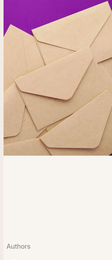
It's the law: Public Procurement under the Procurement Act 2023: 'what?', 'when?' and 'why (again)?'



This edition of 'It's the law' explores the Procurement Act 2023 and the key issues to be aware of, especially during development and regeneration projects.

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"Procurement is a question to ask before the event, not after it. It will rarely stop a scheme, but for the unwary, it is likely to hold a project up while everyone works out whether it applied in the first place."

Kris Kelliher
Partner

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What?

Public procurement in England, Wales and Northern Ireland is now governed by the Procurement Act 2023, which went live on 24 February 2025. It swept away the old EU-derived rulebook, the Public Contracts Regulations 2015 (the "PCR 2015", better known as the "OJEU Regulations"), and replaced it with a single, home grown regime. If you still have a mental filing cabinet marked 'OJEU', this is your cue to relabel it.

Why, oh why (again)?

The Act represented one of the biggest reforms to procurement law in a generation. Its stated aims were to create a simpler, more flexible and more transparent system, while keeping faith with the familiar principles of fair and equal treatment. Contracts procured by public sector bodies must still be awarded openly and without discrimination, but authorities now have far more freedom over how they run the process.

When (and a bit of the who)?

The Act applies whenever a "contracting authority" wishes to award a "public contract" for works, services or supplies with a value at or above the relevant threshold.

"Contracting authorities" remain, essentially, public and quasi-public bodies: registered providers of social housing remain under the umbrella, as well as central government departments and other bodies, such as NHS bodies, local authorities and schools. Registered providers continue to be caught because they are treated as bodies governed by public law by virtue of their regulation (i.e. through the Regulator of Social Housing).

The financial thresholds changed on 01 January 2026. A crucial difference from the old regime is that the thresholds are now inclusive of VAT, so authorities must factor in whether their requirement attracts VAT (and at what rate) before deciding whether it is caught. The figures are:

Contract type	From 01 Jan 2026 (inc VAT)
Works contracts	£5,393,000
Supplies & services (central Government)	£135,018
Supplies & services (sub-central, incl. local authorities and RPs)	£207,720
Light touch services contracts	£663,540
Concession contracts	£5,393,000

A lighter touch regime continues to apply to certain social, health, education and similar services, with its own higher thresholds.

Notable exclusions

Certain contracts sit outside the Act altogether, whatever their value. As before, these include contracts for the acquisition or disposal of an interest in land, employment contracts and certain financial services arrangements. The land exemption is particularly important in our sector and is examined further below.

The key principles

When carrying out a covered procurement, a contracting authority must have regard to the Act's objectives, which include delivering value for money, maximising public benefit, sharing information transparently, and acting (and being seen to act) with integrity. In practical terms this means, among other things:

- All suppliers must be treated equally, and a contracting authority that treats them differently must be able to show that the difference does not put a supplier at an unfair advantage or disadvantage.
- Conditions of participation (such as financial standing requirements) must be a proportionate means of ensuring suppliers can perform the contract.
- Award criteria must be disclosed in advance and must relate to the subject matter of the contract.
- The regime is underpinned by a significantly expanded system of published notices, running through the whole life of a procurement, designed to make the process more visible to the market.

Choice of procedure

The Act strips back the old menu of five procedures back to a much simpler set. For an above-threshold procurement, a contracting authority will generally be likely to use one of the following:

- **Open procedure:** a single-stage process, largely unchanged from before, under which any interested supplier may submit a tender in response to the tender notice. It suits straightforward, lower-complexity requirements.
- **Competitive flexible procedure:** often cited as the largest innovation within the new regime. This is a broad, design your own procedure that lets the authority structure the process largely as it sees fit, including multiple stages, negotiation rounds, dialogue, proof of concept phases and intermittent assessment of tenders, provided it still complies with the Act's principles and notice requirements. It replaces the old restricted, competitive dialogue and competitive procedure with negotiation in a single flexible container.
- **Direct award:** permitted only in tightly defined circumstances (for example, genuine exclusivity or extreme urgency). Running a competitive procedure remains the default, and the direct award grounds are construed strictly: and
- **Call-off under a framework:** where a suitable framework already exists, the authority can award ("call off") a contract under it, either by direct award or through a mini-competition among the appointed suppliers, without running a fresh full procurement. For our sector this is often the quicker route to market, and it is examined further below.

There are minimum time limits: broadly, a 25-day tendering period, and, where the competitive flexible procedure includes a request-to-participate stage, a 25-day participation period. Both can be shortened in defined circumstances. Note that the concept of a fixed statutory minimum number of shortlisted bidders has gone; the emphasis is on running a process that is genuinely competitive and proportionate.

"The competitive flexible procedure hands the design of the process to the authority. That is a gift and a liability in equal measure, because whatever you design is what you will be judged against."

Sarah Ward
Associate

Excluding suppliers and conditions of participation

Before award, an authority must consider whether any bidder falls to be excluded. The Act sets out mandatory and discretionary exclusion grounds (covering matters such as serious criminal convictions, tax misconduct and, notably, poor performance or breach on previous public contracts), backed by a new central debarment list of suppliers that authorities across the public sector can, or must, exclude. Separately, an authority may set conditions of participation, which test the supplier itself, its legal, financial and technical capability to perform, as distinct from the award criteria, which test the bid.

Assessing tenders

The old "most economically advantageous tender" (MEAT) test has been rebranded as the "most advantageous tender" (MAT). The change is more than cosmetic: dropping "economically" is intended to reassure authorities that they can give real weight to wider social value, quality and delivery factors alongside price. The statute itself puts it more drily, the contract goes to the tender that satisfies the authority's requirements and best satisfies the award criteria when assessed against the assessment methodology, but the practical effect is a green light for broader value judgements. Award criteria, and their relative importance, must still be set out up front.

Assessment summaries and standstill

Once the authority has decided who should win, it must provide unsuccessful suppliers with an assessment summary (explaining how their tender fared against the winning one) and publish a contract award notice. A standstill period then applies before the contract can be signed. Under the Act this is 8 working days, running from publication of the contract award notice, shorter than the old 10 day period.

Remedies

An aggrieved supplier that believes the authority has breached its duties under the Act can still ask the court for relief, including setting aside the award decision and/or damages for wasted bid costs and lost profit. Two points deserve real attention:

- Automatic suspension: To stop the authority signing the contract, the supplier must issue proceedings and notify the authority before the end of the standstill period. Miss that window and the authority can proceed to sign having the supplier with a damages-only claim.
- The general limitation period is unchanged: a challenge must be brought within 30 days of the date the supplier knew, or ought to have known, of the grounds for it (extendable by the court up to three months in limited circumstances). A "wait and see" approach usually is problematic.

In the most serious cases, for example where an above-threshold contract is awarded with no required notice and no competition, or where the standstill is breached, the court may make a set-aside order, the successor to the old declaration of ineffectiveness. These 'set aside conditions' have been recast but perform a similar function: unwinding contracts that should never have been signed.

The obligations don't stop at signing

Under the Act, the scrutiny does not stop at award, but transparency principles now apply to the life of the contract through to completion. For contracts worth more than £5 million, the authority must set and publish at least three key performance indicators (KPIs) and, at least annually, publish an assessment of the supplier's performance against them. Serious breaches or failures to perform, once the supplier has had a proper chance to put things right, must also be published, feeding directly into the exclusion and debarment regime described above. For suppliers, in other words, performance on one contract now has a visible bearing on the next.

A word on frameworks

Because framework call-offs are such a common route for our clients, three points are worth flagging.

- First, the Act introduces the 'open framework', a scheme of successive frameworks on substantially the same terms that reopens to admit new suppliers at set points, softening the long standing criticism that frameworks shut the market out for years at a time.
- Second, there are term limits: as a general rule a framework may run for no more than four years (eight for open frameworks).
- Third, the familiar traps remain, using a framework beyond its advertised scope or value, or making a direct award or running a mini-competition otherwise than as the framework permits, risks the call-off being treated as an unlawful direct award. A framework is a convenience, not a blank cheque.

And in the world of regeneration and land

One question crops up constantly on estate regeneration and development deals: does the Act bite at all? Contracts for the disposal of an interest in land remain exempt. The dividing line, developed under the old case law and carried into the new regime, turns on obligation. If the arrangements place the developer under a positive, legally enforceable obligation to carry out works to a specification the landowner has prescribed or had decisive influence over, the deal is likely to be a public works contract and must be competitively procured. A bare condition that any works follow the planning permission will not usually cross that line. In practice, because landowners rarely dispose without meaningful build obligations, many regeneration projects still need to be tendered. The good news under the Act is greater freedom to design the process, and more scope to vary a project over its life without automatically having to start again.

S106 agreements and "package deals"

Where the developer is the owner of the site and presents the opportunity to a Registered Provider (RP) as a "package deal" – whereby the developer will transfer the site to the RP on the condition that the RP appoints it to carry out the works – the RP will usually be able to rely on the "exclusive rights" direct award justification under the Act to appoint the developer without undertaking a competitive tender exercise. However, there are number of notice requirements that the RP will need to comply with under the Act before signing the building contract in this situation.

This document is part of Devonshires' 'It's the law' series, tailored for people working in development and regeneration. All reasonable precautions have been taken to ensure that the information contained is materially accurate; However, this document is not intended to be legally comprehensive, and no action should be taken on the matters covered without seeking specific legal advice.

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