

The Procurement Act 2023 – an outline.

New procurement objectives.

Section 12 of the Procurement Act 2023 introduces “Procurement Objectives”, replacing the EU Treaty principles of transparency, equal treatment, non-discrimination, and proportionality that applied under the PCR 2015. The Procurement Objectives are:

- (a) Delivering value for money;
- (b) Maximising public benefit;
- (c) Sharing information for the purpose of allowing suppliers and others to understand the authority’s procurement policies and decisions;
- (d) Acting, and being seen to act, with integrity.
- (e) Treating all suppliers the same unless a difference between suppliers justifies different treatment.
- (f) Having regard to the fact that Small and Medium-sized Enterprises (SMEs) may face barriers to participation, after which they should “consider whether such barriers can be removed or reduced and “if the contracting authority considers that different treatment is justified in a particular case, [it] must take all reasonable steps to ensure [it does] not put a supplier at an unfair advantage.” This will include exercising the duty under section 18 to consider dividing the procurement into lots.

Scope and exemptions.

The full rigor of the 2023 Act will apply to all contracts with an estimated value of more than £214,904 (supply of goods or services) and £5,372,609 (works) unless the contract is not an exempted contract. Regulations will specify certain contracts, known as “Light touch contracts” which although still subject to the main requirements of the 2023 Act, will benefit from special rules excepting them from some of the requirements.

Exempted contracts are now based on the identity of the party contracting with the contracting authority, such as contracts between local authorities or a local authority company, or on the subject matter of the contract, such as contracts for the acquisition of land and buildings, certain legal services, certain financial services, employment contracts, and emergency services.

There is a separate regime for below-threshold contracts except concession contracts, utilities contracts or exempted contracts. Within the below-threshold regime, there is a further difference in the treatment of those contracts with an estimated value of less than £30,000 and more than £30,000. Below £30,000 there is no requirement to publish a below-threshold tender notice. Under the Public Contract Regulations 2015, the difference was made at £25,000.

As at present, if a contracting authority decides to competitively tender a regulated below-threshold contract it must not use a separate selection stage (now referred to as a suitability stage) to reduce the number of bidders invited to tender.

Procurement procedures.

Under the 2023 Act there are fewer procedures options to choose from, but greater flexibility. The procedures are:

- direct award;
- competitive tendering procedure (comprising either an open procedure or a competitive flexible procedure); or
- an award under an existing framework.

The competitive flexible procedure allows contracting authorities the discretion to design their procurement processes to suit their requirements. Although there is more flexibility about the procedure, there are minimum periods for the participation and tendering periods, previously known as the selection and the award stages.

Selection of tenderers

Under the Public Contract Regulations 2015, criteria are set out in a mandatory questionnaire that leaves the contracting authority with limited scope to ask its own questions to assess the economic and financial standing and technical and professional ability of the prospective tenderer. Section 22 of the 2023 Act refers to "Conditions of Participation" and gives a contracting authority a discretion to set the conditions, but these must be proportionate to the cost, nature, and complexity of the contract.

The 2023 Act introduces the concepts of "Excluded Suppliers" and "Excludable Suppliers". A contracting authority must exclude Excluded suppliers from the procurement, while the authority may exclude excludable suppliers. The mandatory grounds are set out in Schedule 6 and the discretionary grounds in Schedule 7. Where a contracting authority excludes a supplier, there is an obligation to notify the appropriate authority, who will investigate whether the supplier is indeed an excluded supplier (mandatory exclusions) or an excludable supplier (discretionary exclusions) and prepare a report for the Secretary of State.

Award criteria.

Contracting authorities must award a contract to the supplier that submits the "Most Advantageous Tender" rather than the "Most Advantageous Economic Tender." The Most Advantageous Tender is the tender that best satisfies the award criteria in accordance with the published assessment methodology and weightings. This will allow the possibility of awarding contracts that further general procurement policies the best. Linked to this, the 2023 Act removes the

prohibition in the Local Government Act 1988 on including “non-commercial considerations” in procurement where a contracting authority is complying with obligations in the 2023 Act.

The 2023 Act gives contracting authorities a new flexibility to refine award criteria and relative weightings during a procurement provided that:

- it is not an open procedure;
- the ITT document has not yet been issued; and
- there are no suppliers who have been excluded from the process who would have been able to progress had the refinement been in place at the time of their exclusion.

The procurement documents must have reserved the right to make this refinement, and making these changes triggers an obligation to republish the tender notice/documents. A refinement is not permitted if, had it been made earlier, it would have allowed one or more suppliers (that did not progress beyond an earlier round or selection process) to have done so.

Notice requirements.

The Act introduces different notices and new publication requirements. The Procurement Regulations 2024 provide the details. The notices include:

- **Planned procurement notice.** A planned procurement notice is not mandatory. It will operate to alert the market to a particular procurement coming up and to reduce the time limit for tenders to 10 days in “qualifying” circumstances.
- **Preliminary market engagement notice.** A preliminary market engagement notice is published to communicate to suppliers that the authority either (a) intends to carry out a market engagement exercise or (b) has carried out a market engagement exercise. Where preliminary market engagement has been used, it is mandatory to publish one ahead of publishing the tender notice (unless the authority can justify a decision not to publish one).
- **Tender notice.** A tender notice must be published when a contracting authority is inviting suppliers to take part in an open or competitive flexible procedure.
- **Below threshold tender notice.** A below threshold notice is a notice by a contracting authority that it intends to award a contract with a value between £30,000 and £213,477 (supply of goods or services) or £5,336,937 (works) following a competitive procedure.
- **Transparency notice.** To be published where a contracting authority is making a direct award in special cases or switching to direct award following a failed competitive tendering procedure.

- Contract award notice. This is different from a contract award notice under the PCR 2015. It is a notice given before awarding the contract to notify the market that the contracting authority intends to enter a contract. Its publication starts the standstill period of eight working days.
- Contract details notice. This is the equivalent of a contract award notice under the PCR 2015. The contracting authority must publish the notice within 30 days of the parties signing the contract.
- Contract performance notice. Before entering a public contract estimated over £5m contracting authorities (with some exceptions) must set and publish at least three KPIs.
- Contract change notice. A contract change notice is required for all contract amendments, except those that do not alter the scope of the contract and do not result in specific tolerances being exceeded.
- Payments compliance notice. Notice setting out a contracting authority's compliance with the term that any sum due under a public contract must be paid within 30 days.
- Information about any payment over £30k. Information must be published quarterly.
- Procurement termination notice. This is entirely new and is required where a procurement is abandoned.
- Contract termination notice. Another new obligation. A contracting authority must publish a Contract Termination Notice within 30 days of termination. The notice must give details of the reasons for termination, e.g., expiry, discharge, early termination by a party, contract set aside etc.

Performance and information requirements.

Contracting authorities must keep records of the rationale behind any material decisions they make when awarding public contracts. They must also keep records of any communication between themselves and the suppliers that is made in relation to the award, before the contract is entered into.

Where a public contract has an estimated value of more than £5m, the contracting authority must publish an assessment of the supplier's performance against key performance indicators at least once every 12 months during the lifetime of the contract.

Contract modifications.

Modifications to an existing contract are justified under the Act if the modification is:

- a "permitted" modification of a type listed in Schedule 8;

- not substantial (as defined in the 2023 Act); or
- a below-threshold modification.