



# Procurement Bill

UK Public Procurement Reform Webinar - Session 2  
Planning and Commencing a Procurement

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# Speakers



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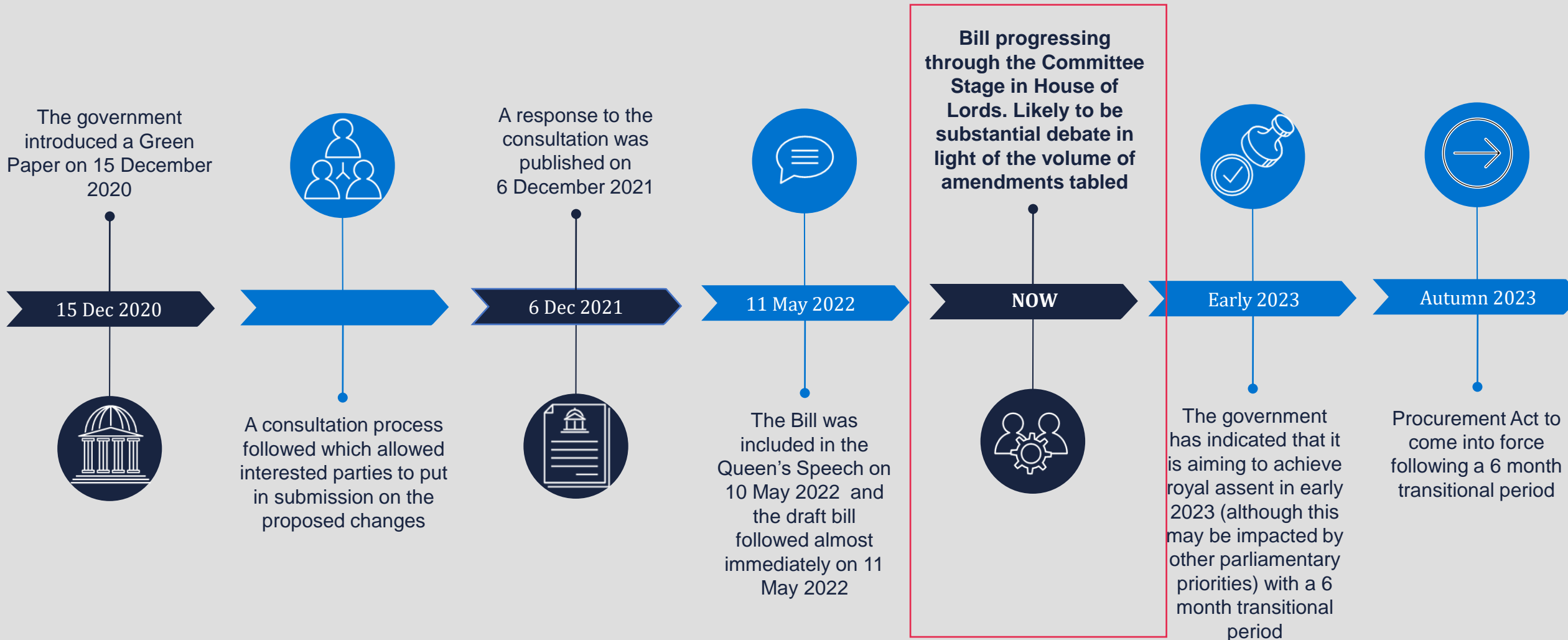


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# Timelines for the Procurement Bill



# Today's topics

1. Competitive flexible procedure – a 17 step process
2. Direct Awards
3. Commercial Purchasing Tools
4. Application to Scotland
5. Helpful resources and blogs

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# Competitive flexible procedure – a 17 step process

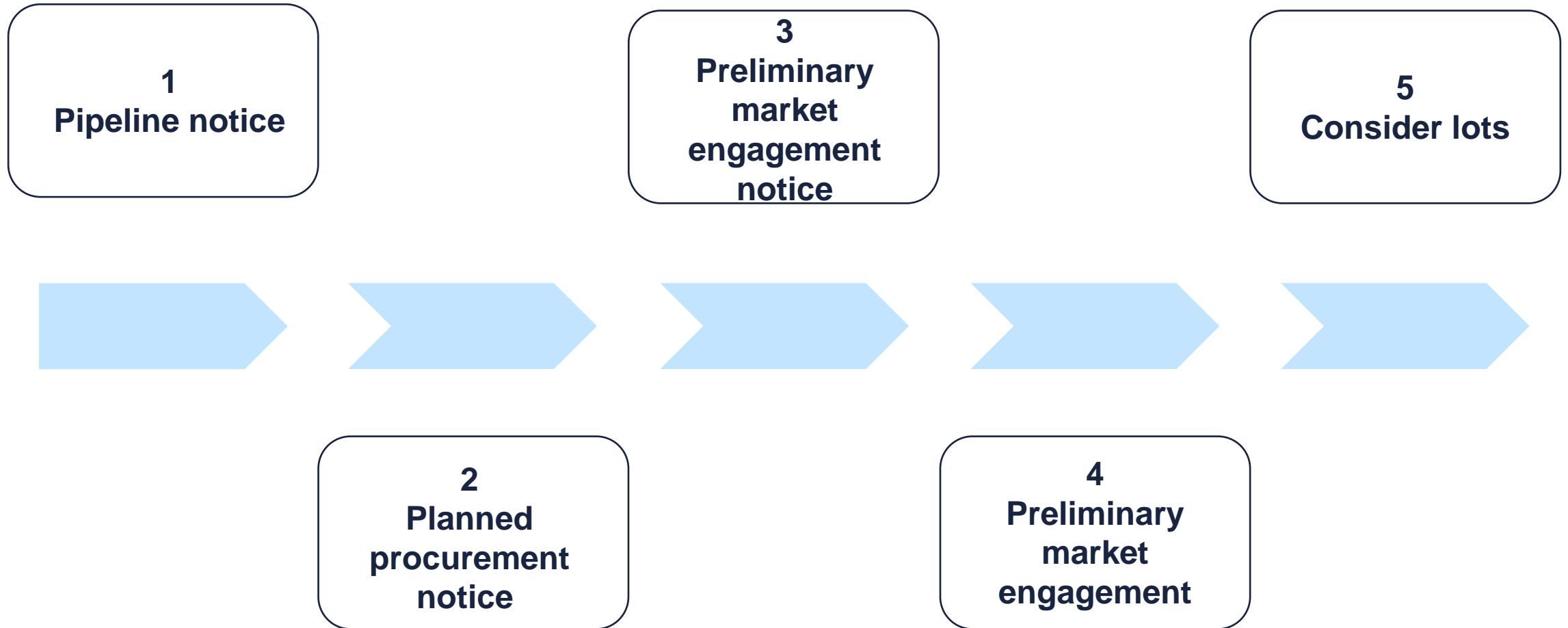
Assumption that this is a contract under the competitive flexible procedure.

✓	✗
<ul style="list-style-type: none"><li>• A public contract</li><li>• Above threshold amounts in Schedule 1.</li><li>• Not an exempt contract, as set out in Schedule 2.</li></ul>	<p>Not a “special regime contract”, ie:</p> <ul style="list-style-type: none"><li>• a concession contract;</li><li>• a defence and security contract;</li><li>• a light touch contract;</li><li>• a utilities contract; or</li><li>• awarded under a framework or dynamic market.</li></ul> <ul style="list-style-type: none"><li>• Not procured using the open procedure.</li></ul>

The description of the steps on the following slides assumes that the Government’s amendments to the Bill tabled in June will be accepted, and that none of the opposition or cross-bench amendments will be.

# Competitive flexible procedure – a 17 step process

Steps 1 to 5



# Competitive flexible procedure – a 17 step process

Steps 6 to 10

**6**  
**Set the  
procedure**

**8**  
**Set conditions of  
participation**

**10**  
**Prepare technical  
specifications**



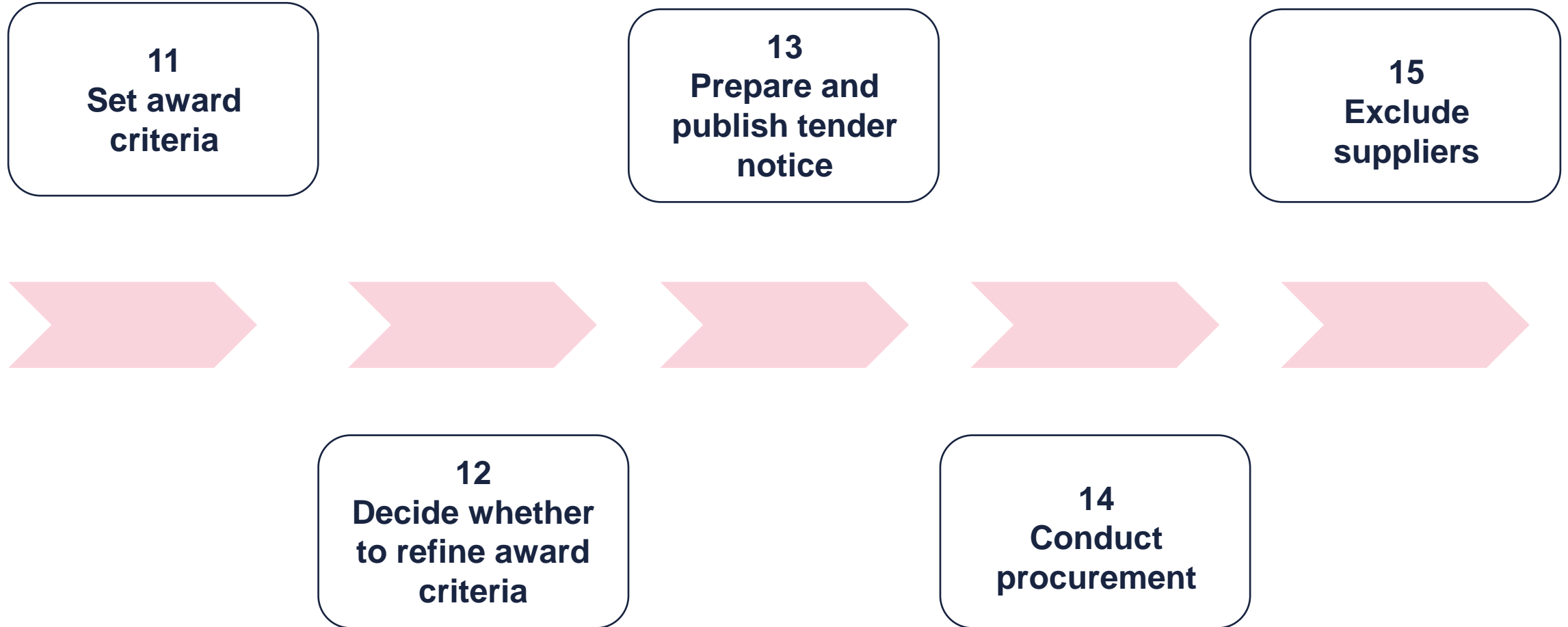
**7**  
**Set the lotting  
rules**

**9**  
**Detail  
requirements**



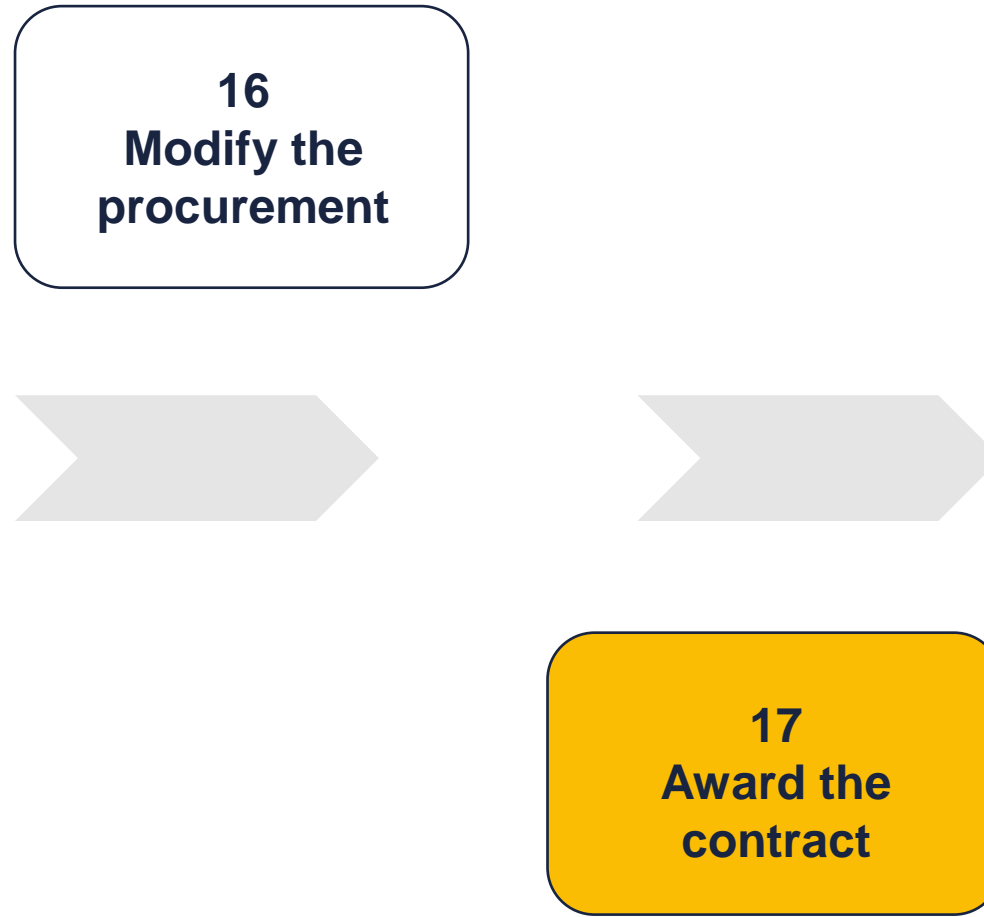
# Competitive flexible procedure – a 17 step process

Steps 11 to 15



# Competitive flexible procedure – a 17 step process

Steps 16 and 17



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1. Competitive flexible procedure – a 17 step process
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# Direct Awards

## Existing regime - Regulation 32 of the PCR

- Often used in difficult circumstances and as a justification for needing to enter a contract urgently without a prior competition.
- Not always easy to fit within the limited and prescriptive direct award tests.
- Relied on heavily in the pandemic and been subject to significant criticism and legal challenge over transparency and VIP lanes for certain suppliers.

## New regime

- Some differences but it will remain a contentious area as you are awarding a contract to given supplier without others getting the chance to compete for it.

# Direct Awards

## Clause 40 - Direct award in special cases

- Where a direct award justification applies as set out in Schedule 5 of the Bill.
- A contracting authority **may** carry out a selection process or take such other preliminary steps as it considers appropriate for the purpose of awarding a contract under this section (our emphasis).

## Clause 41 – Direct award to protect life

- Minister able to issue regulations which permit a direct award necessary to protect human, animal or plant life or to protect public order or safety.
- Appears to be intended as a catch all provision to allow for temporary measures for specific issues such as the pandemic.
- May specify a class of contract, could be used for all contracts made by contracting authorities in response to a specific issue.

# Direct Awards

## Clause 42 – Switching to direct award

- Applies where the contracting authority does not receive any suitable tenders/responses and considers a competitive procedure is not possible.
- The clause sets out reasons why a tender or request would not be considered suitable e.g.
  - Failure to meet award criteria.
  - Abnormally low tender.

## Clause 43 – Transparency notices

A transparency notice will need to be published before making a direct award (except for user choice contracts).

A contract award notice will need to be published before a direct award which triggers the standstill period.

Note that this is not required for user choice contracts and the standstill will not apply to direct awards made under the need for urgency or to protect life as they cannot be delayed by a standstill period.

# Direct Awards

## Justifications - Schedule 5

- Single suppliers (paragraphs 4 – 6).
- Additional or repeat goods, services or works (paragraphs 7-9).
- Urgency (paragraphs 13 and 14).
- User choice contracts (paragraphs 16 – 18).
- Defence and Security (paragraphs 19 – 21) – to be considered in a separate session.

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# Commercial Purchasing Tools - **Current position**

## Frameworks

- Used extensively
- Can speed up and simplify the procurement process
- Aggregates demand

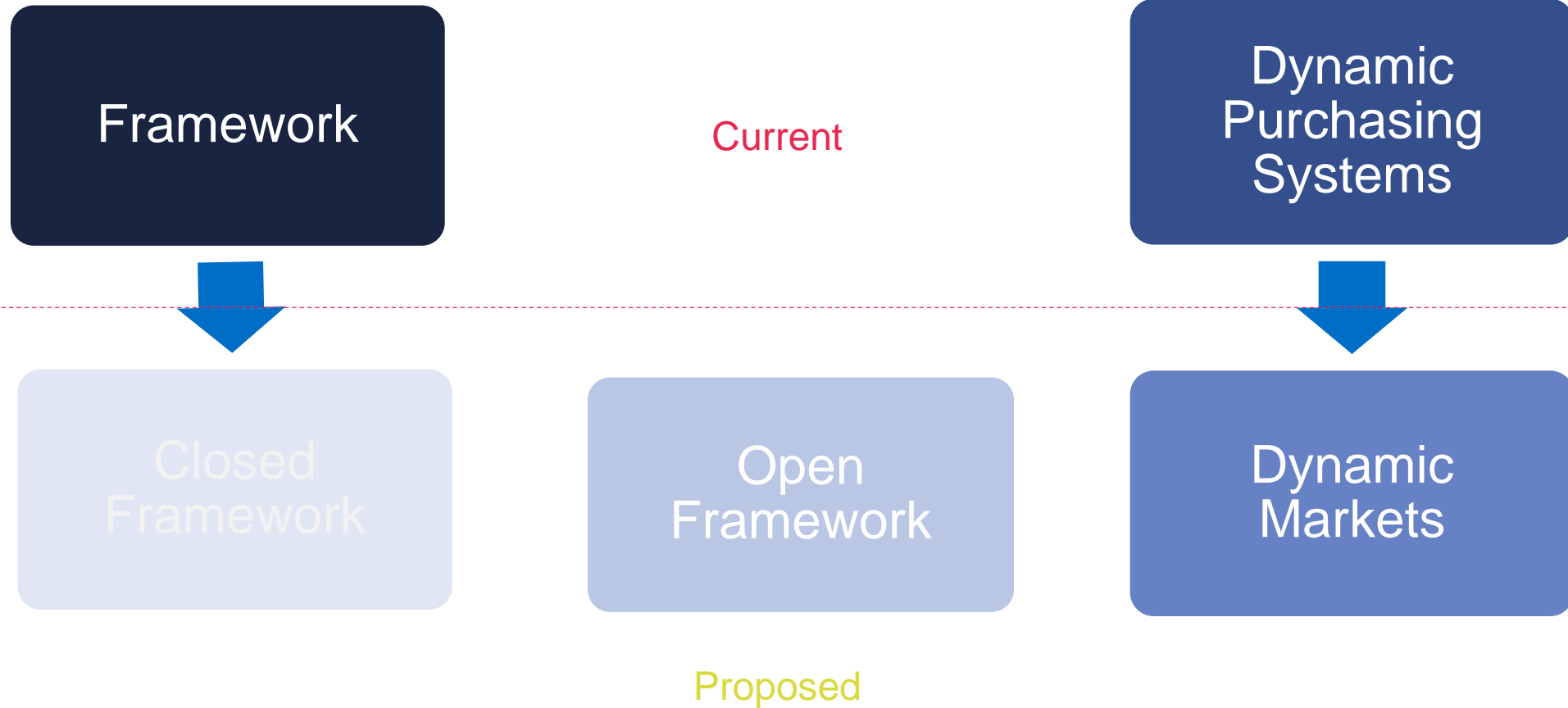
## Dynamic Purchasing Systems

- Similar to a framework but new suppliers can join over time
- Limited to “commonly used purchases”

## Qualification Lists

- Only available under UCR
- Commonly used for utilities

# Commercial Purchasing Tools – **Proposed changes**



# Frameworks generally – Chapter 4, Sections 44-47

## Simplified definition

“a contract between a contracting authority and one or more suppliers that provides for the future award of contracts by a contracting authority to the supplier or suppliers”.

## Frameworks must include

- description of goods, services or works to be provided
- the price / price mechanism
- selection process for award of contracts
- details of eligible contracting authorities
- whether it is an open framework

## A framework may not

- permit award of a contract to an excluded supplier
- prevent a contracting authority from asking for further information before awarding a contract

- **Fees can be charged** to suppliers on frameworks based on the value of business awarded
- Terms are implied to allow **exclusion of excluded suppliers**
- No standstill period for call offs

# Frameworks – Closed Frameworks (sections 44-46)

## Term

- Generally limited to 4 years but defence and utilities frameworks limited to 8 years
- Can be extended if “a longer term is required” due to the nature of the goods services or works (explain in the tender notice).

## Direct Awards

- **Direct awards** (“future award of a public contract without competition”) remain possible if the framework sets out (i) the core terms of the public contract (ii) an objective mechanism for supplier selection.

## Further competition

- Draft bill was silent (!) on further competition procedure - being added through the debate process. The **selection process**:
  - should be a **proportionate** means of ensuring **capacity and ability** to perform the contract (having regard to the nature, complexity and cost of the public contract)
  - can include **requirements on qualifications, experience and ability** but cannot require experience of working with a particular Authority or having received other call off orders
  - can include **provision of evidence** that is verifiable by a person other than the supplier
  - can include **assessment** of proposals “by reference to the award **criteria against which tenders were assessed in awarding the framework**” but these can be “refined”

# Frameworks – Open Frameworks (section 47)

Open framework is a “scheme of frameworks that provides for the award of successive frameworks on substantially the same terms”

It is open (but not permanently like a dynamic market) to new suppliers

Must be **reopened** at least once during period of:  
“**three years** beginning with the day of the award of the first framework in the scheme, and  
**five years** beginning with the day of the award of the second framework in the scheme”.

Each individual framework **must expire when the next one is awarded**. The **final framework must expire 8 years after the first one**.

When second and subsequent framework awarded, original suppliers can join the new framework:

- if **no limit** on number of suppliers, based on their **previous offering** (ie rolls over as a continuing supplier) **or** they can **update their bid**
- if **number** of suppliers is **limited**, its **original bid** must be **re-evaluated** or a **new bid** submitted

An open framework with just one supplier is effectively transformed into a closed framework

# Dynamic Markets

Dynamic purchasing systems seen as too restrictive so renamed as **Dynamic Markets**

## Establishing a Dynamic Market

Can be established by **contracting authorities or utilities** (utilities dynamic markets)

Conflicts assessment must be prepared then commenced via publication of a “dynamic market notice” (contents TBC)

Established using unique flexible requirements

### Conditions for membership:

**must be proportionate** (based on nature, complexity and cost of contracts to be awarded);

**assess capacity and ability** (can relate to qualifications, experience or technical ability)

**may require evidence** that is verifiable by a third party

# Dynamic Markets

## Establishing a Dynamic Market (contd.)

- **Numbers** on a dynamic market (or part) **cannot be limited**
- **Conditions for membership cannot be modified** during the term of the market
- Contract / terms of membership likely to be needed
- Notice of modifications must be published
- As soon as possible after establishment a notice must be published (contents TBC)
- **Applications for membership** must be:
  - **open throughout the term of the market**
  - **considered within a reasonable period**
  - **accepted as soon as reasonably practicable** if the supplier meets
    - the conditions of membership and is not an excluded supplier
  - accepted or rejected (with reasons) as soon as reasonably practicable

# Dynamic Markets

## “Call Offs”

- Competitive flexible procedures (other than the open procedure) can exclude suppliers who are not members of an appropriate dynamic market or an appropriate part of it.
- No standstill period needed for public contracts awarded by reference to a dynamic market

## Removing suppliers from a Dynamic Market and end a Dynamic Market

- Excluded suppliers must be removed from a dynamic market and excludable suppliers may be excluded
- Before removing a supplier they must be informed (with reasons)
- Notice must be published as soon as possible after a dynamic market ceases to operate (plus further information TBC)

## Fees

- **Fees** can be charged to suppliers on dynamic markets:
  - utilities dynamic markets - based on joining and maintaining membership
  - other dynamic markets - based on estimated values of awarded contracts



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# Applicability to Scotland

## Introduction

- Clause 114 of the Bill - *“This Act extends to England and Wales, Scotland and Northern Ireland”*.
- Legislation will apply in Scotland albeit Scottish regulations still apply to Scottish authorities.
- The Court of Session has jurisdiction in relation to procurement challenges and other litigation.
- Scottish Ministers are empowered to make subordinate regulations under the Act.
- The Bill permits UK regulations to amend existing Scottish legislation in issues and provisions that are devolved to the Scottish Ministers and Scottish Parliament.

# Applicability to Scotland

## “Devolved Scottish Authorities”

- The Bill applies to a “contracting authority” as defined in Clause 1(a) the Bill as:
  - “a public authority other than an excluded authority...”.
- The definition of “excluded authorities” includes “devolved Scottish authorities”.
- Clause 1(6) provides, in summary, that devolved Scottish authorities are those with functions exercisable only in or as regards Scotland, and where either:
  - (a) none of its functions relate to reserved matters, or
  - (b) some of its functions relate to reserved matters and some do not.
- In relation to any public undertaking or private utility, this will be treated as a devolved Scottish authority if it operates only in or as regards Scotland and either none of their activities relate to reserved matters or some relate to reserved matters and some do not.

# Applicability to Scotland

## “Devolved Scottish Authorities” – Some queries...

- **How will the Bill apply to bodies exercising functions or operating solely in Scotland?**
  - Such bodies will continue to be governed by existing Scottish legislation – Public Contracts (Scotland) Regulation 2015; Utilities Contracts (Scotland) Regulation 2016; and the Concession Contracts (Scotland) Regulation 2016.
- **How will this apply to bodies exercising functions or operating in Scotland, but whose activities may also extend beyond Scotland?**
  - Bodies may potentially be caught by the definition of a ‘contracting authority’ as a result of their activities, as to whether or not they are excluded authorities, e.g. whether or not they exercise their functions only in or as regards Scotland.
- **What happens if a body does not meet the test of being a devolved Scottish authority (or the other very limited excluded authorities in the legislation)?**
  - The provisions contained in the Bill will apply and any procurement activity must be carried out in accordance with the terms of the new legislation.

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# Helpful public resources

- [Hansard Second Reading of the Bill](#)
- [Running List of Committee Stage Amendment Papers](#)
- [Government Commercial Function – summary guide to the provisions of the Procurement Bill](#)
- [Government Commercial Function Webinar](#)
- Separately, on 13 June 2022 Scottish Ministers [announced](#) concerns about the terms of the Bill and lodged a Legislative Consent Memorandum in the Scottish Parliament, recommending that MSPs refuse consent for the Bill in its current form. The Delegated Powers and Regulatory Reform Committee of the UK Parliament has also issued a report identifying failures in the memorandum prepared to assist with its scrutiny of the Bill.

# DLA Piper – Procurement Reform blogs

## [The Public Procurement Bill – delegated powers – ‘to delegate, or not to delegate: that is the question’](#)

Jonathan Blunden – 21 September 2022

## [Webinar Q&A – The Procurement Bill – what is it, why is it here, an overview and initial thoughts on content, structure and its potential impact](#)

Andy Batty, Steven Condie, Joanna Haigh, Jessica Hill, Martyn Scott – 29 July 2022

## [Procurement Challenges – A new regime but not a revolution](#)

Jessica Hill - 7 July 2022

## [Same as it ever was? Has the Procurement Bill seized a once in a lifetime opportunity?](#)

Matthew Cliff - 20 June 2022

## [Transparency, Transparency, Transparency – A summary of the changes to the transparency obligations in the Procurement Bill.](#)

Rebecca Walker - 16 June 2022

## [Public Procurement Reform – Procurement Bill updates.](#)

Andy Batty - 12 May 2022

## [Debarment from UK Government contracts – back to the future.](#)

Richard Bonnar - 5 May 2022

## [Public Procurement Reform – Frequently Asked Questions](#)

Daniel Lavender - 24 March 2022

## [Public procurement reform – ‘Crisis? what crisis’](#)

Jonathan Blunden - 22 December 2021

## [Procurement Challenges – the future](#)

Jessica Hill - 16 December 2021

## [Public procurement reform ... the times they are a-changin’](#)

Jonathan Blunden - 8 December 2021

# Upcoming webinars



If you have any follow up questions after the webinar, please send them to [ProcurementReform@dlapiper.com](mailto:ProcurementReform@dlapiper.com)