to exclude the supplier from future competitions due to this notice
- Rival suppliers may apply pressure for competitor to be excluded if there is a notice against them for poor performance.



# Exclusions

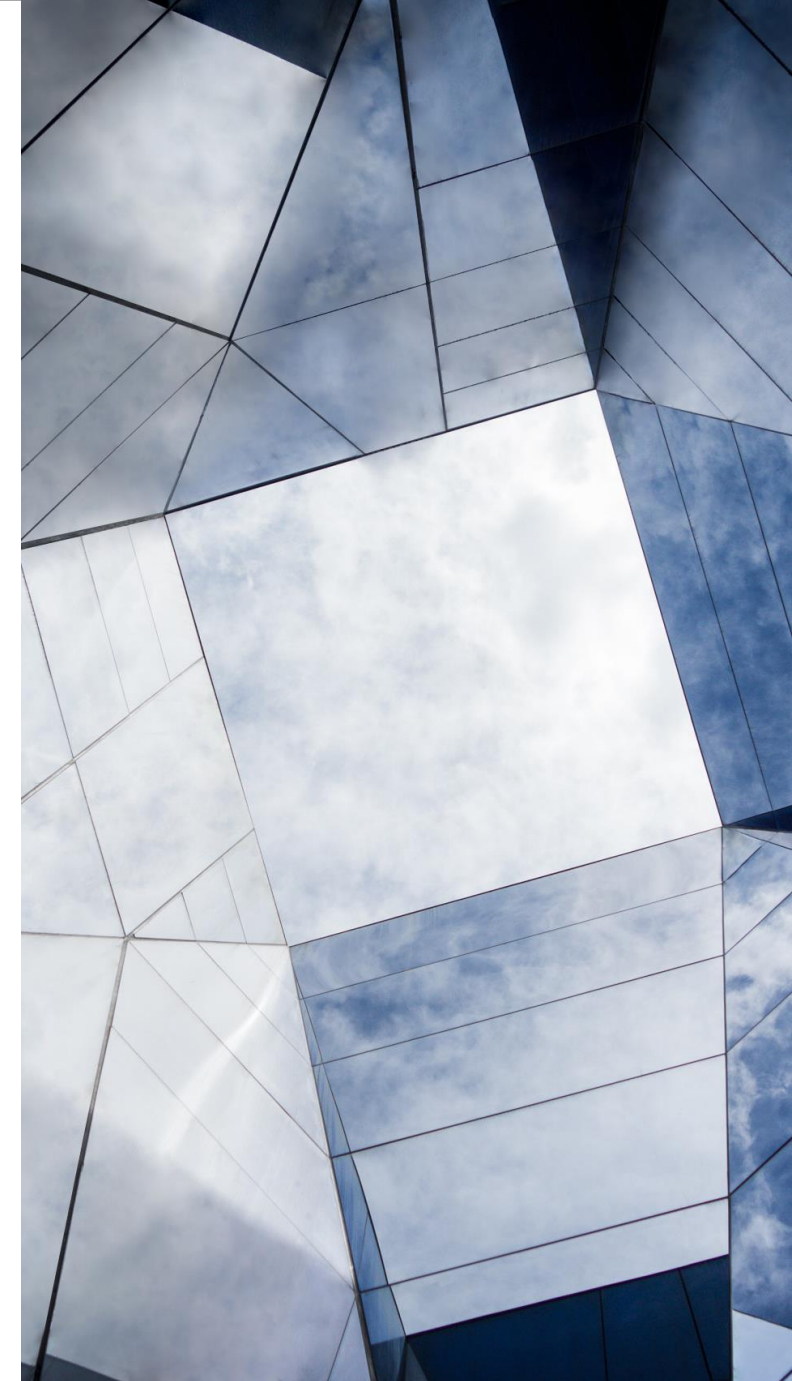
## Excluding for Improper Behaviour

### The Test

- Acting improperly covers:
  - failing to provide information requested by the contracting authority;
  - providing information that is incomplete, inaccurate or misleading;
  - accessing confidential information, or
  - unduly influencing the contracting authority's decision-making.

### The Process

- A supplier must gain an unfair advantage because of its behaviour which requires exclusion, no other alternative
- Bidder must be allowed to make representations and provide relevant evidence

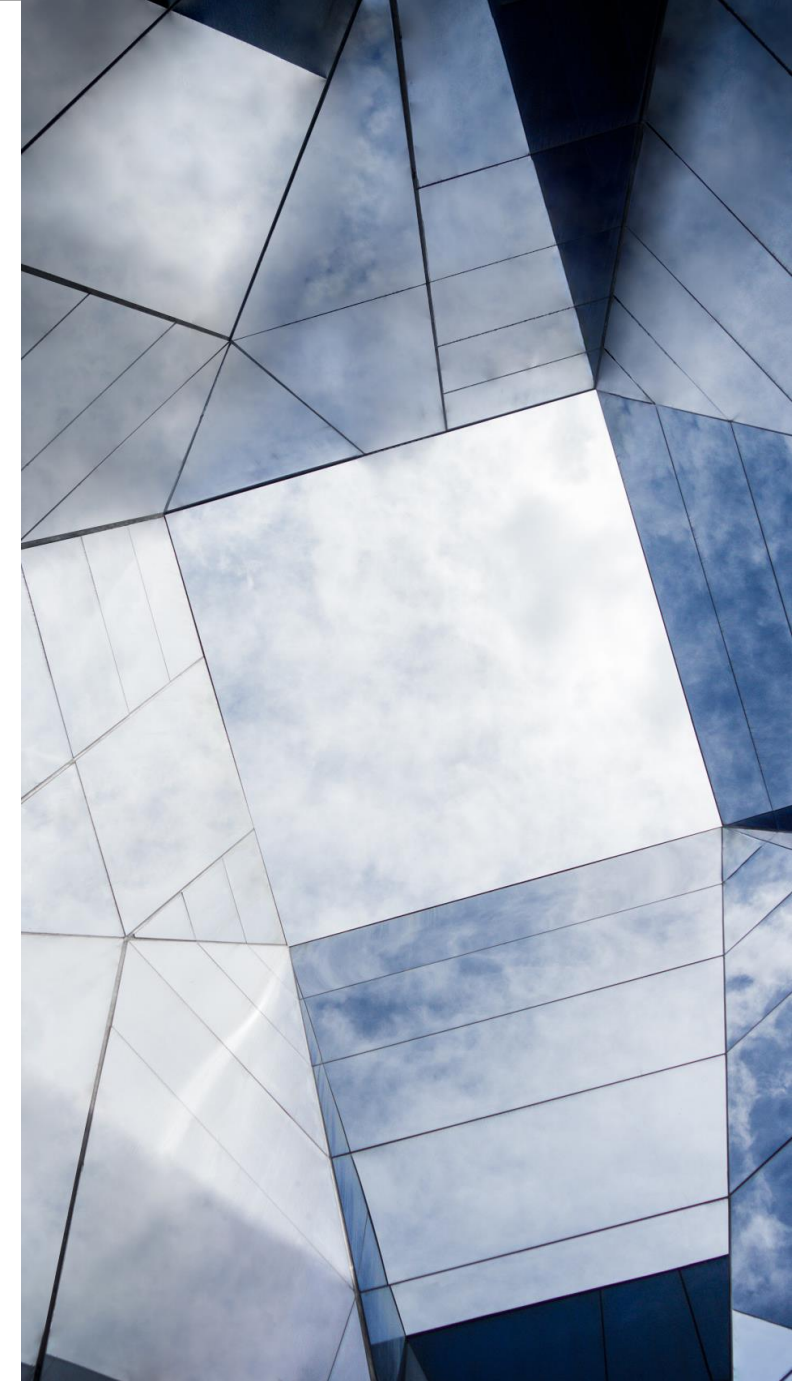




# Exclusions

There are 2 routes for exclusion on grounds of threat to national security:

- 1. A mandatory power for the Minister for the Cabinet Office to debar suppliers if the supplier**
  - poses a threat to the national security of the UK; and
  - would pose such a threat in relation to public contracts of a particular description.
  
- 2. A contracting authority has a discretionary ground to exclude - subject to the following provisions.**
  - the authority has notified the Minister of its intention, and
  - the Minister considers that:
    - the supplier or an intended sub-contractor is an excludable supplier; and
    - the tender should be disregarded or the supplier excluded.

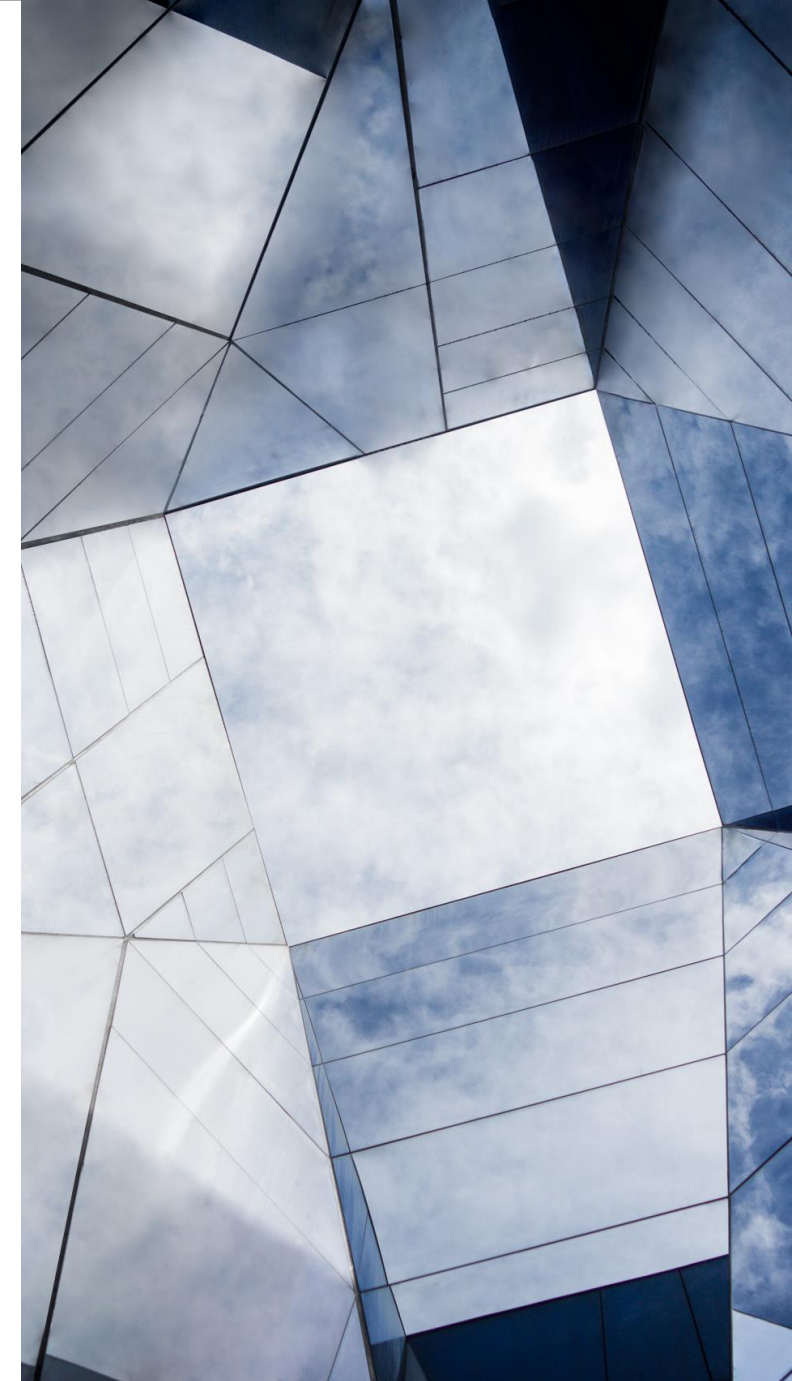


# Debarment

# Debarment List

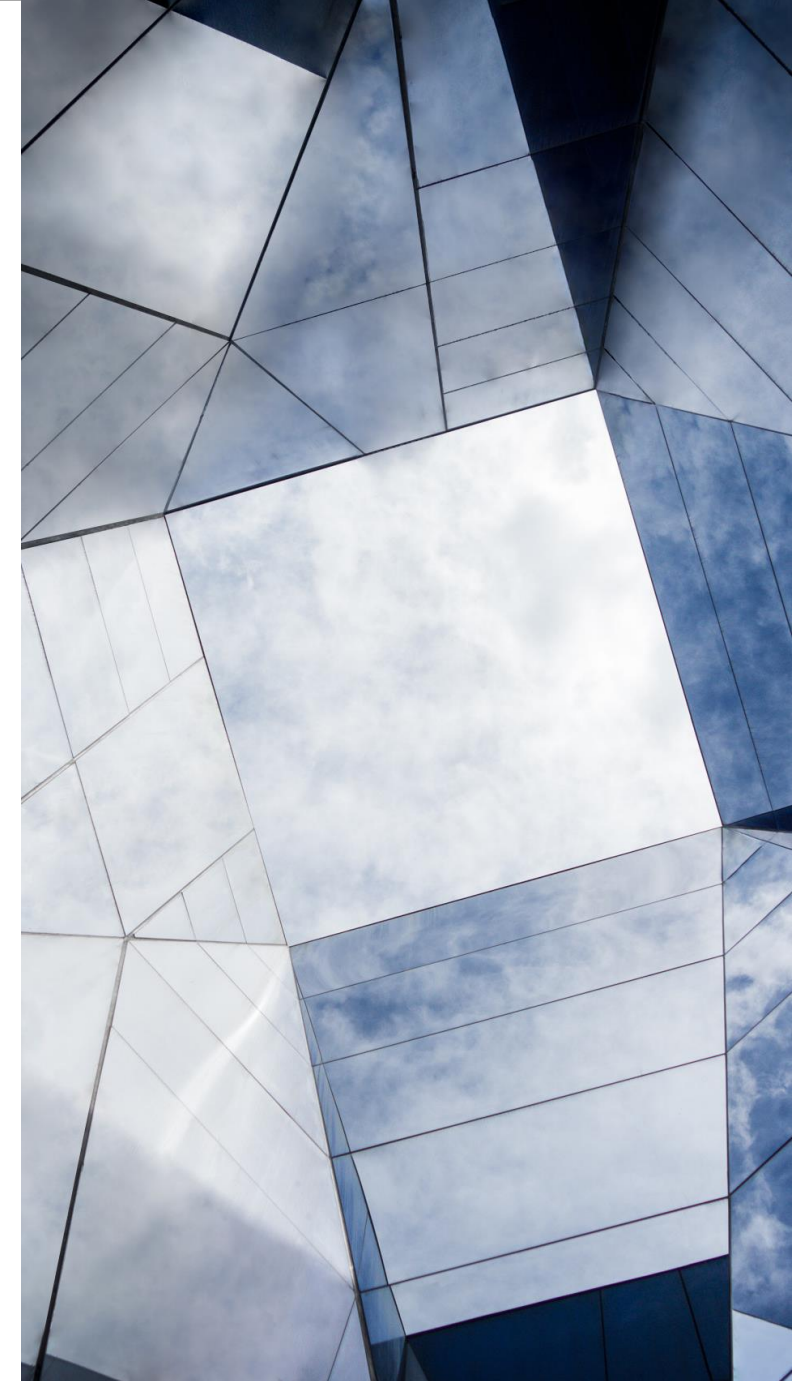
This is a new concept – centrally managed by government

- Process for being added to the debarment list:
  - contracting authorities are under an obligation to report a supplier to the Minister for the Cabinet Office if they exclude the supplier
  - the Minister then decides whether to put the supplier on a debarment list following an investigation
- Suppliers can apply to be taken off the list/revise the period they are stated to be on the list
- Applications require a material change of circumstances or significant new information



# Debarment List

- Suppliers can apply (via the Courts) for suspension of the decision to enter the supplier onto the list
- Debarment standstill period – supplier has 8 working days from getting notice to issue in court
- Supplier can also appeal to the courts to be removed from the list.
- Any such appeal must establish a material mistake of law and must be commenced within 30 days of knowledge of the decision
- Supplier can apply to Minister to be removed from the list at any time if there is a material change of circumstances

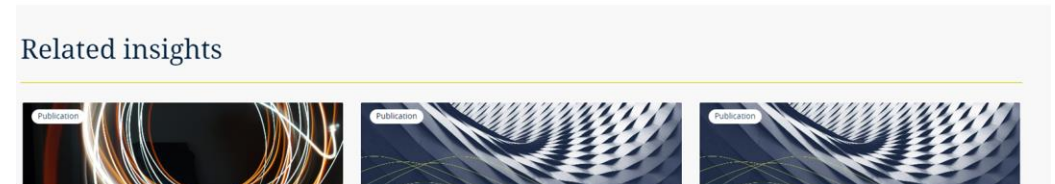
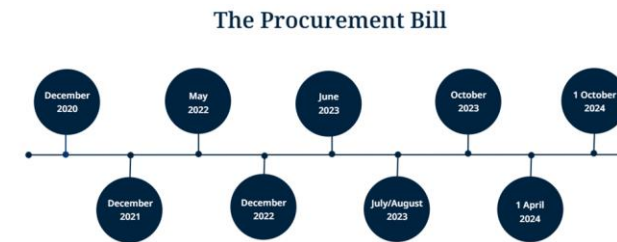
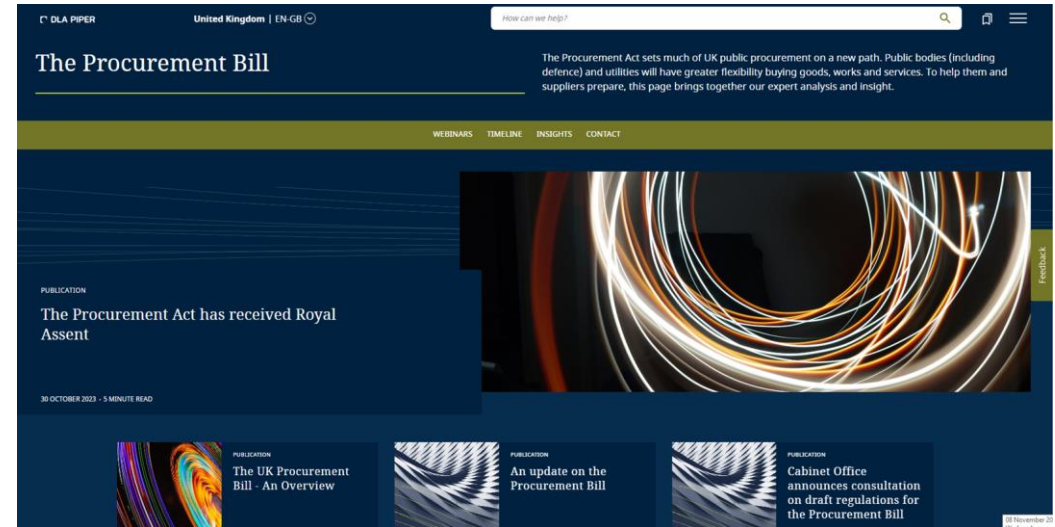


# UK Public Procurement Reform Hub

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.

- Register for upcoming webinars
- Access links to previous webinar recordings
- Read our latest blogs

<https://www.dlapiper.com/en-gb/insights/topics/uk-procurement-bill>



Any questions?