

Running a Procurement under the Procurement Act

Webinar | 28 February 2024

Introduction

18 Steps to running a Procurement under the Procurement Act

In this session we will discuss the **18 Steps** of running a procurement under the new Procurement Act 2023, from planning and preparation through to Award.

This webinar will look at the steps public bodies must take and the ways in which suppliers can engage in the process

Speakers



Steve Condie
Legal Director
T: +44 20 7 796 6645
steven.condie@dlapiper.com



Andy Batty
Senior Associate
T: +44 161 235 4446
andrew.batty@dlapiper.com



Nicholas De Lacy-Brown
Senior Associate
T: +442077966588
nicholas.de.lacy.brown
@dlapiper.com



Rebecca Walker
Associate
T: +44 113 369 2180
rebecca.walker@dlapiper.com

Pre-procurement

Step 1 Publishing a Pipeline notice

Who and What?

- Any contracting authority (not private utilities or transferred NI authorities) that expects to pay more than £100 million in the financial year.
- Sets out all planned contracts (including direct awards) of £2 million or more.
- Title, subject matter, estimated dates of publication and award (notably not value!)
- Publish by 26 May each financial year, covers next 18 months from 1 April
- No obligation to update throughout the year

Current position

- No statutory obligation to publish
- National Procurement Policy Statement advises annual pipelines looking forward at least 18 months (pref. 3-5 years)
- UK Government policies have much more detailed content requirements



Step 2

Publishing a Planned Procurement Notice

What is it?

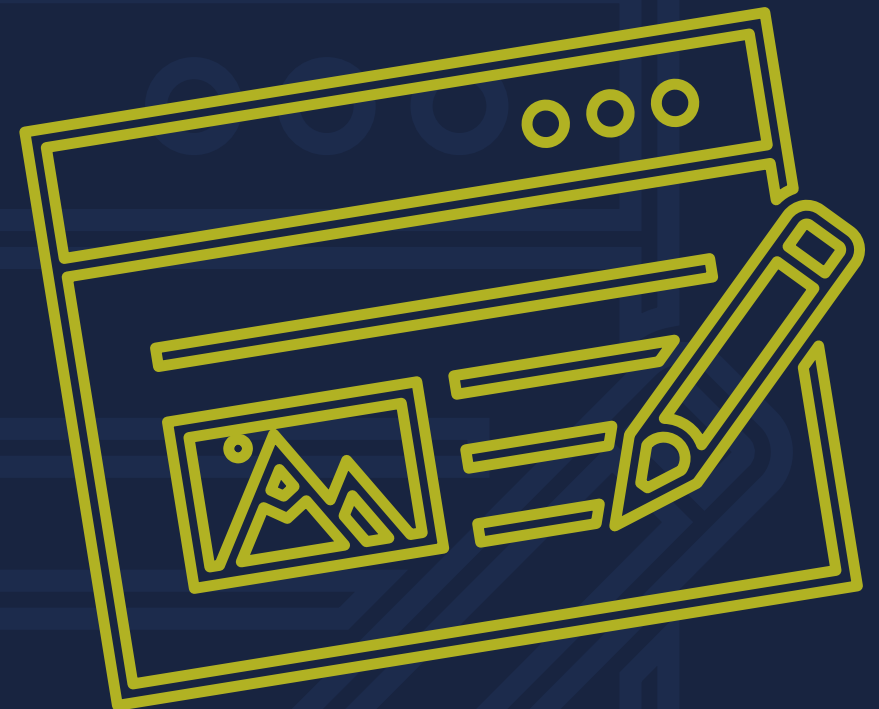
- Optional notice to warm the market up to upcoming bidding opportunity
- Set out as much information as is available to the authority at that time including estimated dates for procurement, subject matter, how to express interest etc.

Qualifying Planned Procurement Notice

- Published between 40 days and 12 months prior to a tender notice
- Reduces minimum time period for submission of tenders (10 days down from 25-35)

Current position

- Effectively same as a PIN
- Slightly lower transparency requirements currently
- Similar impacts on shortening tendering time periods



Step 3

Publish a Preliminary Market Engagement Notice

Preliminary Market Engagement Notice

- Not obligatory BUT if not used then authority must publish (in tender notice) its reasons for not doing so
- Can publish either before or after have conducted the market engagement

What should be in the Notice?

- Set out details of the procurement it relates to including estimated dates of publishing tender notice/ transparency notice and contract award
- How the Authority will conduct (or has conducted) the market engagement e.g.
 - When and where it will hold (has held) events
 - When suppliers can submit expressions of interest and other information



Step 4

Conduct Preliminary Market Engagement

Purpose

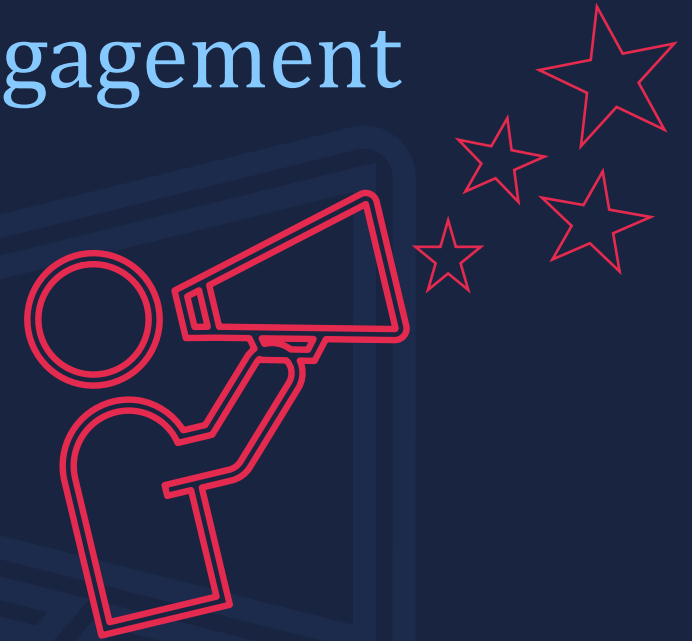
- Developing requirements and procurement process
- Identifying a market and develop market appetite
- Identifying contractual positions

What?

- No set rules on how to conduct this
- Variety of methods including supplier days, desktop exercises, site visits, targeted meetings
- BUT must take steps not to distort competition or place any supplier at an unfair advantage

Current position

- Similar provisions in existing legislation around preliminary market engagement
- Slightly more guidance on how to conduct the engagement in existing legislation
- Supplier involvement more likely to trigger exclusions under new regime – onus on contracting authority to determine unfair advantage with no express opportunity for supplier to disprove this
- Existing regime affords a supplier the opportunity to prove that its involvement is not capable of distorting competition



Procurement preparation

Step 5

Consider whether to use Lots

What?

- Obligation to consider whether goods, works or services could be supplied under multiple contracts and whether could be awarded by reference to lots
- If so must either:
 - Use lots; or
 - Provide reasons for not doing so (in tender notice)

Exemptions

- Utilities
- Light touch contracts

Current position

- Similar provisions in existing legislation to consider whether to use lots
- Inclusion in procurement documents or regulation 84 report so less transparency



Step 6

Determine how to use Lots

What?

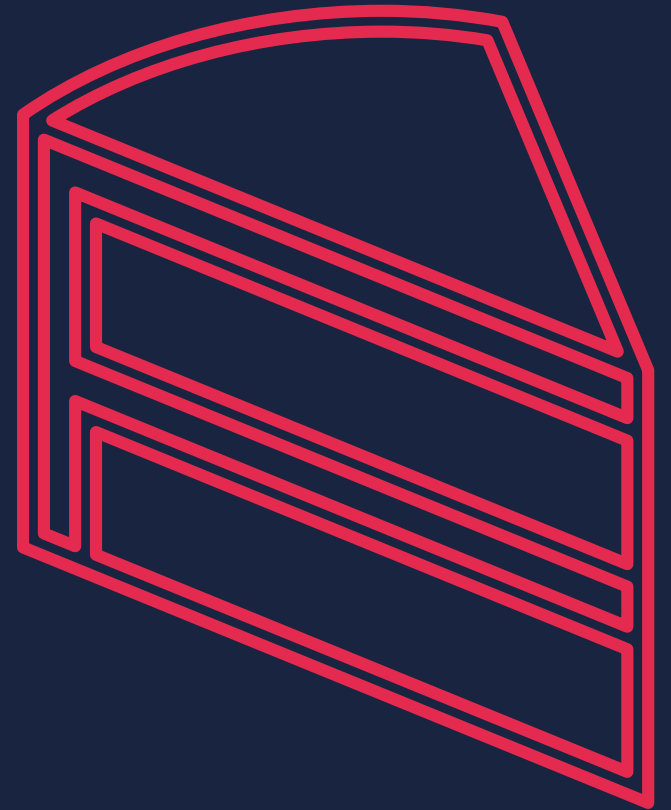
- May limit the number of lots a supplier may bid for
- May limit the number of lots a supplier may be successful in – subject to providing an objective mechanism to determine this.

Notice requirements

- Title and lot number
- Details on restrictions and criteria to determine this

Current position

- Similar provisions in existing legislation to place lotting restrictions subject to objective criteria
- Under existing legislation can combine contracts where successful on more than one lot



Step 7

Determine the Procedure

Options

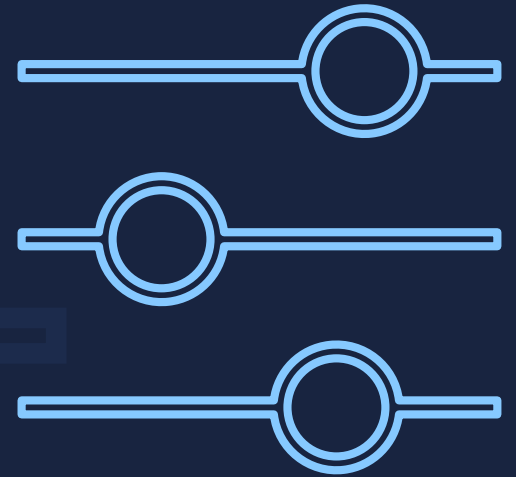
- Open procedure
- Competitive flexible procedure

Open procedure

- Single stage with no market restrictions – “off-the-shelf” procurements, well-defined market

Competitive flexible procedure

- Very wide ranging – carte blanche for a contracting authority to design bespoke procedure
- Increased flexibility - mix and match from existing procedures
- Must be proportionate
- Multiple stages involving down-selection but cannot allow for re-entry if previously excluded
- Can allow for refinement of award criteria



Step 7

Determine the Procedure *continued*

Current position

- Open procedure
- Restricted procedure
- CPN
- Competitive dialogue
- Innovation partnership
- Negotiated procedure (utilities)
- Greater number of procedures but perhaps less flexibility built into them.



Step 8

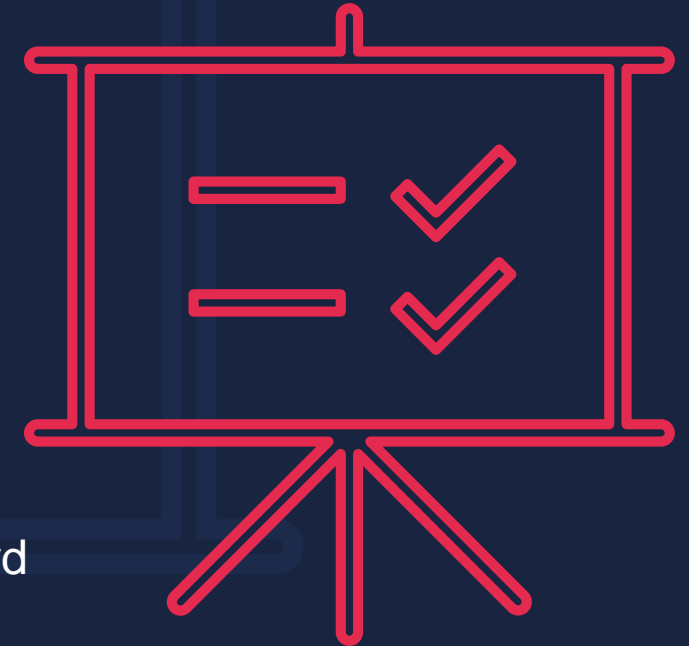
Set the Conditions of Participation

What?

- Selection criteria – down-selection of certain suppliers to reduce number of tenderers
- Set by reference to:
 - Legal and financial capacity; or
 - Technical ability

Restrictions

- Must be proportionate
- Cannot require audited annual accounts for those companies not obliged to under Companies Act
- Cannot require insurance re performance to be in place before contract award
- Cannot require precise qualifications without allowing for equivalents
- Cannot limit to incumbent suppliers



Step 8

Set the Conditions of Participation *continued*

Reliance

- May rely on associated suppliers e.g. JV members, subcontractors, guarantors

Current position

- Broadly the same principles
- Additional guidance and parameters around e.g. use of financial measures, use of references
- Reliance is much more restrictive under Procurement Act – must be a certain legal link (structural or contractual)



Step 9

Detail Requirements

What?

- Set clear and specific detail on required goods, works or services – the specification
- Do not break the rules on technical specifications
- Subjective measure – contracting authority “must be satisfied” that they are sufficiently clear and specific

Where?

- Publish in tender notice or associated procurement documents

Current position

- More objective measure – “must be sufficiently precise to..... determine the subject matter of the contract and to allow contracting authorities to award the contract”
- Less discretion in current regime and easier to challenge



Step 10

Establish the technical specifications

What?

- Contracting authority may set certain technical specifications that goods, works or services must meet
- Certain rules on this to ensure remain reasonable and proportionate and ensure all suppliers treated equally.

Restrictions

- Refer to performance or functional requirements – i.e. output based spec
- Restrictions on specifying certain IPR, place of origin or specific producers/suppliers
- Only permissible when “necessary” to make requirements understood – likely to be very narrowly interpreted
- Must allow for equivalency of quality or performance
- Must allow for international equivalency



Procurement preparation: award criteria and conflicts

Step 11 Set the Award Criteria

What?

- The criteria against which tenders are assessed and contracts awarded
- They must:
 - Relate to contract subject-matter;
 - Be clear, measurable and specific;
 - Not break rules on technical specifications;
 - Be proportionate
- Must also describe how they will be assessed and indicate relative importance (weightings/rankings) – all set out in the tender notice, or at least a summary

Application

- Subjective measure – contracting authority must be satisfied that they meet above requirements.
- Greater discretion for authorities in setting these – more difficult to challenge



Step 11 Set the Award Criteria *continued*

Application

- Subjective measure – contracting authority must be satisfied that they meet above requirements.
- Greater discretion for authorities in setting these – more difficult to challenge

Current position

- Similar principles re related to contract subject-matter
- More guidance currently on what may cover e.g. price/cost, qualitative, socio-environmental
- Must not confer unrestricted freedom on an authority and must be verifiable



Step 12

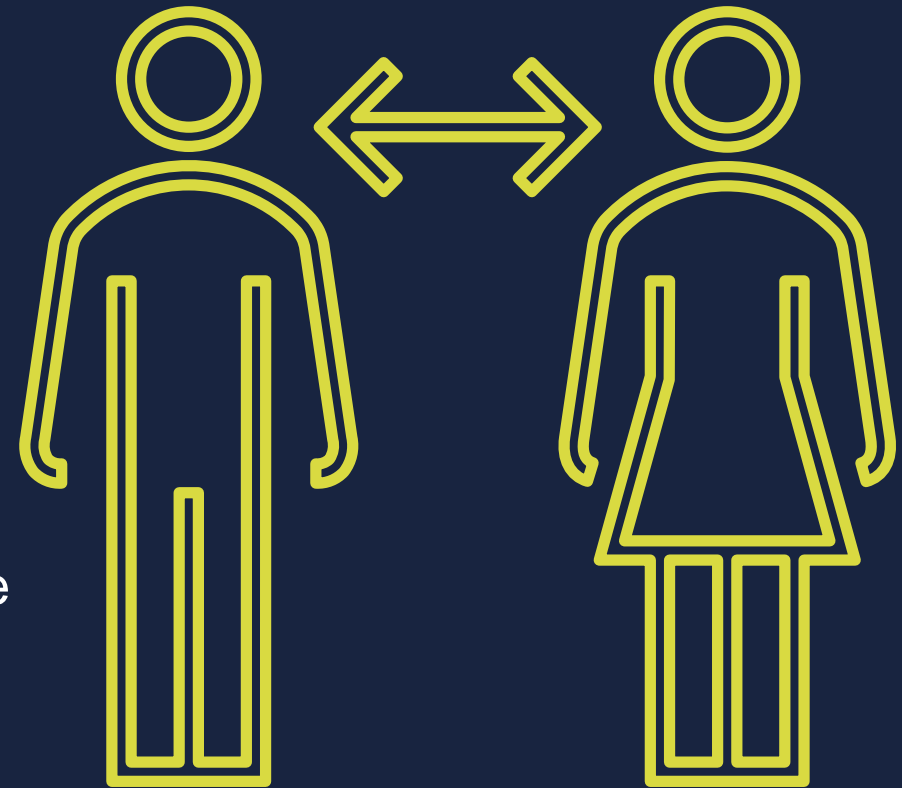
Consider refining the award criteria

- The competitive flexible procedure allows contracting authorities to refine the award criteria mid-procurement
- Extends to changing the relative weightings of award criteria
- To do so, they must include details in the tender notice
- Those details must summarise how the contracting authority will refine the award criteria
- Contracting authorities must not refine the award criteria:
 - after the call for final tenders
 - where refinement, if made earlier, would have allowed different suppliers to progress past an earlier stage



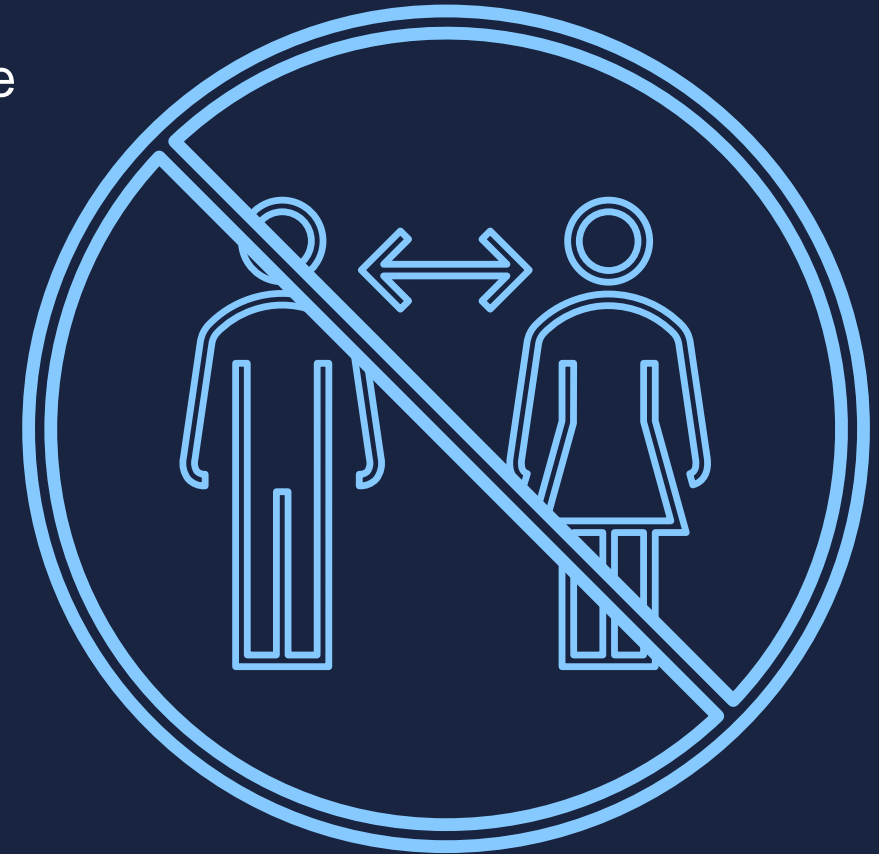
Step 13 Conflicts of interest

- Contracting authorities must identify and keep under review conflicts of interest
- A conflict of interest includes potential conflicts of interest.
- A person has a conflict if her or she has a direct or indirect interest that is:
 - personal
 - professional
 - financial
- Extends to Ministers that act in relation to the procurement
- Does not apply to corporate conflicts of interest, eg, preference for supplier A over supplier B.



Step 13 Duty to mitigate conflicts

- Contracting authorities must take all reasonable steps to ensure a conflict does not put a supplier at an unfair advantage or disadvantage
- This can include requiring the supplier to take reasonable steps.
- It can also mean excluding a supplier from the procurement where:
 - the conflict puts the supplier at an unfair advantage; and
 - either:
 - the advantage cannot be avoided; or
 - the supplier will not take the steps required by the contracting authority



Step 13 Conflicts assessment

- Before publishing a tender notice a contracting authority must undertake a conflicts assessment
- This sets out:
 - any conflicts identified; and
 - the steps the contracting authority will take to mitigate the conflict
- Extends to perception of conflict and demonstrating that no conflict exists
- Notice published that assessment undertaken (but not assessment)
- Assessment to be kept under review
- Further confirmation published with:
 - contract details notice
 - any contract change notice



Step 14 Publish the Tender Notice

- The tender notice is the formal start of the procurement process
- Tender notice accompanied by associated tender documents
- Contracting authorities must follow the process set out in the tender notice and associated tender documents
- Key substantive requirements for tender notice:
 - the procurement process (including any negotiation)
 - the option to refine the award criteria
 - the process and deadline for submitting requests to participate or initial tenders
 - award criteria
- Associated tender documents set out further detail about the procurement



Conducting the procurement and contract award

Step 15 Conduct the Procurement

- Contracting authorities must carry out the procurement in accordance with:
 - the tender notice
 - the associated tender documents
- Aim is to select the most advantageous tender that:
 - satisfies the contracting authority's requirements
 - best satisfies the award criteria using:
 - ✓ the assessment methodology
 - ✓ the relative importance of the award criteria



Step 15

Conduct the Procurement *Disregarding tenders*

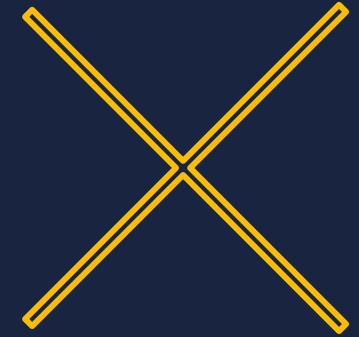
- Contracting authorities must disregard tenders from those suppliers that do not satisfy the conditions of participation.
- Contracting authorities may disregard tenders:
 - from suppliers (or who use sub-contractors) that are not from the UK or a treaty state (ie, members of the GPA or specified bi-lateral FTAs)
 - with an abnormally low price
 - that breaches procedural requirement in the tender notice or associated procurement documents, including the provision of information
- Abnormally low prices
 - notify supplier
 - give reasonable opportunity to explain
 - if contracting authority satisfied that supplier can perform, then cannot disregard



Step 16

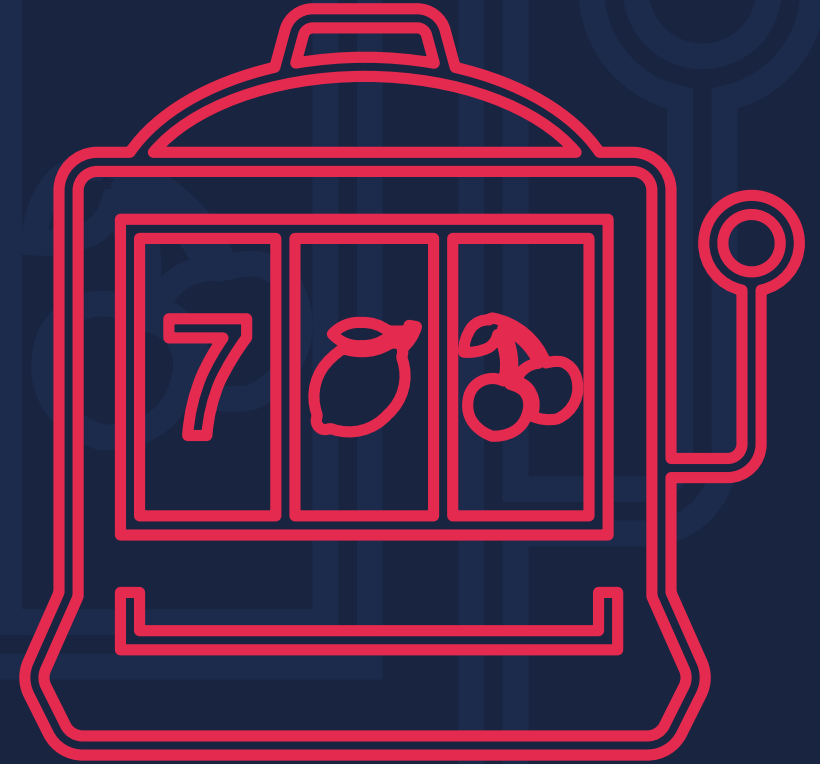
Exclude suppliers where appropriate

- Contracting authorities:
 - **must exclude** excluded suppliers from participating or progressing in a procurement
 - **may exclude** excludable suppliers
- Excluded suppliers:
 - **both:**
 - **mandatory ground of exclusion in Schedule 6 applies.** Can apply to:
 - connected persons (directors, parent companies, those with significant influence or control)
 - associated persons (person relied upon to satisfy conditions of participation)
 - sub-contractors
 - **circumstances giving rise to the ground applying continue or are likely to occur again**
 - **on the debarment list**
- Excludable suppliers:
 - **as for excluded suppliers, but grounds in Schedule 7**
 - **includes poor performance grounds**
- Supplier must be given opportunity to make representations, provide evidence and replace sub-contractors



Step 17 Modify the procurement

- Contracting authorities can modify the terms of a procurement
- The terms of the procurement are the contents of the:
 - tender notice
 - associated tender documents
- Can make unrestricted changes before the first supplier submission, ie:
 - request to participate
 - first or only tender where no request to participate
- After that date, and before the submission of assessed tenders, changes must not be substantial:
 - would have seen other suppliers participate
 - would have seen different suppliers invited to participate
- Revising time limits



Step 18 Award the contract

- Contracting authorities award public contracts to the most advantageous tender.
- Before signing the contract, contracting authorities must:
 - provide assessment summaries to suppliers that submitted an assessed tender
 - publish a contract award notice
 - observe the standstill period
- Standstill period begins with the day on which the contract award notice is published and ends:
 - after eight working days
 - any longer standstill period specified in the contract award notice
- Contracting authorities can observe voluntary standstill for those not covered:
 - direct awards
 - framework call-offs
 - dynamic markets
 - light-touch



Other resources

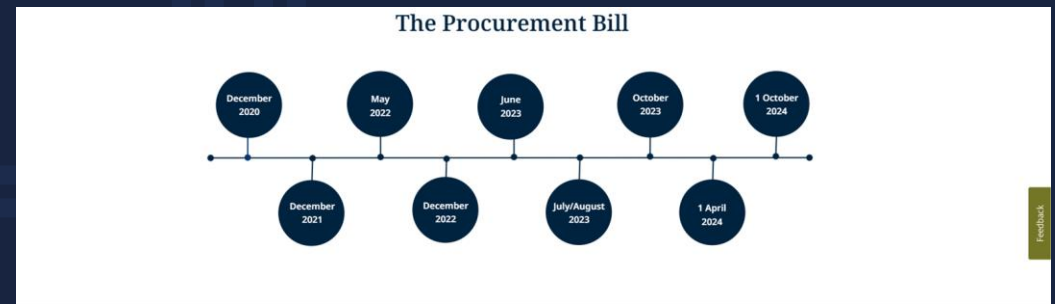
UK Public Procurement Reform Hub

The Procurement Act sets much of UK public procurement on a new path. Public bodies (including defence) and utilities will have greater flexibility buying goods, works and services. To help them and suppliers prepare, this page brings together our expert analysis and insight.

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

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

The screenshot shows the top section of a website page. At the top left, it says 'DLA PIPER' and 'United Kingdom | EN-GB'. There is a search bar on the right. The main heading is 'The Procurement Bill'. Below the heading, there is a sub-heading: 'The Procurement Act sets much of UK public procurement on a new path. Public bodies (including defence) and utilities will have greater flexibility buying goods, works and services. To help them and suppliers prepare, this page brings together our expert analysis and insight.' Below this, there is a navigation bar with links for 'WEBINARS', 'TIMELINE', 'INSIGHTS', and 'CONTACT'. The main content area features a large image of glowing orange and white lines. Below the image, there is a 'PUBLICATION' section with the text 'The Procurement Act has received Royal Assent' and '30 OCTOBER 2023 - 5 MINUTE READ'. At the bottom, there are three smaller publication cards: 'The UK Procurement Bill - An Overview', 'An update on the Procurement Bill', and 'Cabinet Office announces consultation on draft regulations for the Procurement Bill'.



Related insights



The Procurement Act Expo

Birmingham NEC, 12 March 2024

- Visit us at Stand 21 opposite the Cabinet Office Pavilion.
- Join our session at 12:30pm in the People & Skills Zone. Steven Condie and Jessica Hill cover *"Putting the new exclusions and debarment process into practice: guidance for suppliers and contracting authorities."*



Thank you.



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