

One of the biggest changes that the [Procurement Act 2023](#) will make to the UK public procurement rules will be to streamline the procedures that contracting authorities use to assess tenders and award contracts. Instead of the highly prescriptive procedures used until now, contracting authorities will have the choice of running either an open procedure or a competitive flexible procedure – meaning a procedure that they can largely design as they wish.

In addition, the Procurement Act 2023 introduces some important changes to the rules that apply when authorities award contracts without a competitive procedure – the process known as direct award.

Streamlining Procurement Procedures

The Public Contracts Regulations 2015 (PCR 2015) that authorities and suppliers are familiar with require contracting authorities to use certain prescribed procedures to conduct procurements. There are six possible procedures under the PCR 2015: the open procedure, the restricted procedure, the competitive negotiated procedure, competitive dialogue, innovation partnership and the negotiated procedure without prior publication.

Under the Procurement Act 2023, these six procedures will be replaced with just two. The open procedure will remain largely as it is, but the other prescribed procedures will all be replaced by the new competitive flexible procedure. This will empower contracting authorities to design their own selection and award processes from scratch, limited only by the need to follow certain overarching objectives and comply with minimum timescales. This new freedom will create both opportunities and potential risks for authorities and suppliers alike.

The Competitive Flexible Procedure

As the name suggests, the competitive flexible procedure is intended to give contracting authorities maximum flexibility to design their own procurement procedures in circumstances when the open procedure is not suitable. Principally, this will be when authorities wish to limit the number of suppliers invited to submit a tender (which is not possible under the open procedure).

The Procurement Act 2023 contains very few rules on how a competitive flexible procedure should be conducted. There are minimum time limits of 25 days each for the “participation period,” from the invitation to submit requests to participate until the deadline for receiving such requests, and the “tendering period,” from the invitation to submit tenders until the deadline for receiving tenders. (In both cases, the 25-day deadline can be either extended or shortened in certain cases). The [government guidance note on competitive tendering procedures](#) emphasises the importance of choosing realistic deadlines, in particular noting that short deadlines may hinder small and medium enterprise (SME) participation and innovation in tenders.

Contracting authorities are also obliged to have regard to certain overarching objectives of procurement that are set out in the Procurement Act 2023, such as delivering value for money and acting, and being seen to act, with integrity.

Within this broad framework, authorities are free to design and conduct a competitive flexible procedure as best meets their needs. This means, for example, that they can restrict the number of participants invited to submit a tender and reduce the number of participants again during the evaluation process, using as many rounds of down-selection as they wish. Authorities can also incorporate other elements into the procurement process, such as negotiation, dialogue, a demonstration stage or a site visit, and can require suppliers to deliver presentations. All these elements can take place before the submission of tenders (for example, so that the authority can refine its requirements), during the tender process (to clarify aspects of bids and develop proposals further) and after the contract has been awarded (to get final clarification on the winning proposal before signing the contract).

When considering how to design a competitive flexible procedure, contracting authorities must ensure that it is a proportionate means of awarding the contract in question, having regard to the contract’s nature, complexity and cost. The government guidance note emphasises that procedures should not be “overly burdensome” on suppliers or “unnecessarily complex and/or time-consuming.” As in other areas, the intention is that the Procurement Act 2023 will simplify procurement for both suppliers and authorities.

The Competitive Flexible Procedure

While there are attractions to abandoning the prescriptive and formulaic menu of procurement procedures available under the PCR 2015, the new flexibility may bring some downsides. First and foremost, suppliers' bid teams and commercial managers have spent many years becoming familiar with the procedures that they come across most often, such as the restricted procedure, the competitive negotiated procedure and competitive dialogue. Under the Procurement Act 2023, suppliers may have to follow different procedures for each different authority that they deal with, as those authorities will have the flexibility to design their own distinct rules. It is also likely that the same authority will use different bespoke procedures for different contracts. As such, an element of consistency will be lost. There is also a risk for contracting authorities that there will be more failed procurements and more challenges if procurements are poorly designed, either because they do not deliver the best outcome or because they lead to unfairness between bidders.

Therefore, at least in the medium term after the Procurement Act 2023 comes into force, many contracting authorities may choose to apply rules that are very similar (if not identical) to the old restricted procedure or competitive negotiated procedure, or competitive dialogue, in order to avoid these pitfalls.

The Open Procedure

The open procedure under the Procurement Act 2023 is largely unchanged from the PCR 2015. It is described as "a single stage tendering procedure without a restriction on who can submit tenders" and is intended to be used for straightforward procurements where the buyer's requirements are clear and there is no need to limit the number of bidders or engage in negotiation or dialogue.

A minimum 25-day deadline applies to the tendering period in most cases (again, this can be extended or shortened in some circumstances), and authorities are obliged to observe the overarching principles of procurement as described above.

Direct Awards

While the Procurement Act 2023 introduces some new grounds on which an authority can justify making a direct award – as explained below – the most significant changes in this area are aimed at increasing transparency.

Under the Procurement Act 2023, it will become mandatory for authorities to publish a transparency notice on the central digital platform before directly awarding a contract, with some limited exceptions. Under the PCR 2015, by contrast, authorities that intend to award a contract without a competitive procurement have the option of publishing a voluntary transparency notice but can choose not to do so.

The transparency notice must include the grounds for the direct award and explain why a direct award is justified, and include information on the supplier to whom the contract will be awarded if this is known at the time of publication. There may be cases (for example, due to extreme urgency) when an authority may publish the notice without having determined to whom the contract will be awarded. The government guidance note recommends that the transparency notice should be published as soon as the decision to directly award a contract is made so that, if there is a challenge to the decision to directly award the contract, it will generally be made when it is less disruptive to the procurement.

In addition, in the case of almost all direct awards, it will be mandatory for the authority to publish a contract award notice after publishing the transparency notice and before entering into the contract in question. Publishing the contract award notice will trigger the start of a mandatory eight-working-day standstill period when the authority is not permitted to enter into the contract, and during which time a claimant can start legal proceedings that will automatically suspend the signing of the contract. The standstill period need not be observed in some exceptional cases (for example, when a direct award is made due to extreme and unavoidable urgency).

The table below summarises the grounds on which a contracting authority can justify making a direct award. It is important to note that running a competitive procurement (either the open procedure or the competitive flexible procedure) is always the default position. As exceptions to the main rule, the grounds for using direct awards are interpreted very strictly. Contracting authorities should also note that the Procurement Act 2023 provides that selection processes or other preliminary steps can take place prior to a direct award. Hence, even if a contracting authority is permitted to directly award a contract, it can still consider using a rapid, informal competition or selection process.

Direct Award Justifications	
Prototypes and development	Applies when an authority procures a prototype or other novel good or service that is developed or designed at the authority's request.
Single suppliers	<p>Applies in three situations:</p> <ul style="list-style-type: none"> • The procurement of a unique work of art or artistic performance. • A particular supplier has intellectual property rights or other exclusive rights and there are no reasonable alternatives, such that only the supplier with those rights can fulfil the contract. • Only one supplier can fulfil the contract due to an absence of competition for technical reasons, and there are no reasonable alternatives.
Additional or repeat goods, services or works	<p>Applies in two situations:</p> <ul style="list-style-type: none"> • A contracting authority wishes to buy additional or partly replace existing goods, services or works that are the same as, or compatible with, existing supplies, and changing supplier would result in the authority receiving incompatible goods, services or works, and the incompatibility would result in disproportionate technical difficulties. • A contract has previously been awarded under a competitive tendering procedure and the tender notice or tender documents set out the authority's intention to carry out a subsequent procurement of similar goods, services or works.
Commodities	Applies when an authority purchases goods on a commodity market.
Advantageous terms on insolvency	Applies when awarding a contract will result in the authority getting particularly advantageous terms because a supplier is undergoing insolvency. The authority could award the contract to the entity undergoing insolvency or to a third party such as an administrator.
Urgency	<p>Applies when a contract cannot be awarded on the basis of a competitive tendering procedure because the goods, services or works are strictly necessary for reasons of extreme and unavoidable urgency.</p> <p>Urgency is not unavoidable if it is attributable to any act or omission of the authority or could have been foreseen by the authority. The situation must be so urgent that the authority cannot comply with the timescales required for a competitive tender (even the shortened timescales permitted for urgency).</p>
User choice contracts	This refers to situations where an authority is required by law to consider the views of a third party in the choice of supplier (for example, a parent or a carer).
Defence and security	In certain circumstances, some defence and security contracts can be awarded without a competitive tendering procedure.
Protection of life or health	Specified contracts can be directly awarded in circumstances where a Minister of the Crown considers it necessary to protect human, animal or plant life or health, or to protect public order or safety, and they have passed secondary legislation authorising a direct award.
Switching to direct award	<p>Authorities can switch from a competitive tendering procedure to a direct award if no suitable tenders or requests to participate have been received in that procedure, and using a competitive tendering procedure is not possible in the circumstances.</p> <p>Authorities should consider, before using this justification, whether no suitable tenders were received because the tender documents were unclear or there was an error, which if corrected and time permitted, could result in a successful award.</p>

If you would like to discuss any aspect of this alert or if you have any other public procurement-related queries, including how the Procurement Act 2023 may impact your organisation, please reach out to one of our contacts.

Contacts

**Will Sparks**

Partner, Brussels
M +324 905 61 719
T +322 627 76 10
E william.sparks@squirepb.com

**Martin H. Rees**

Partner, London
M +44 787 210 0412
T +44 20 7655 1137
E martin.rees@squirepb.com

**Sam Hare**

Senior Associate, London
M +44 792 160 0172
T +44 20 7655 1154
E sam.hare@squirepb.com

**Dickie Chan**

Associate, London
T +44 20 7655 1163
E dickie.chan@squirepb.com

**James Mosley**

Associate, London
T +44 20 7655 1069
E james.mosley@squirepb.com

**Sabah Saghir**

Associate, London
T +44 20 7655 1030
E sabah.saghir@squirepb.com

**Lucija Vranesevic**

Associate, Brussels
T +322 627 76 03
E lucija.vranesevic@squirepb.com