

The Procurement Act for Private Utilities

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Rainey, Michael

Good morning, everyone, and welcome to our webinar on the Procurement Act for private utilities.

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Rainey, Michael

I'm Michael Rainey and I'm joined today by Jack Doukov-Eustice, Charlotte Pashley and Jonathan Davey, all members of our specialist procurement team who work day in, day out on private utility procurements and together we're going to talk you through what the new Procurement Act changes mean for you.

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Rainey, Michael

The Procurement Act is a massive change in procurement law, not least because a single piece of legislation will now apply to everyone, including the public sector and private utilities.

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Rainey, Michael

Much of the material out there is heavily public sector focused, but today we're ignoring them and focusing on the private utility perspective.

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Rainey, Michael

From a technological perspective, you've all joined this session this morning as attendees, and so we can't see you or hear you on the screen. Please do raise any questions you have as you go along using the Q&A button that you'll see on the screen and we have time set aside at the end to answer any of your questions.

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Rainey, Michael

Before then, we'll be covering the following key topics, procuring contracts, challenging procurements, changing and managing contracts and getting ready for the new rules and as part of that, we're going to look at some practical tips on what you can be doing now to get ready.

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Rainey, Michael

We're now gonna look at where we are today. As you will know and as you can see from this slide, the new rules have been an awfully long time coming and it'll be nearly four years to be precise since the original Green Paper on transforming public procurement back in 2020.

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Rainey, Michael

28th of October this year is the date when everything changes and utilities procurement, at least for new procurements. Ongoing procurements will continue on the current UCR rules as will existing framework agreements

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Rainey, Michael

until they're terminated and qualification systems can carry on under the UCR for at least four years.

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Rainey, Michael

You may remember going back to the Green Paper that it was extremely light on utilities content and any related insight.

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Rainey, Michael

But that has changed since.

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Rainey, Michael

A huge amount of good work has been done to make sure that the private utility context is understood properly by government. Many of you have been involved in discussions with Cabinet Office and the regulatory perspective in which you operate be that Ofgem, Ofwat or the URR and the wider price control environment is now much better reflected in the new rules and in the surrounding guidance which we're still awaiting and there's much greater flexibility.

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Rainey, Michael

In in all of these rules, for private utilities to operate, much of this flexibility is secured through exemptions from the provisions of the new act, and there is still a power in the Act for further exemptions to be granted to reduce the regulatory burden on private utilities yet more.

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Rainey, Michael

The new rules, of course, are not perfect, and you will certainly notice the difference once you start to use them, and once the changes bed in, things will feel generally quite different. But.

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Rainey, Michael

The fundamentals of good procurement are not changing hugely. So much of what we are covering today and what you'll hear from us about the changes will feel familiar, even if many of the concepts, terminology and the words have been changed.

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Rainey, Michael

So on that note, I'm going to hand over to Jack to talk you through how you go about procuring contracts under the Procurement Act.

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Doukov-Eustice, Jack

Thanks, Michael, and thanks to everyone who's joined today taking time out of your days. I think it's a really important sessions here to have are quite exciting as well. So bring on a procurement Act 2023, I'm going to go through some more fundamental points of procuring actual contracts. You know what you need to be aware of and how that is designed to function and what we have here is actually probably one of the

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Doukov-Eustice, Jack

more significant or more obvious changes

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Doukov-Eustice, Jack

in a procurement act, so what we're used to under the UCR are the old EU procurement principles, so treatment transparency, non discrimination, proportionality.

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Doukov-Eustice, Jack

There's a big change from that those EU based principles have largely been either relegated, removed, reworded, and they've been replaced with what are now called objectives.

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Doukov-Eustice, Jack

And as Michael alluded to, a lot of the development of the procurement acts was heavily focused on the wider public sector. And I think this is one of those areas where you can see that that really has come through. There are some important differences though, when it comes to private utilities.

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Doukov-Eustice, Jack

Which we will touch on as we go through. So what are those objectives that you need to be mindful of the first value for money So this is obviously very familiar in, in the wider public sector.

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Doukov-Eustice, Jack

Will largely be driven by, you know, trying to make a good commercial decision from your perspective, but you know source material for that might be things like the Green Book and then wider public policy. They may be useful places to go to maximising public benefit is another objective. So thinking about things like social value, how the contract we are procuring impacts the wider society, UK economy, local economy, etc.

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Doukov-Eustice, Jack

Sharing information to allow the understanding of your policies and decisions.

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Doukov-Eustice, Jack

Is almost transparency in another in another guise really so it's showing the information so that people understand what it is you're doing, the decisions you've made.

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Doukov-Eustice, Jack

Acting and being seen to act with integrity is new, so we've not had that enshrined in a procurement law before.

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Doukov-Eustice, Jack

And then we have treating suppliers the same unless there's a difference.

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Doukov-Eustice, Jack

Which is equal treatment, but again rebadged in slightly different language. Finally, there's having regards to small medium sized enterprises, so being mindful as to whether there are barriers to them engaging with your procurement and having a mind as to whether they can or should be reduced removed, etc.

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Doukov-Eustice, Jack

The important thing to note with all of this is that the vast majority are things you need to have regards to.

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Doukov-Eustice, Jack

And so whereas before everything was quite hard edged, there were absolute obligations to comply with those procurement principles. Now what the law says is you need to have regards to these principles and the only one that remains hard edged is the equal treatment one so treating supplies the same unless there's a difference between them. That's the only one that we're told we have to comply with everything else is, you know, put in the balance and it's something that we need to be mindful of we need to have regard to and we need to.

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Doukov-Eustice, Jack

You know, reference in how we are designing and running a procurement.

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Doukov-Eustice, Jack

But they are not, you know, hard edged absolute obligations anymore.

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Doukov-Eustice, Jack

This will have essentially quite interesting impacts, so the last point on here is the departure from EU language. It's a subtle point in some respects, but also potentially hugely disruptive if you think about all the case law you've had over the years. They help us understand what the rules mean, how different situations, you know, function.

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Doukov-Eustice, Jack

That potentially has largely gone out, so there, you know, there is discussion at the moment about which case law is still good case law. Now that we've moved away from EU law, EU language, there seems to be a deliberate intention from Parliament to move away from that language. So what does that mean in terms of the interpretation of these tests? You know? Are they the same principles but just use, you know, re badge in slight different words? Or are they something new?

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Doukov-Eustice, Jack

And that's something which we're going to have to keep a real close eye on.

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Doukov-Eustice, Jack

to see how that develops. So it may have some far reaching and unintended consequences, but.

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Doukov-Eustice, Jack

something to to wait and see.

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Doukov-Eustice, Jack

So one of the key things in UCR for private users was the use of qualification systems and qualification systems don't appear in a Procurement Act, but I've badge these qualification system version 2.0.

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Doukov-Eustice, Jack

Essentially, they operate in a very very similar way, and there are some important exemptions that have been secured by lobbying Parliament and getting changes in, so they are essentially very very similar.

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Doukov-Eustice, Jack

So a dynamic market is for the purpose of the award of utilities contracts by utilities, that's utilities dynamic market.

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Doukov-Eustice, Jack

Important things about this is for private utilities, there's no term length on here at all, so they can last as long as you need them to.

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Doukov-Eustice, Jack

Conditions that to be admitted so the participation qualification grounds to be added to the system, to the list, it's important to know that those can't be changed during a term of the qualification system or.

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Doukov-Eustice, Jack

utilities dynamic market, so they need to be flexible enough to work in the future as well.

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Doukov-Eustice, Jack

You need to consider applications to join within a reasonable period, and that's not defined. We haven't been given a set time scale with within which to

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Doukov-Eustice, Jack

assess and response to those requests and like we used to have, it's just a reasonable period.

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Doukov-Eustice, Jack

Notice requirements around utilities. Dynamic markets are quite light, which is good. It preserves that qualification system approach so you publish a notice when that market is being launched but there's no requirement for private utilities to publish contract award notices so where you're calling off contracts through the dynamic market, you don't need to publish an award notice for those.

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Doukov-Eustice, Jack

As well as this, we don't have to consider parallel tenders, so this is another exemption for private utilities, in particular when you are calling off a contract from a dynamic market, obviously people or suppliers may seek to join so that they can bid for that contract.

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Doukov-Eustice, Jack

For you, you don't need to consider those at the same time if they're not on that dynamic market already, there's no need to consider their application to join and their tender at the same time, which keeps it nice and fluid and quick.

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Doukov-Eustice, Jack

Finally, there's no requirement to publish notes on termination of the market either. Michael mentioned this point earlier on in the introduction with regards to termination of markets.

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Doukov-Eustice, Jack

So going back to your qualification systems.

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Doukov-Eustice, Jack

There's a lot of guidance out from Cabinet Office on Procurement Act. It touches on qualification systems.

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Doukov-Eustice, Jack

Their intention is the dynamic markets will begin to replace qualification systems over time.

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Doukov-Eustice, Jack

And what they have indicated quite strongly is that they want to see them being terminated in an orderly manner so trying to find a natural place for them to be terminated. The end point though is 27th of October 2028. That's when they would like to see all the existing qualification systems closed down.

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Doukov-Eustice, Jack

So

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Doukov-Eustice, Jack

we should still have, you know, Achilles UVDB, etc. They should still be running qualification systems, but they will start to become dynamic markets, utilities, dynamic markets.

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Doukov-Eustice, Jack

In terms of the actual procurement process that you will follow, again this is one of the most talked about changes. It's one of the most noticeable changes in legislation.

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Doukov-Eustice, Jack

Gone are the many different and restrictive types of procedure where you'd have to follow the steps that are set out and you need to identify you know how complex your contract was and which particular procedure suited it best. That's now been flipped on its head. So now it's more about designing a procurement process that works for your contract.

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Doukov-Eustice, Jack

So they've been reduced down to three essentially. So we have open procedure, direct awards and then what we're talking about here, the competitive flexible, so competitive flexible will be used in most circumstances where there's any level of complexity whatsoever and it really allows you to design something that works fit for you and for your contract. So the requirements in designing this are that is proportionate and then having a regard obviously to the objectives that we talked about before.

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Doukov-Eustice, Jack

And then also the nature and complexity of the contracts as well. And then looking at the value of it as well, the need to subcontract etc.

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Doukov-Eustice, Jack

So you've really got freedom within those rules to think about the best way of designing those.

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Doukov-Eustice, Jack

Really important to keep in mind though is the instructions on that process will need to be set up very clearly. The law no longer sets this out. You know those are, you know, gone away with. We don't have the separate issues anymore. It'd be really important to make sure your ITTs are really clear on what's going to be happening.

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Doukov-Eustice, Jack

Very interesting move as well as that there's no minimum number of bidders required in a process so particularly in constrained markets.

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Doukov-Eustice, Jack

This will be quite useful. Perhaps we don't have the absolute sort of publication to have, you know a minimum number of bidders and the concerns around whether less than that is still sufficient for competition. So that could be quite useful. So overall a lot more flexible.

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Doukov-Eustice, Jack

Will we see things looking sort of different as how they are at the moment? I think initially, no. I think the procedures will or at least they can do end up looking very similar to how they're being run at the moment.

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Doukov-Eustice, Jack

A lot of the things in competitive flexible procedure that you can do are things that you could have done before. So I think we'll see largely similar processes being run, at least initially.

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Doukov-Eustice, Jack

And so this is a quick diagram of how a competitor flexible procedure might run. So step by step. So starting off with optional preliminary market engagement and a plan procurement notice these are things you can do to get ready for the procurement, warm the market up, inform how you want to go about running the tender.

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Doukov-Eustice, Jack

Publishing a tender notice. Obvious next step. That's the contract notice that's now called a tender notice.

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Doukov-Eustice, Jack

It then asks you to provide all associated tender documents.

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Doukov-Eustice, Jack

and you may remember from UCR that there was a requirement to publish everything at the same time. A question over whether you actually had to do that or not. Quite usefully, the Procurement Act clarifies this and says there's no absolute need to publish everything at the same time, but the impact of that is that it extends the time period that bidders have to respond with their tenders. So be aware of that.

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Doukov-Eustice, Jack

You then generally have 25 days for the return of applications to participate, so your PQQs SQs, so you'd run that stage shortlist and move into tender stage. There's then a minimum of 10 days for a turn of tenders, which is

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Doukov-Eustice, Jack

quite nice, quick and short. So that's a big win for private utilities much longer in other circumstances so 10 days is really good.

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Doukov-Eustice, Jack

You've then got optional stages around negotiation and down selection you want to do demonstrations, site visits, etc. that you can build in so a competitive flexible procedure. You know, it's up to you. You can design it how you want and then any final tenders, best and final offers, etc.

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Doukov-Eustice, Jack

Then when we get to the assessment summaries and the award notices, we're going to pick up on this in a little bit more detail later on but we recommend you do these at the same time, so

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Doukov-Eustice, Jack

at the moment they are done at the same time and I think that should continue and we will talk a little bit later about sort of timings and

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Doukov-Eustice, Jack

you know providing some reason and the impact of that and stand still is 8 working days

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Doukov-Eustice, Jack

so the working days is

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Doukov-Eustice, Jack

from time to time, an important change, so giving the standstill letters on a bank holiday or when Easter is coming up is no longer going to be a helpful thing to do. It's working days from the publication of the Contracts Award notice.

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Doukov-Eustice, Jack

The last thing just to touch on here is Director Wars

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Doukov-Eustice, Jack

so

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Doukov-Eustice, Jack

it's very very similar to what we had before

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Doukov-Eustice, Jack

so

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Doukov-Eustice, Jack

when you're able to do a direct awards and you'll recognise many of these, you know prototypes and development, so innovative things where there's only one supplier and where there's particularly advantageous terms where there's urgency. This is all very very familiar

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Doukov-Eustice, Jack

and you know, they will be strictly interpreted in the same way that they have been previousl

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Doukov-Eustice, Jack

so

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Doukov-Eustice, Jack

one thing to to note with this and an exemption in these circumstances, especially for private utilities, is that there's no mandatory standstill period. So if you are able to take advantage of a direct award, there is no need to then put the contract award notice and stand still. You know you can enter into that contract.

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Doukov-Eustice, Jack

In some circumstances, that's obviously going to be quite useful. Urgency in particular is going to be appropriate for that.

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Doukov-Eustice, Jack

But when Charlotte goes through later on the remedies process, she'll refer to the standstill period, and that's more in a kind of normal process where it's not direct awards, but you'll see that having a standstill period, you know, protects you from potential challenge because it removes some of the remedies available. So you're able to do a voluntary standstill in the circumstances

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Doukov-Eustice, Jack

and it's worth just bearing in mind that actually doing that eight working day voluntary stand still period might actually be quite useful. But otherwise in terms of direct awards

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Doukov-Eustice, Jack

it's going to be largely the same.

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Doukov-Eustice, Jack

And then final slide from me is, is frameworks. There's quite a bit of excitement around frameworks, but in a private utility sector, I think we're not going to see many things changing. What we have now is a concept of open and closed framework.

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Doukov-Eustice, Jack

And open frameworks is.

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Doukov-Eustice, Jack

A framework that can last for eight years. It has to be recomputed. None of this is really relevant for you, so you know, don't be too distracted by the conversations around frameworks for you. You can keep your closed frameworks. There's no maximum term for you. You know, for others it may be, you know, four years for you. They can last as long as you need them to.

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Doukov-Eustice, Jack

And there's no need to make use of open frameworks about longer term because of that ability to have no map, you know no maximum term for your closed frameworks. So I think everything there is going to stay very much the same and cooling off as well.

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Doukov-Eustice, Jack

You can still do direct award or mini competition. Very similar process applies as it does at the moment under UCR.

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Doukov-Eustice, Jack

Contract award notices have to be published from contracts called off from a framework.

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Doukov-Eustice, Jack

So that's slightly different.

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Doukov-Eustice, Jack

And there's no requirement. Most importantly, I think to produce assessment summaries. So again, really important exemption, especially for private utilities here, is you don't need to provide that detailed feedback for calling off from a framework. So things are very, very similar. They're going to operate in a very similar way to how they do now.

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Doukov-Eustice, Jack

So that's the basics of sort of procurement, running a process. The objectives you need to keep in mind some of the key instruments that you will be used to using largely staying the same, at least being familiar and now we're going to look at the remedies under the Procurement Act and challenges that that may come.

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Pashley, Charlotte

Perfect. Thanks Jack.

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Pashley, Charlotte

So looking at challenges, obviously this is the thing that everyone would like to avoid, but they do happen. So it's important to know some of the key provisions around what a legal challenge actually looks like. So spoiler alert, not a huge amount is changing under the Procurement Act in terms of the actual process for a challenge, but we're going to look at where there are some differences as we run through this.

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Pashley, Charlotte

So typically we see challenges at the end of a process. So bidder receives a stand still letter, it gets its own scores, the winning bidder scores, they aren't happy with the score or the feedback usually and then they will ask further questions, which are generally about the evaluation process.

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Pashley, Charlotte

While the new Act does focus on increasing transparency, there is a lot in there that doesn't apply to private utilities in terms of notices and publication requirements, but.

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Pashley, Charlotte

I still think you will find that bidders are increasingly asking more questions, being more on it in the procurement process generally and we still think that this decision letter at the end of a process will be a key point in time where you might see challenges.

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Pashley, Charlotte

So two changes under the Act, the first is standstill letters or the contract decision notice. So these are now going to be called assessment summaries and Jack touched on these in his section just before so the user sent at the end of the process

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Pashley, Charlotte

to all bidders at the same time and they'll give an explanation of the scores that were awarded to the bidder's own bid, and also to the winning bidders bid. We're also anticipating that there's going to be some best practise guidance on these assessment summaries coming from Cabinet Office and that's potentially going to suggest that it would be good practise to also explain in these assessment summaries why the bidder and also why the winning bidder were not awarded the score immediately above the score that they did get if they didn't get full marks.

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Pashley, Charlotte

That guidance is still awaited and it won't be enforceable. It is just guidance. So it will remain to be seen whether that practise does actually become the norm to include in assessment summaries. But just to highlight that it's potentially going to be something you should consider.

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Pashley, Charlotte

The second change is the standstill period following the notice of the decision to the bidders. So I'm talking in the context of the mandatory standstill circumstances here following a process, but equally it applies if you're electing for a voluntary standstill period because you're awarding under a direct award or a framework, for example.

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Pashley, Charlotte

So now we work to 10 working days from the standstill letter being sent, but the change as Jack touched on will be that the period will now be 8 working days, so quite possibly a very similar time frame, still equally a tight time frame but it does get rid of those difficulties we often find ourselves in in the challenge world. If standsill the letters were sent on Fridays or right before bank holiday weekends.

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Pashley, Charlotte

It's also not the assessment summary that's going to start the clock on the this eight working Days but it's going to be the contract award decision notice, so the notice will be submitted that communicates to the public that the decision has been made in the procurement and the intention to award to the winning bidder.

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Pashley, Charlotte

It might be sensible to publish that notice at the same time as sending your assessment summaries out, given that it's likely to be the assessment summary which prompts a disappointed bidder to raise a challenge. But just be aware that if you do your notice after sending out the summaries, it is that notice that starts the clock on the eight working days.

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Pashley, Charlotte

Just a quick point to touch on. If you are in the realms of a voluntary standstill, it can't be a period of less than eight working days. So if you're putting a standstill in place where it's voluntary only

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Pashley, Charlotte

it still must be at least eight working days.

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Pashley, Charlotte

So looking a little closer on the slides is a quote from the consultation response and this is where the best practise point comes from to potentially be explaining why the bidder hasn't achieved the score above. There is also some further guidance expected on how you can avoid including bidder confidential information in these summaries and potentially some other points too, which came out of the consultation process that happened. The Cabinet Office have said that they anticipate and hope that all of the guidance will be published by the end of June

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Pashley, Charlotte

and we've had some being published, but I think the meatier ones will probably will probably find coming out in June rather than anytime soon.

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Pashley, Charlotte

But I think ultimately the changes here feel less burdensome to what we've got now. So the artificial grasp that we've got now that artificial comparison between the bidder and the winning bidder that's gone and there is also this change in language which remains to be seen how it will be applied

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Pashley, Charlotte

but we are now to give an explanation of the scores, and that's a change in the wording from reasons for the scores.

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Pashley, Charlotte

Although I suspect at least to start with you, you probably will be doing the same sort of thing that you are doing with standstill letters in terms of giving that feedback and why bidders were awarded certain scores.

0:26:52.860 --> 0:27:9.420

Pashley, Charlotte

And then once you're out of the standstill period, you can award your contract under the new Act. There are some notice provisions for contract award, but generally these don't apply to awards for private utilities other than the private utilities do have to publish contract award notices

0:27:9.780 --> 0:27:15.380

Pashley, Charlotte

for specific awards under frameworks, but these are going to be a much lighter touch version of the notice.

0:27:18.80 --> 0:27:21.320

Pashley, Charlotte

So what do you need to be aware of?

0:27:22.760 --> 0:27:26.520

Pashley, Charlotte

If you do get an actual challenge, I think we can just flip on to the next slide.

0:27:28.560 --> 0:27:46.40

Pashley, Charlotte

So it's starting with the time limits. These are pretty much the same with what we've got now in terms of the overall limitation period to bring a court claim. So for most claims this is within 30 days of knowledge of a breach. As I've said, the standstill period is that slight change to 8 working days from the contract award notice.

0:27:47.240 --> 0:27:58.480

Pashley, Charlotte

The remedies that you get are again pretty much what we have now. So if the contract hasn't been awarded and the claim has been brought in time, then the remedy is available that the court can order

0:27:59.70 --> 0:28:16.790

Pashley, Charlotte

are to set aside a decision taken by the utility, they can also award damages for the bidders, losses that were caused by the breach, or they can order. They can make an order requiring the utility to take a particular action or any other order that the court thinks is appropriate.

0:28:18.70 --> 0:28:31.310

Pashley, Charlotte

Slightly less remedies if the contract has been awarded in that the court can't set aside a decision that's been taken to award the contract to the winning bidder, but it can potentially set aside the contract itself, although that's extremely rare.

0:28:32.460 --> 0:28:43.380

Pashley, Charlotte

It can reduce the term of the contract or the subject matter of the contract, but the most likely remedy that we quite often see is damages for losses that the bidders sustained that were caused by the breach.

0:28:47.280 --> 0:28:54.440

Pashley, Charlotte

So just as a final point to touch on on the automatic suspension on contract award, if a court claim is issued.

0:28:55.720 --> 0:29:17.80

Pashley, Charlotte

Currently, if you have a claim that's issued and you are notified of that claim and the contract hasn't been awarded at that point, then an automatic suspension is put in place and that stops you from being able to award the contract until either a court decides that you can award or you and the bidder that's challenging agree to lift that suspension.

0:29:17.610 --> 0:29:21.170

Pashley, Charlotte

And then you have the choice to award the contract if you choose.

0:29:22.490 --> 0:29:51.490

Pashley, Charlotte

There is quite a significant change here now in that the claim has to be issued within that eight working day standstill period to have the benefit of the automatic suspension. So if the standstill period expires, but for whatever reason, the contract still hasn't been awarded and then a claim is brought, it could still be within that 30 day overall limitation period. But under the new Act, the automatic suspension doesn't come into play because the claim has to be brought within the eight working day period.

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Pashley, Charlotte

So a challenging bidder after eight working days would possibly need to apply for an injunction. So the suspension, if they wanted that in place rather than having an automatic right to it.

0:30:5.0 --> 0:30:28.560

Pashley, Charlotte

There is a risk that comes with this that court claims could be issued sooner and a bit more hastily by challenging bidders so that they get it within the eight working day period and benefit from the suspension and having that suspension in place while their challenges are investigated further. But if a claim isn't issued in that standstill period, you do still need to be mindful of the overall 30 day limitation period

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Pashley, Charlotte

because the claim could still be brought, then, although most likely it's going to be a damages only claim at that point.

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Pashley, Charlotte

So I said earlier that if a claim is issued and has the benefit of the automatic suspension, that can only be lifted

0:30:44.250 --> 0:30:54.650

Pashley, Charlotte

if there is agreement by the parties or if the court orders it to be lifted, if it's going to be an order of the Court, they will follow a test to determine whether they should lift that suspension.

0:30:56.290 --> 0:31:11.130

Pashley, Charlotte

In most cases, the court will lift the suspension and the big determining factor for that on the current test is that the challenging bidder could be adequately compensated in damages if it's found that there has been a breach of the rules.

0:31:11.720 --> 0:31:44.200

Pashley, Charlotte

Now, obviously, bidders don't really want this, they don't necessarily want the damages, but it has been notoriously difficult for bidders to maintain suspensions because most of the time, damages would have adequately compensate them for any losses that they've incurred if it was later found that there was a breach of the rules. So under the new procurement Act, we have a slightly new test, although it's not hugely new and there's a slight tweak to the wording and I think the idea here is to give less emphasis to the adequacy of damages as a remedy

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Pashley, Charlotte

and you'll see from the test on the slide that that's just one factor to be considered now when thinking about the interest of the supplier so the challenging bidder in maintaining that suspension.

0:31:56.430 --> 0:32:16.830

Pashley, Charlotte

That still has to be balanced against the public interest, which again, as you can see from the slide, is still weighted in avoiding delay of awarding public contracts. So we will have to see how that actually plays out in practise, but I don't think there's going to be a huge change and I suspect that these suspensions will still be notoriously difficult to keep in place.

0:32:18.400 --> 0:32:39.240

Pashley, Charlotte

So overall on the challenging side, there are a couple of changes in the challenges world, but hopefully nothing too dramatic and it's still as always, just to be very aware of those tight timeframes and make sure you diarising them and you know you know what could happen next. So I'm going to hand over to Jonathan now to look at modification of contracts.

0:32:42.170 --> 0:32:53.690

Davey, Jonathan

Thanks, Charlotte, and good morning everybody. I hope you like these AG backgrounds, I quite like them because if I move my head quickly, it makes it look like I have more hair.

0:32:55.130 --> 0:32:58.250

Davey, Jonathan

So that's good.

0:32:58.370 --> 0:33:0.330

Davey, Jonathan

Talking about changing contracts then?

0:33:1.890 --> 0:33:16.730

Davey, Jonathan

Just looking at the timeline there at the top, Jack has taken us through the pre award and award stage. I'm going to be focusing on management of contracts and modification and touch briefly on termination of contracts.

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Davey, Jonathan

Now to start with a philosophical point.

0:33:21.530 --> 0:33:45.450

Davey, Jonathan

This has been a wedge over some time in procurement law. The idea that procurement law doesn't just regulate the process up to a ward of a contract, but actually has something to say about the way that the contract is managed and modified. So we could have a philosophical debate about whether procurement law is the right tool to use for this.

0:33:45.950 --> 0:34:11.270

Davey, Jonathan

I guess that was a more relevant argument when we were talking about intervention via the EU directives. I guess it's open to our Parliament to decide that it will indeed regulate those things, but bearing in mind now we have a whole part of the Act which deals not with a ward of contracts, but with the process of managing, modifying and terminating them.

0:34:13.460 --> 0:34:43.100

Davey, Jonathan

It's worth pointing out that a lot of the developments in this area don't apply to private utilities, and there's this strange process of reading through a provision in the act and then finding at the very end it says, oh, but none of this surprised to private utilities and to give you some examples of that, there are now provisions requiring contracting authorities to include KPs in their contracts and to assess contract performance. Those don't apply

0:34:43.340 --> 0:35:8.260

Davey, Jonathan

to private utilities. There are provisions around payment compliance and payment compliance notices, and again, those don't apply to private utilities and finally, contract termination notices. Those also don't apply to private utilities, but the right is still there, implied for private utilities to terminate a contract.

0:35:9.420 --> 0:35:14.460

Davey, Jonathan

In circumstances where the authority considers that it was awarded

0:35:16.90 --> 0:35:45.170

Davey, Jonathan

to somebody who's an excluded or excludable supplier, or where the contract was awarded or modified in breach of the Procurement Act, the key change there from what's currently in the UCR is that at the moment it's an objective test going forward. It's a subjective test, so it may be much safer ground for private utilities if they're concluding that they consider having thought through the issue and taken advice that they are entitled to terminate.

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Davey, Jonathan

They won't be overridden by an objective standard if that argument arises.

0:35:55.470 --> 0:36:8.670

Davey, Jonathan

So how do we go about modifying the utilities contract? Well, I think the first thing to say here by way of brownie points for the Cabinet Office is the provisions in the Act are now much better organised as regards

0:36:10.30 --> 0:36:24.830

Davey, Jonathan

modifying contracts it's much easier to follow how the rules work. So to start off, we're told in section 74 that a utility may modify a contract if that modification is either a permitted modification

0:36:25.570 --> 0:36:34.930

Davey, Jonathan

and those permitted modifications are set out in schedule eight. There are eight of them to relate to defence, and we'll look at the other six in a moment.

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Davey, Jonathan

Secondly, you can modify a contract if it's not a substantial modification that again mirrors the rules in the UCR, but with an added express reference to changes in duration up or down. And finally we can modify a contract if the modification is a below threshold modification similar to the existing safe harbour and of course of limited use day-to-day because the problem is

0:37:5.60 --> 0:37:16.580

Davey, Jonathan

that this is pegged to the thresholds under the procurement rules so any substantial modification is going to trip that element of the test.

0:37:17.730 --> 0:37:43.250

Davey, Jonathan

And aggregation of changes means that that exception is even more stingy than we might otherwise have thought. So in addition to those three ways of modifying a contract, we can also modify a light touch contract. Light touch contracts include, mercifully, things like legal services, services only by the way, not works or supplies.

0:37:45.800 --> 0:38:5.360

Davey, Jonathan

Finally, it's stated expressly now that you can't modify a utilities contract so as to change the supplier except where that modification is permitted on corporate restructuring and we'll come back to this issue because it may give rise to some problems later on.

0:38:6.760 --> 0:38:15.640

Davey, Jonathan

So let's look now at those six permitted modifications in a little more detail. As I say, these are set out in Schedule 8

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Davey, Jonathan

and Jack's already referred to the justifications for direct award that are set out in Schedule 5 and as you'd expect, there are some parallels between the two lists.

0:38:29.650 --> 0:38:38.290

Davey, Jonathan

The first, as is the case in the UCR currently, is that the modification is provided for in the contract.

0:38:39.690 --> 0:38:46.970

Davey, Jonathan

That the new word here is unambiguously so. I guess that's a signpost to the fact that

0:38:47.90 --> 0:38:58.490

Davey, Jonathan

the modification must be clearly set out. I think. For example, a standard contract change provision with a schedule talking about some agreement to agree process

0:38:58.890 --> 0:39:8.530

Davey, Jonathan

probably doesn't pass the unambiguous test any more than it passed the clear, precise and unequivocal test in the current rules.

0:39:9.930 --> 0:39:27.450

Davey, Jonathan

There's also a requirement that even if it is provided for in the contract, it can't change the overall nature of the contract. There's a bit of a logic trap there, isn't it. If it's provided for in the contract, how can it change the overall nature of the contract? Because it's part of the contract.

0:39:28.270 --> 0:39:33.230

Davey, Jonathan

Anyway, maybe one for Charlotte and her colleagues to fight over in litigation.

0:39:36.380 --> 0:39:44.100

Davey, Jonathan

Specific provision on urgency and the protection of life. I'm sure this is a reflection of the world after COVID.

0:39:45.700 --> 0:39:58.140

Davey, Jonathan

Note it's both human life and animal life, and this requires regulations which will no doubt see and draft at some point. But the idea there of an exception to

0:40:0.20 --> 0:40:3.740

Davey, Jonathan

the prohibition on modifying contracts.

0:40:4.740 --> 0:40:22.380

Davey, Jonathan

Next unforeseeable circumstances, there's a reasonableness test here and again, we mustn't change the overall nature of the contract. There's a 50% cap on this for most people, but not for private utilities, so that's helpful.

0:40:23.700 --> 0:40:37.60

Davey, Jonathan

That's also the case with the next permitted modification, materialisation of a known risk. There's no 50% test here, although there is for those other than private utilities.

0:40:38.820 --> 0:41:3.660

Davey, Jonathan

How useful this permitted modification will be? I somewhat doubt, because it requires that we've identified the known risk in the tender notice and both described it and referred to the possible need for modification. So quite how often our crystal ball will enable us to look forward to a known risk and

0:41:5.220 --> 0:41:7.580

Davey, Jonathan

state that we may modify if it materialises.

0:41:9.180 --> 0:41:12.820

Davey, Jonathan

I'm not sure again we have a subjective test here interestingly.

0:41:13.220 --> 0:41:19.420

Davey, Jonathan

It's the authority, considering that a known risk has materialised, which is hopefully useful.

0:41:21.930 --> 0:41:51.370

Davey, Jonathan

Next test will be familiar to you from the UCR. The idea that we want to acquire additional goods, services, or works where a different supplier would involve different products or incompatible products, and that would result in disproportionate technical difficulties and substantial cost duplication. And once again, whereas the 50% test here for most contracting authorities, that doesn't apply to private utilities.

0:41:52.210 --> 0:42:4.850

Davey, Jonathan

Finally, transfer on corporate restructuring, the idea that the new supplier has to satisfy the selection questionnaire requirements has gone.

0:42:6.770 --> 0:42:20.570

Davey, Jonathan

So we don't need to worry about that, but the supplier can't be an excluded supplier and we'll come back to this on the next slide because I foresee some difficulties here for private utilities and others.

0:42:21.880 --> 0:42:24.80

Davey, Jonathan

So let's look at some problem areas

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Davey, Jonathan

under The Procurement Act as regards contract modification.

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Davey, Jonathan

First of all, it was a knotty problem under the

0:42:37.480 --> 0:42:42.40

Davey, Jonathan

PCR, when they were introduced, which regime applies to contract modification?

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Davey, Jonathan

Why? Well, because the way that the case law has worked is that

0:42:51.320 --> 0:43:2.120

Davey, Jonathan

a modification to a contract that's substantial is viewed as if it were the award of a new contract without a process. So the thinking goes, if we have a new contract

0:43:2.690 --> 0:43:5.850

Davey, Jonathan

well, that contract must have been awarded

0:43:7.330 --> 0:43:15.450

Davey, Jonathan

in accordance with the rules as they apply at the point at which it was awarded, but the guidance we have so far

0:43:16.930 --> 0:43:32.330

Davey, Jonathan

suggests that the regime under which a contract was originally awarded will also apply to modifications of that contract, so flipping over that idea that new contract equals new rules.

0:43:33.380 --> 0:44:3.340

Davey, Jonathan

There are two issues with that. One is the logic problem I've just identified, which is well, this is that the rules view this as a new contract so how can it somehow be considered under the old rules and the practical problem here, which doesn't matter so much to me but matters immensely to Jack and Charlotte as younger lawyers, is if one awards a 20 year contract on the 1st of October this year, what the guidance is suggesting is that

0:44:3.570 --> 0:44:15.410

Davey, Jonathan

the PCR or the UCR will continue to apply for the 20 year life of that contract, quite apart from any permitted extensions to it, and that seems to me to be

0:44:17.170 --> 0:44:27.570

Davey, Jonathan

a real issue because the idea that people will have to stay up with the existing rules for a long time after the Procurement Act comes in seems to me to be

0:44:29.370 --> 0:44:32.810

Davey, Jonathan

both odd as well as logically inconsistent.

0:44:34.440 --> 0:44:39.240

Davey, Jonathan

The next of my quadrants, some issues from the old regime persist.

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Davey, Jonathan

Jack mentioned earlier that the language has been almost remorselessly changed throughout the Act, but there are one or two places where the old language persists. One of those is the question of economic balance in testing whether a contract has been substantially altered, so it's odd that this phrase has been retained and the James waste case

0:45:5.840 --> 0:45:34.400

Davey, Jonathan

last year, I think showed how that test is a very problematic one. We do at least now have the word materially added, so it's clear that there's a de minimis element to changes in economic balance when we modify a contract. And as I already mentioned, the safe harbours are really still largely useless because they're pegged to the threshold values in the Act, with aggregation added as well.

0:45:36.540 --> 0:46:6.740

Davey, Jonathan

3rd Quadrant Business acquisition. Well, the problem here is the language has been changed. The language is now that you can change the supplier where that change is required following a corporate restructuring or similar circumstance, Cabinet Office thinks that's the same as the previous language, but it's clearly quite a bit narrower. First of all, when is a, a novation of a contract really required? It might be

0:46:7.130 --> 0:46:36.330

Davey, Jonathan

prudent. It might be desirable, but required is a pretty high bar. And secondly, corporate restructuring, does MNA really count as a corporate restructuring if we're disposing of a corporate entity? Is that restructuring or similar circumstance? So I can see corporate lawyers and their procurement colleagues chewing their fingernails over that one until we have a court decision telling us what the position is.

0:46:37.510 --> 0:47:2.310

Davey, Jonathan

My final quadrant. I think there is a lost opportunity here to improve a number of things on contract modification. One example of that is short extensions. If for example one runs into a problem with a procurement or starts the procurement late or there's a challenge, then we do have the difficulty that even a short extension of that contract to

0:47:3.830 --> 0:47:9.710

Davey, Jonathan

allow for the extra period to procure will not be, will not be permitted.

0:47:10.180 --> 0:47:24.20

Davey, Jonathan

And I think it's undesirable that the rules should place authorities in the position where they have to do what's commercially expedient and break the rules or do something that's commercially crackers in order to comply with the rules.

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Davey, Jonathan

I hope that's given you some food for thought. I'm gonna hand you back to Michael.

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Rainey, Michael

Thank you, Jonathan. So,

0:47:42.180 --> 0:47:57.580

Rainey, Michael

having heard all of that, what are you gonna do about all of this? How are you gonna get ready for the new act, which is coming imminently in October? So if we just have a look on the slide, we've got our top five tips on what you can actually do between now and October.

0:47:58.900 --> 0:48:5.940

Rainey, Michael

First thing is to raise internal awareness. I'm sure you're doing this already within your in your utility organisations and wider groups.

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Rainey, Michael

Clearly, updating, refreshing training programmes for people who are running procurement processes for people who are sort of on the phone a friend basis, providing the legal support

0:48:16.620 --> 0:48:49.220

Rainey, Michael

and another input into procurement processes, updating everybody on the on the new language. The new procedure is on all of the bells and whistles that go with that will be really important to make sure that everyone's still kind of upskilled and performing at a sort of best practise level. Clearly going along with that, there'll be a need to update internal precedents for the reasons that that everyone's explained almost all of your documents are going to have to change in terms of you can have procurement documents speaking to a different procedure, a different, different type of terminology for various steps in the in the process.

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Rainey, Michael

Your template stands still letters are going to have to change for all the reasons that Charlotte's explained. Probably your template contracts will need to be updated as Jonathan has mentioned the implied rights terminate it's likely

0:49:2.420 --> 0:49:32.500

Rainey, Michael

different than it is today to the language that people have typically put into framework agreements and the like to mirror that will need to be updated, and there will also be a need to update you kind of internal governance and approval procedures, obviously making sure senior decision makers are aware of what the new rules mean, that there will be a slight delay probably for the first year or so as everyone gets used to the new regime and also possibly twin tracking parallel regimes. As Jonathan's explained if to the extent you have approval forms and procedures for changing contracts.

0:49:33.20 --> 0:49:43.620

Rainey, Michael

You might need two different types of approval depending on whether the contract was awarded under the UCR or is awarded under the Procurement Act, because the tests and therefore the risks will be will be different.

0:49:44.660 --> 0:50:14.820

Rainey, Michael

Moving down the next sort of key task is to raise external awareness and engage with your supply chain on how your procurement processes are going to look moving forwards. Jack's already explained that there's a there's a large amount of flexibility to do set a procurement process in a way that you think best, obviously what's important there also is what the supply chain and what the bidders think best private utilities that run their procurement in a way that that bidders like gets better, more committed bidders and better bids.

0:50:15.180 --> 0:50:44.980

Rainey, Michael

We've all seen through recent utilities procurements, for example, and pay and CP7. And then I'm sure it'll be the same in Rio 3 to come that there's a huge amount of competition between utilities to get the best contractors, particularly in the construction space, but also elsewhere, good bidders and good contractors are a premium at the moment in all senses of that word. So really you want to be running the best possible procurement process as the most supplier friendly procurement processes and.

0:50:45.450 --> 0:50:52.290

Rainey, Michael

This is a good opportunity with the change in the rules to really engage with your bidder pool and your supply approval and those you're interested in working with you.

0:50:53.630 --> 0:50:55.950

Rainey, Michael

You know what is a good procurement they'd like from your perspective?

0:50:57.730 --> 0:51:30.370

Rainey, Michael

Next one down is to plan strategically. Obviously there's a limit to what you can do here in terms of planning out your procurement timetable for the remainder of 2024. There are I think you'll have heard in the last 50 minutes, there are a huge number of reasons why sticking with the UCR gives you a lot more certainty and clarity if you can do that for your procurement process. So if you can launch a procurement process before the 28th of October, that would be a very sensible thing to do to make sure that procurement process runs smoothly and is clear and consistent and

0:51:31.10 --> 0:51:34.50

Rainey, Michael

you know you aren't having to reinvent the wheel to run those procurements.

0:51:34.820 --> 0:51:37.980

Rainey, Michael

On the other side of the coin, I think it's really important to pick

0:51:39.200 --> 0:52:11.960

Rainey, Michael

a good example for your very first Procurement Act procurement that you don't want that to be kind of accidental and sort of spill into a really complex, really naughty procurement process and that being the first time you've ever had to procure something under the under the Procurement Act, it's much better to choose this carefully and actually you know choose a procurement that probably is chunky and has a level of complexity so you can really sort of test out your new processes, but isn't like super complex, it isn't in a brand new innovative area for you and it's probably a slight repetition of something you really understand very well

0:52:12.310 --> 0:52:31.630

Rainey, Michael

so that you can put all of your resources and training and precedence really into action with an example procurement process that you run from end to end, The Procurement Act, it then becomes your kind of gold standard internally for how you're going to procure under this new start, the alien regime. So I think planning for that is a really important step that you can take now.

0:52:33.270 --> 0:52:50.70

Rainey, Michael

The next one is to is to watch what other people are doing. You may remember back in 2016, actually the public sector version of the UCR were brought in a year early because the government wants to rush them in because of the extra flexibility. So it was great for utilities because you had a full year of watching

0:52:50.500 --> 0:53:28.300

Rainey, Michael

how the how the public sector had grappled with those new rules, and you could follow what their

example and do what they did well and avoid what they did badly. Clearly, the new rules are coming into place now for everybody at the same time, so there's less opportunity to do that but there is still opportunity to have a bit of a watching brief on how other people are launching big procurements under the Procurement Act, how they're describing them, how they're putting their notices and their documents together and how they're sort of dealing with all of the transparency requirements. So it will be very useful to watch what other people do. You can bet your bottom dollar there'll be people holding back procurements for the 28th of October to be the first people to procure under the Procurement Act

0:53:28.740 --> 0:53:58.260

Rainey, Michael

you probably don't want to be those people, but you want to be watching what those people are doing. And then the last point from a sort of practical perspective is that again, back in 2016, the change in the rules was a really good opportunity to just reengage with the business on procurement and on procurement compliance and on procurement, good practise, the key risk areas are not changing so the need to evaluate and score bids properly

0:53:58.860 --> 0:54:0.820

Rainey, Michael

to tell bidders how you are going to evaluate and score.

0:54:1.500 --> 0:54:32.540

Rainey, Michael

All of that key stuff isn't changing, but this is a really good opportunity to re engage with the kind of subject matter experts in the business. Those who are the real engine room of good procurement and start looking again at the processes for those things, make sure that kind of bad practises that have been slipped into are, you know, addressed and to do all that in the name of the new Procurement Act, it is a good opportunity. So certainly not an opportunity to be wasted to have those internal conversations and upscale on procurement

0:54:33.260 --> 0:54:33.620

Rainey, Michael

generally.

0:54:34.510 --> 0:54:56.30

Rainey, Michael

So those are our sort of sort of top five tips really for moving forward. Hopefully what you've heard today means that this isn't too daunting, but it is all going to change and October is going to be you know there's going to be a few months certainly of just getting through it and getting up to speed and the more you the more you're ready for that the better.

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Rainey, Michael

So we've left a few minutes just at the end for questions.

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Rainey, Michael

There are a couple of questions to raise, so if we can just.

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Rainey, Michael

Get everyone on screen and see who's best at to answer these. The first one Jonathan probably is a you question, so this is.

0:55:21.220 --> 0:55:24.660

Rainey, Michael

There's been very few challenges to contract modifications under the

0:55:25.950 --> 0:55:32.470

Rainey, Michael

UCR and do we think that's gonna change under the new regime? People are gonna challenge procurements more often.

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Davey, Jonathan

Yeah. Thanks Michael.

0:55:36.45 --> 0:55:56.885

Davey, Jonathan

Certainly for mainstream contracting authorities, now that they have to publish a notice every time they change a contract, every one of those is an opportunity for a challenger to step in and have a go. It's therefore a blessing for private utilities that they don't have to publish contract change notices.

0:55:58.445 --> 0:56:5.405

Davey, Jonathan

I've always wondered though, why there aren't more challenges to contract change, and my conclusion is.

0:56:6.45 --> 0:56:36.125

Davey, Jonathan

And this applies to private utilities as well as to everybody else that anybody who might be minded to challenge is themselves a contracting party to other contracts that they may want to change and so maybe there's a sort of mutual stand off which says I'm not going to challenge that contract that my competitor has because who knows tomorrow it may be me needing to change my contract. So disappointing as it is for Charlotte and our litigation colleagues

0:56:36.525 --> 0:56:37.565

Davey, Jonathan

I think that

0:56:39.345 --> 0:56:46.585

Davey, Jonathan

thinking if I'm right will persist into the new regime as well as it does under the existing one.

0:56:48.260 --> 0:56:53.660

Rainey, Michael

Or everyone will be challenging the public sector 'cause they have to publish the notices, which yes.

0:56:53.655 --> 0:56:55.935

Davey, Jonathan

Charlotte's smiling now.

0:56:57.320 --> 0:56:57.520

Rainey, Michael

and

0:56:58.910 --> 0:57:3.230

Rainey, Michael

Last point, time for one more. There's probably one for you, Jack. So

0:57:5.790 --> 0:57:20.310

Rainey, Michael

Utility, this one in particular said that you negotiated procedure most of the time all the time. Should they start thinking about using the open procedure under the new active, competitive, flexible, presumably because you've put them off designing competitive flexible procedure?

0:57:21.175 --> 0:57:46.815

Doukov-Eustice, Jack

Yeah, it is good question and you know I think open procedure is actually the most commonly used procedure sort of thinking about procurement more widely. You know the benefits of it being that it's you know great for competition you know as a bidder you know that you're going to get assessed and your tenders going to get looked at so you do tend to get a lot more responses and they do tend to have a shorter time period

0:57:48.215 --> 0:57:54.15

Doukov-Eustice, Jack

it can result in quite a lot of admin for you as an evaluator

0:57:54.655 --> 0:58:23.295

Doukov-Eustice, Jack

looking at all those bids, so I think that the same as it is now that it's not going to be appropriate where contracts are complex or you know, there's a lot of involvement that is needed from bidders. So I don't think the changes in law necessarily mean that open procedure should be used more. I think rather what we'll start to see is competitive flexible being used and tweaked and bespoke to suits each scenario.

0:58:25.185 --> 0:58:55.265

Doukov-Eustice, Jack

So where you might have something which could suit an open procedure, but you know you want to have a little bit of engagement, say a demonstration or something like that, which is going to be I think, increasingly important with the advent of AI in bid writing and I think actually seeing bid teams come in and demonstrate what they might do is going to be more important. I think actually what we're going to see is a more heavy use of competitive flexible but you know designed

0:58:55.625 --> 0:58:58.105

Doukov-Eustice, Jack

specifically and streamlined as required.

0:59:1.510 --> 0:59:2.270

Rainey, Michael

Thank you, Jack.

0:59:4.150 --> 0:59:16.310

Rainey, Michael

And we've come to the end of our hour now, so it only remains to see. Thank you very much, to everyone, for joining. I hope you find that useful and clearly any questions or follow up please do get in touch. Thank you very much.