

# Procedures under the Procurement Act 2023



# YOUR TEAM TODAY



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# BACKGROUND TO THE PROCUREMENT ACT

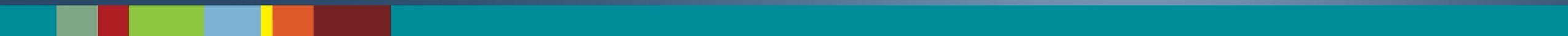
- Brexit
- Green Paper – Transforming Public Procurement
- Procurement Bill
- Procurement Act 2023
  - Procurement Regulations 2024; and
  - Guidance.
- Key Date – 28 October 2024

# ALL CHANGE?

- Merging of previous separate Regulations.
- New terminology but some familiar concepts.
- Major focus on transparency.
- Publication of information subject to an exemption – national security and sensitive commercial information.
- Contracting authorities – not intended to catch anybody new.
- Covered procurement – key term:
  - The whole lifecycle;
  - Not just procuring the contract at the beginning;
  - Includes termination of the procurement prior to award;
  - Must be carried out in accordance with the Act.

# EXEMPTIONS AND SPECIAL REGIME CONTRACTS

- Exempted Contracts
- Light Touch Contracts
- Concession Contracts
- Utilities Contracts
- Defence and Security Contracts



# OBJECTIVES AND PRINCIPLES

- In carrying out a covered procurement, a CA must have regard to the importance of:
  - Delivering value for money;
  - Maximising public benefit;
  - Sharing information with tenderers for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions;
  - Acting (and being seen to act) with integrity.
- Treat suppliers the same unless a difference justifies different treatment. Take all reasonable steps to not put particular suppliers at an unfair advantage or disadvantage – i.e. equal treatment.
- Must consider removing or reducing barriers faced by small and medium sized enterprises.

# NATIONAL PROCUREMENT POLICY STATEMENT

- Sets out the Government's strategic priorities in relation to procurement.
- Duty to "have regard" – must follow unless there is a good reason not to.
- Latest published in May 2024 to be in force from 28 October – however, impact of the election.

# NOTICES

- Central online portal:
  - Pipeline, planned procurement and preliminary market engagement notices;
  - Tender notice and “associated tender documents”;
  - Transparency notice;
  - Contract award and contract details notices;
  - Procurement termination notice;
  - Contract change notice;
  - Contract performance notice (KPIs);
  - Information about payments over £30,000;
  - Contract termination notice (incl. on expiry).

# CONFLICTS OF INTEREST

- Must take “all reasonable steps” to identify and keep under review actual or potential conflicts of interest;
- Applies to anyone “acting for authority” or who “influences a decision” including external advisers;
- Must take reasonable steps to prevent unfair advantage or disadvantage – if cannot avoid putting at advantage or supplier will not take steps necessary to avoid then treated as an excluded supplier;
- Must prepare a “conflicts assessment” before submitting tender notice, keep it under review and confirm they have done so when publishing contract details notice and contract change notice.

# MARKET ENGAGEMENT

- Not always required.
- Procurement Act sets out a broad list of permitted purposes including developing authority requirements and approach to the procurement as well as designing the procedure.
- Procurement Act applies **if undertaken**:
  - Must not be any unfair advantage created and must not distort competition – in particular decisions taken on the procurement need to be objectively justifiable and not for the benefit of one supplier.
  - Must publish a preliminary market engagement notice **before** the tender notice or explain in the tender notice why it did not publish a notice before engaging.
- Procurement Act provisions do not apply where the pre-engagement relates to framework call-offs, establishing a dynamic market or direct awards. However, other parts such as the objectives do still apply.
- Keep records.

# MARKET ENGAGEMENT

- Consider:
  - Why are you doing it?
  - What outcome do you want – including what you want the market to take from it?
  - How will you do it – provision of information, in person/virtual engagement or workshops, site visits?
  - What are the timescales – needs to be proportionate to enable the market to engage?
  - How many suppliers are there in the market and how will you manage large numbers (including possible reductions)?
  - What are the costs to you and to the market – both time and financial (think about SME accessibility)?
  - How will you manage access to confidential/commercially sensitive information – both yours and the suppliers?
  - How your approach meets the objectives and does not result in unfair advantage and distortion to competition?

# PIPELINE NOTICE

- Early provision of information where pay more than £100million in the coming financial year under “relevant contracts”.
- Include any public contract with a value of more than £2million where a tender notice or transparency notice will be published in the 18 months commencing at the start of the financial year.
- Publish within 56 days of first day of financial year.

# PLANNED PROCUREMENT NOTICE

- Previously a prior information notice.
- Optional notice.
- Enables provision of advanced information and the market to consider/prepare.
- Can be used to reduce the time for tender but not as a call for competition:
  - Not more than one year before the Tender Notice; and
  - At least 40 days before the Tender Notice.
- Reduction to 10 days – subject to the objectives.

# SELECTION/PARTICIPATION

- Prequalification/selection criteria.
- Proportionality requirement - must have regard to nature, complexity and cost of the contract.
- Legal and financial capacity.
- Technical ability:
  - Not previous work for the authority;
  - Comply with the rules on technical specifications and permit equivalent qualifications.
- Means of proof – flexibility.
- Exclusion and the debarment list.



# AWARD CRITERIA

- Most advantageous tender (rather than most economically advantageous tender).
- MAT determined by reference to award criteria.
- Sufficiently clear, measurable and specific.
- Proportionate.
- Must comply with technical specification rules.
- Scope for many different pricing/quality models.
- Can “refine” award criteria and weighting pre ITT in competitive flexible procedure.



# KEY PERFORMANCE INDICATORS

- Key performance indicators: “factor or measure against which a supplier’s performance of a contract can be assessed during the life-cycle of the contract”
- Before entering into a public contract with an estimated value of more than £5 million, a contracting authority must set at least 3 KPIs.
- Does not apply where the CA considers the supplier’s performance under the contract could not appropriately be assessed by reference to KPIs.
- CA must publish the KPIs.
- Assess performance at least every 12 months.
- Consider:
  - Engagement with the market;
  - Corporate approach to setting KPIs; and
  - Resourcing.

# PROCUREMENT PROCEDURES

- Direct Award.
- Competitive Tendering Procedures:
  - Open Procedure;
  - Competitive Flexible Procedure;
  - Disregarding tenders.
- Award under an existing framework.
- Role of dynamic markets.
- Time limits.



# DIRECT AWARD

- Only in limited circumstances – similar to existing Regulation 32 (e.g. unique work of art, exclusive rights, absence of competition for technical reasons,) but slightly wider (e.g. user choice for light touch services; direct award to protect life, health or public safety).
- Not to an excluded supplier unless an overriding public interest.
- Must consider if an excludable supplier.
- Switching to direct award.
- Must publish a transparency notice before award.



# TENDER NOTICE

- Publish when starting a tendering procedure.
- Provide associated tender documents – must provide sufficient information to allow preparation of a tender including the details of what is to be supplied by the supplier.



# OPEN PROCEDURE

- Green Paper – simple off the shelf procurement.
- Single stage – no restriction on who can submit a tender.
- Intended to work as per the PCR 2015.



# COMPETITIVE FLEXIBLE PROCEDURE

- Green Paper:
  - “a new flexible procedure that gives buyers freedom to negotiate and innovate to get the best from the private, charity and social enterprise sectors”;
  - Encourage innovation and more effective and proactive engagement with the market.
- A competitive tendering procedure that the CA considers appropriate for the purpose of awarding the public contract.
- Must:
  - be consistent with the objectives and principles;
  - be advertised in accordance with the Procurement Act;
  - comply with minimum time limits;
  - not allow participation by a supplier who did not submit an initial tender or has been excluded earlier.
- Can limit numbers and exclude by reference to (for example) conditions of participation, intermediate assessment of tenders.
- May provide for refinement of award criteria.

# COMPETITIVE FLEXIBLE PROCEDURE

- Implementation:
  - Will CAs use it or design CFP along well-known paths?
  - Government acknowledges likely some bedding in time.
  - How do CAs approach corporately?

# COMPETITIVE FLEXIBLE PROCEDURE

- What could it look like?
  - What do CAs want to do that they could not do before?
  - What does the market want?
- Consider – complexity, resource and cost implications (CAs and the market).

# COMPETITIVE FLEXIBLE PROCEDURE

- Simple – introduce a separate suitability stage with/without a reduction in numbers to tender stage (basically the restricted procedure).
- Procurement Act suggests it could be single stage (see Tender Notice provisions).
- Difference methods of engagement – presentation/demonstration; site visits.
- Introduction of negotiation – single round or multiple rounds.
  - Needs to be properly planned and controlled.
  - Consider if CPN scenarios where need to reserve right to award on the basis of initial tenders.
- Post award negotiation.
- Limiting participants – might include reduction of numbers through successive stages.
- Refine award criteria.
- Limiting number of Lots.

# AWARD, STANDSTILL AND CHALLENGE

- Procurement Act provides for a mix of mandatory and voluntary standstill period.
- Provide an assessment summary of each bidder's tender.
- Contract award notice starts the standstill period.
- Eight working day standstill period.
- Challenge period is still 30 days from knowledge but still a six month long stop for set aside (previously ineffectiveness).
- Automatic suspension only applies to challenges within the standstill period.
- Contract details notice when enter the contract within 30 days (or 120 days for light touch contracts).
- Copy of the contract – more than £5million – within 90 days (or 180 days for light touch contracts).

# TERMINATING A PROCUREMENT

- Must publish a notice.
- Voluntary notice if not proceed after publishing details in the Pipeline Notice or a Preliminary Market Engagement Notice.



# BELOW THRESHOLD CONTRACTS

- Part 6 – separate regime.
- Does not apply to concessions, utilities or exempted contracts.
- Does not apply to schools (including academy trusts or sixth form colleges).
- Very similar to PCR 2015.
- Pre-market engagement provisions do not apply – but can still do engagement.
- Possible to do a voluntary planned procurement notice.
- Must publish a notice if value exceeds £12,000 (central government) or £30,000 (other CAs) AND inviting tenders – excepts apply (pre-selected group, particular supplier).
- Contract details notice required.
- No separate suitability assessment – some exceptions including a works contract above the services/supplies threshold.
- Consider SME barriers including reduction/removal.
- Time limits reasonable and the same for all.



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