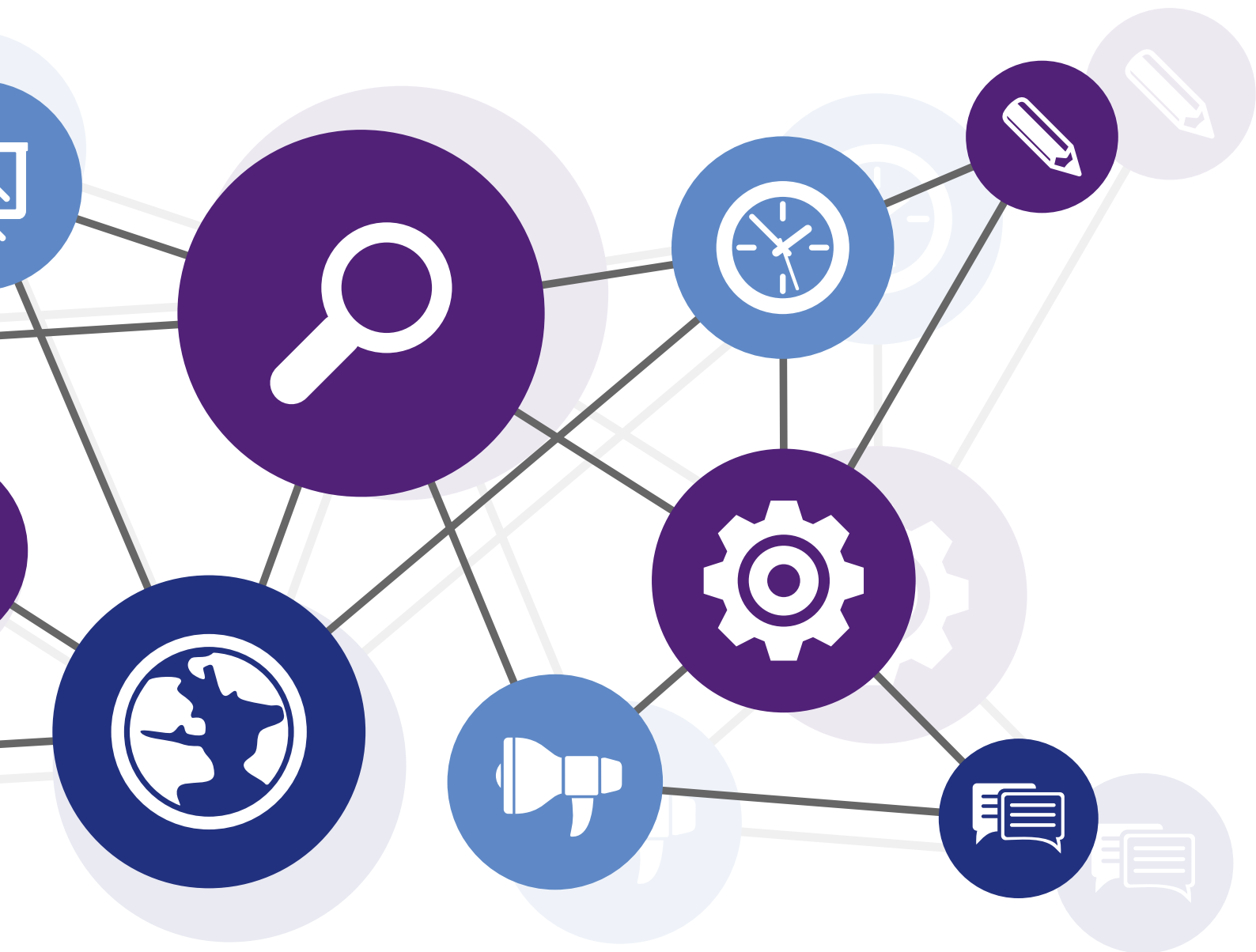


THE PROCUREMENT ACT 2023

Why we need a jargon-buster



Foreword

Do you know your vertical arrangements from your horizontal arrangements? What about your pipeline notices from your planned procurement notices? Could you tell us the difference between a Competitive Flexible Procedure and a Multi-Stage Procedure?

The Procurement Act 2023 was given royal assent on 26 October 2023 and is expected to come into force by October 2024.

In developing the new Act the Cabinet Office adopted some significant linguistic and stylistic differences from the current, well-known and understood procurement law terms. Clearly, some of the new terminology is adopting existing legislative language already common-place on the face of the statute-book, some of it is political and part of the post-Brexit dividend: putting a new British stamp on procurement jargon, and there are some new concepts altogether that need defining and describing.

This easy-to-use reference guide sets out some of the key terms under the Procurement Act 2023, what they were referred to under the Public Contracts Regulations 2015, and in plain language what they are. We hope this will be useful to those new to procurement, as well as experienced practitioners.

Please visit www.trowers.com and search for public procurement in order to find more materials relating to the Procurement Act 2023. Including a selection of Procurement On Demand bite-sized short videos focussing on a single element of the Procurement Act 2023, flowcharts to show you which notices should be published and when, insight articles and much more.



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The Basics

Procurement

“The award, entry into and management of a contract”

In relation to procurement or covered procurement – the Act states this includes a reference to:

- any step taken for the purpose of awarding, entering into or managing the contract
- a part of the procurement
- termination of the procurement before award

Often thought of simply just as the process by which the public sector buys things, the Act’s definition demonstrates that procurement governs a contract throughout its life and importantly includes the way in which contracts are managed or even terminated.

Some key provisions the Act has introduced include notices regarding contract management that will need to be new to procurement and delivery officers.

Covered Procurement

“The award, entry into and management of a public contract”

The Act makes a distinction between procurement and covered procurement. Covered procurement is essentially the award of a contract which is subject to the Act.

Contracting authority

A term that has not changed since the previous Public Contracts Regulations 2015. This is defined as either a “public authority” or for utilities contracts a “public authority, public undertaking or private utility”.

Public Authority

The definition of public authority is a new one, but which is very familiar to procurement practitioners. Including that they are funded primarily through public funds or subject to public authority oversight and does not operate on a commercial basis. There are further provisions to expand on these terms.

Public contract

A contract for the provision to a contracting authority of goods, services or works in exchange for money or moneys worth which exceeds the specified thresholds (see). The agreement may be a single agreement, a framework agreement or a concession contract.

For exemptions – please see “exempted contracts”

Procurement objectives

The Act sets out some common objectives that all contracting authorities must have regard to in procurements, including:

- Delivering value for money
- Maximising public benefit
- Sharing information for the purpose of allowing suppliers and other to understand the authority’s procurement policies and decisions
- Acting, and being seen to act, with integrity
- Equal treatment
- Taking reasonable steps not to disadvantage a bidder by treating them differently (where justified)
- Consideration of removing potential barriers to SMEs

Notices

Pipeline Notice A new concept – contracting authorities spending over £100m in procurable goods, works and services annually must publish a notice (within the first 56 days of each financial year) stating all public contracts valued at over £2m for which the contracting authority will go out to tender within the next 18 months

Procedure Notices

Preliminary Market Engagement Notice A new concept – where a contracting authority notifies the market that it has or will carry out preliminary market engagement

Planned Procurement Notice Previously a Prior Information Notice (or PIN)
A notice setting out the contracting authority's intention to carry out a procurement

Tender Notice Previously a contract notice
A notice informing the market that the contracting authority is commencing a procurement process

Below-threshold Tender Notice A new concept – where a contracting authority notifies the market that it shall award a below-threshold contract

Contract Award Notice An unchanged term – where a contracting authority notifies the market that it intends to enter a public contract

Contract Details Notice Previously covered by a contract award notice – where a contracting authority confirms it has entered into a public contract

Post Award Notices

Contract Termination Notice A new concept – where a contracting authority confirms it has terminated a public contract

Dynamic Market Notice A new concept – where a contracting authority notifies the market of a new or modified dynamic market

Procurement Termination Notice A new concept – where a contracting authority notifies the market that it has decided not to award a public contract following a procurement

Payments Compliance Notice Previously covered by a prompt payment report – where a contracting authority confirms that it has complied with the payment terms of a public contract

Contract Change Notice Previously a modification notice – where a contracting authority notifies the market that it intends to modify an existing public contract

Transparency Notice Previously a voluntary ex ante transparency notice (VEAT notice) – where a contracting authority notifies the market that it intends to award a contract without running a competitive procedure



Procurement Procedure Terms

Competitive tendering procedure	This term covers the open procedure (see below) and a competitive flexible procedure (see below)
Competitive Flexible procedure	A new concept – which now provides the flexibility for contracting authorities to design a procurement procedure with one or more stages. This may include procedures similar to the previous Restricted Procedure, Competitive Procedure with Negotiation or Competitive Dialogue or other permutation of tender submissions, evaluation and negotiation.
Multi-Staged Procedure	A procurement procedure with more than one stage and a more generic term to encapsulate procedures where an initial tender is submitted followed by assessment, negotiation/feedback and at least one subsequent tender submission
Open procedure	An unchanged term – a single stage tendering procedure without a restriction on who can submit tenders

Standard Vocabulary

Assessment Summary	<p>Previously referred to as the characteristics and relative advantages of a tender vs the most economically advantageous tender</p> <p>This is the feedback information to be provided by a contracting authority to a tenderer prior to publishing a contract award notice regarding the contracting authority's evaluation of the tender and, if different, the most advantageous tender</p>
Associated Person	A person that the supplier is relying on to satisfy the conditions of participation for their tender
Legal and Financial capacity	<p>Previously economic and financial standing</p> <p>One element that contracting authorities will take into account when considering awarding a public contract</p>
Technical ability	<p>Previously Technical and professional ability</p> <p>One aspect that bids should be assessed on</p>
Assessment Methodology	<p>Previously evaluation methodology</p> <p>The methodology by which evaluators will assess tenders</p>
Most Advantageous Tender	<p>Previously most economically advantageous tender</p> <p>The tender which the contracting authority considers satisfies its requirements and best satisfies the award criteria</p>
Preliminary Market engagement	Soft market testing carried out pre-procurement
Conditions of Participation	<p>Previously selection criteria</p> <p>A condition that the tender must satisfy in order to be awarded a public contract. To be set out in the tender documents.</p>

Excludable Supplier	<p>Previously a supplier subject to a discretionary exclusion ground</p> <p>A supplier or associated person who the contracting authority considers is subject to a discretionary exclusion ground (listed in Schedule 7 of the Act) which is ongoing or likely to occur again. For example certain labour market or environmental misconduct findings, bankruptcy or insolvency proceedings, professional misconduct findings, competition infringements and poor performance amongst others (listed in the Act).</p>
Excluded Supplier	<p>Previously a supplier subject to a mandatory exclusion ground</p> <p>A supplier or associated person who:</p> <ul style="list-style-type: none"> the contracting authority considers is subject to a mandatory exclusion ground (listed in Schedule 6 of the Act) which is ongoing or likely to occur again; and/or is on the Debarment List for a mandatory exclusion ground
Tendering Period	<p>Previously tender stage</p> <p>The day following issue of invitation to tender under a competitive tendering procedure until the day tenders must be submitted</p>
Direct Award	<p>Formerly Negotiated procedure without notice</p> <p>No longer anything to do with frameworks – this is where circumstances arise which permit direct negotiation with a supplier and a contract award</p>

Exempted and type of Contracts

Regulated below Threshold Contract	<p>A below threshold contract which is not exempted (by Schedule 2) or a concession or utilities contract</p>
Horizontal Arrangement	<p>Previously Co-operation agreement or Hamburg Waste exemption</p> <p>A contract between two contracting authorities (which otherwise may be procurable) with the aim of achieving objectives the authorities have in common and are entered into solely in the public interest</p>
Vertical arrangement	<p>Previously in-house awards or Teckal exemption</p> <p>A contract between a contracting authority and a person that is controlled by that contracting authority or with other contracting authorities acting jointly</p>
Parent undertaking	<p>As defined by section 1162 of the Companies Act, where in relation to a subsidiary undertaking an undertaking</p> <ul style="list-style-type: none"> holds a majority of the voting rights is a member and has the right to appoint or remove a majority of the board has the right to exercise dominant influence over the undertaking is a member and controls alone or pursuant to an agreement with other members a majority of the voting rights
Parent undertakings	<p>Two or more contracting authorities acting jointly that would, if they were a single undertaking, be a parent undertaking</p>

Frameworks and Dynamic Market System

Award without competition	<p>Previously direct award</p> <p>An award to a framework supplier without competition (if permitted under that framework)</p>
Dynamic Market	<p>Previously Dynamic Purchasing System (DPS)</p> <p>Predominantly established for more “off-the-shelf” supplies/ services, a group of suppliers who have been assessed and found to satisfy the conditions of membership and economic and financial standing requirements. Eligible contracting authorities may make awards without competition to Dynamic Market suppliers.</p>
Frameworks	<p>Previously Frameworks</p> <p>A contract between a contracting authority with one or more suppliers which provides for the future award of contracts either following a competitive selection process or an award without competition</p>
Competitive selection process	<p>Previously mini-competition</p> <p>An award procedure under a framework which follows a competitive process between the framework suppliers, including assessment of supplier proposals against the award criteria set from the outset of the framework</p>
Open Framework	<p>A new concept</p> <p>A type of framework which allows for a series of framework awards which can be reopened for competition during the framework term, in certain cases suppliers can be reappointed to the framework without re-tendering</p>

Organisations

Centralised Procurement Authority	<p>Previously central purchasing body</p> <p>A contracting authority which carries out procurement for the purpose of the supply of goods, services or works to other contracting authorities</p>
Contracting Authority	A public authority, other than an excluded authority
Public Authority	A person that is wholly or mainly funded out of public funds or subject to "public authority oversight" which does not "operate on a commercial basis"



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