

Thursday, 23 January 2025

## Report of the Leader of the Council

### Update on Procurement Act 2023

#### Exempt Information

None

#### Purpose

To provide Cabinet with a brief overview of the changes coming into force on the 24<sup>th</sup> of February 2025 with the new Procurement Act 2023 (PA23), to request approval of the Council's Social Value Policy and Pledges and to circulate the revised Procurement Strategy for review and approval.

#### Recommendations

It is recommended that:

1. Cabinet notes the requirements of the Procurement Act 2023 and endorses the action plan to ensure compliance
2. Cabinet approves the Social Value Policy
3. Cabinet approves the Social Value Pledges
4. Cabinet approves the revised Procurement Strategy

#### Executive Summary

##### The Procurement Act 2023

The Procurement Act 2023 will be the largest change to the procurement regulations for nearly a decade. The Procurement Act 2023 gained Royal Assent on the 26th of October 2023. The new rules and regulations are due to come into force on the 24th of February 2025 replacing the current Public Contract Regulations 2015. This is a single act of Parliament for all procurement regimes. The existing legislation will continue to apply until the new regime goes live and will also continue to apply to procurements commenced under Public Contracts Regulations 2015 (PCR15).

Procurement accounts for £407 billion pounds of public expenditure and the new regime is designed to:

1. Create a simpler and more flexible procurement system
2. Open up public procurement to new entrants (such as small businesses and social enterprises)
3. Embed transparency
4. Deliver value for money

Public Contracts Regulations must be adhered to when awarding a contract where the anticipated value is close to or exceeds the thresholds indicated below (these thresholds are inclusive of VAT).

Thresholds	Supplies & Services (£)	Concessions (£)	Works (£)
Contract Value	£214,904	£5,372,609	£5,372,609

Across current regimes there are eight identifiable procurement procedures. These include the familiar Open and Restricted procedures, and some more complex procedures such as Competitive Dialogue. Some are rarely utilised, with significant overlap between some of these procedures. To simplify the procurement process, the Act replaces these with just three procedures:

1. Open Procedure – single stage process
2. Competitive Flexible Procedure – multistage process, designed by the lead officer with support from procurement but must be in line with the procurement act rules.
3. Direct Award

### **The Procurement Act in a Nutshell**

#### **Contract Management**

The Act contains significant new rules around contract management, including:

1. Publication of information throughout the life of the contract (KPIS's etc)
2. Ongoing performance monitoring
3. Implied terms to deal with invoicing and payment issues
4. Implied term giving a right of termination

#### **Reporting**

The Act contains significant changes to notices, including:

1. Additional notices to be published during a procedure
2. A new notice before making a direct award
3. Changes to the names of existing notices
4. A new public sector platform for publishing notices

#### **Remedies**

Remedies regime largely the same as existing rules, however there are changes regarding notification and standstill period. Under Procurement Act 2023 the following notices and standstill periods are required for over threshold procurements which means contract managers need to allow more time for the procurement process:

1. Assessment Summary
2. Contract Award Notice
3. 8 working days standstill period
4. Execute the contract
5. Contract details notice

#### **Oversight**

The Act includes a new Oversight Regime and a Revamped Procurement Review Unit which have:

1. More extensive powers than the “Mystery Shopper”
2. Powers to conduct investigations

3. Powers to issue guidance and reports
4. Government will also maintain a central Debarment Register.

## Key changes

The government will be introducing a new digital platform for notices to be published which will replace Find a Tender and Contract Finder, our Procurement Officer will meet with InTend (our tendering system software supplier) in the new year once the platform has been launched by the government to ensure our systems are compatible. The current platforms (Contract Finder and Find a Tender) are primarily focussed on procurement opportunity notices and contract award notices. The intention is for the Central Digital Platform to be broader than this and to be a one stop source of information on:

1. Current and future public procurement opportunities.
2. Spend by public bodies.
3. The full life cycle of above-threshold contracts, including modifications and contract extensions.
4. Supplier performance against KPIs on higher-value contracts.
5. Pipelines of future work
6. Companies which are excluded/ debarred from bidding

There will be a centralised register for Frameworks which will simplify the procurement process and ensure all potential frameworks are considered. The Act makes it very clear that a **Competitive Selection Process** (what we currently call a Further Competition) should be the default means for appointing a supplier via a Framework. **Direct Call-Off** (referred to as “award without competition”) is permitted only if:

1. The Framework itself sets out all the core terms for call-off contracts, and:
2. There is an “objective mechanism” for supplier selection.

The government will maintain a centralised Debarment Register detailing excluded suppliers.

Under the new Act when carrying out a covered procurement, a contracting authority must:

1. have regard to the fact that small and medium-sized enterprises may face particular barriers to participation, and
2. consider whether such barriers can be removed or reduced.

The Government intends to lift a restriction, currently present in the Local Government Act 1988, which forbids Local Authorities from reserving competitive procurement opportunities based on locality. At present, under S.17 of the 1988 Act, while it may be justified to request restricted quotations from local suppliers, if a Local Authority decides to openly advertise a procurement (including a below-threshold procurement), then it must not stipulate that only suppliers in a given locality are allowed to bid. The Government intends to amend the Local Government Act 1988 to remove this restriction. This will allow advertised below-threshold tenders to limit bids to firms based in the UK, or a particular County or Borough.

The current Dynamic Purchasing System (DPS) rules are abolished under the Procurement Act 2023. The new Open Framework retains some of the features currently found in a DPS. Existing Dynamic Purchasing Systems under the Public Contracts Regulations 2015 may continue to be used until the end of their period of validity – but from 24<sup>th</sup> February 2025, no new ones may be set up.

A Pipeline Notice will be required to be published but only where spend is expected to be over £100 million on relevant contracts over an 18-month period, this is likely to take effect from 1<sup>st</sup> April 2025. A pipeline template is predicted to be available in the new year which we can compare to our own and make improvements if required. It is unlikely TBC will be

required to publish our Pipeline due to the threshold requirements, but it is still an important document for internal planning purposes and informing suppliers of upcoming procurement opportunities if we do opt to voluntarily publish it.

Additional notices will be required to be published for above threshold procurement projects which will increase the timeframes required for the procurement process.

There are some changes to the terminology that will be used under the new Act which have been recorded in the table below:

## Terminology

Current Terminology	New Wording
"In-scope procurement"	"Covered procurement"
"Prior Information Notice (PIN)"	"Planned Procurement Notice"
"Contract Notice"	"Tender Notice"
"Contract Award Notice"	"Contract Details Notice"
"Standstill Notice"	"Assessment Summary"
"Selection Criteria"	"Conditions of Participation"
"Most Economically Advantageous Tender"	"Most Advantageous Tender"
"VEAT Notice"	"Transparency Notice"
"Further Competition"	"Competitive Selection Process"

Direct award (referred to as "award without competition") will only be permitted under the following criteria:

**1. Direct Award in Special Cases**

- (a) for the testing or research of prototypes or "novel" goods and services (this is a minor amendment of the present R&D clause, rarely used by authorities in practice);
- (b) for the creation or acquisition of a unique artwork or artistic performance (as currently);
- (c) where only one supplier can genuinely meet the requirement due to specific technical reasons, including intellectual property rights, and there are no reasonable alternatives on the market.
- (d) For the purchase of goods on "particularly advantageous terms" from a supplier which is the subject of insolvency or liquidation proceedings.
- (e) Situations of genuine, unavoidable urgency which could not have been foreseen e.g. Pandemic.

**2. Direct Award to Protect Life**

Section 42 creates a new power for Ministers to enact Secondary Legislation to provide additional Direct Award grounds, if the Government feels these are necessary to:

- (a) protect human, animal or plant life or health, or
- (b) protect public order or safety.

Any such grounds are likely to be for specific categories of goods or services only, and for a limited duration. Specific guidance would need to be provided at the time.

**3. Switching to Direct Award**

A contracting authority may award a public contract directly to a supplier that is not an excluded supplier if —

- (a) the authority has invited suppliers to submit tenders as part of, or requests to participate in, a competitive tendering procedure in respect of the contract,
- (b) it has not received any suitable tenders or requests in response, and
- (c) it considers that a competitive award is not possible in the circumstances

### **Conflict of interest**

Contracting Authorities must take all reasonable steps to ensure that a conflict does not put a supplier at an unfair advantage/ disadvantage in relation to a covered procurement. If a conflict creates an unfair advantage for a supplier, and that advantage cannot be avoided, the supplier must be excluded – S82(4) PA23. Prior to publishing a Tender Notice, Dynamic Market Notice or Transparency Notice, the Council must prepare a Conflicts Assessment. When publishing “any relevant notice” (such as the Contract Details Notice) it must confirm that a conflicts assessment has been prepared.

In any of these three situations, the evaluator or team member is obliged to notify the procurement lead, who should then ensure the correct action is taken:

1. Actual conflicts will almost always require the officer involved to withdraw from the project- at the very least, they must not act as an evaluator.
2. Potential conflicts require careful monitoring and recording.
3. Perceived conflicts may not require any action, but should be recorded for the audit trail

### **Key Performance Indicators**

The Act includes extensive new rules regarding Key Performance Indicators and monitoring and transparency arrangements surrounding these but only apply to contracts with an estimated value of more than £5 million including VAT.

Key Performance Indicator Requirements:

1. Before entering into a public contract with an estimated value of more than £5 million, a contracting authority must set at least three key performance indicators in respect of the contract.
2. This does not apply if the contracting authority considers that the supplier’s performance under the contract could not appropriately be assessed by reference to key performance indicators.
3. A contracting authority must publish any key performance indicators set, at least once in every period of twelve months during the life cycle of the contract and on termination of the contract the contracting authority must —
  - (a) assess performance against the key performance indicators, and
  - (b) publish information specified in regulations under section 95 in relation to that assessment
4. A “key performance indicator” is a factor or measure against which a supplier’s performance of a contract can be assessed during the life cycle of the contract.
5. This section does not apply in relation to a public contract that is—
  - (a) a framework,
  - (b) a utilities contract awarded by a private utility

For contracts over £5m, if a supplier breaches the contract, or is guilty of persistent poor performance, you will be obliged to publish a notice giving details of the problem.

### **Payment Performance Transparency**

Section 69 requires public contracting authorities to publish a notice every six months reporting on their payment performance, specifically with regard to their performance

against the obligation to pay all undisputed invoices within 30 days. This already forms part of Finance's monthly KPI's so can be easily adapted once this becomes a requirement to publish.

Section 70 also requires public contracting authorities to publish payment data on a quarterly basis, within 30 days of the end of each quarter, to include, as a minimum, details of every payment to a supplier, over £30,000.

## **PA23 Action Plan**

The Procurement team have broken down the implementation of the Procurement Act 2023 into 5 workstreams as per the Crown Commercial Services (CCS) guidance on preparing your organisation for transforming public procurement, these are as follows:

1. Commercial activity: review all current and planned commercial opportunities
2. Standard operating procedures and policies: ensure they are robust future-proofed for the new regime
3. Guidance and information: review the documents that your teams and suppliers use and ensure they are current
4. Systems: consider the readiness of your organisation's systems and what changes may be needed
5. People: ensure your people understand Transforming Public Procurement and undertake the necessary training

Appendix 1 is a copy of the Procurement Act 23 action plan. It summarises the steps and progress already made and future plans to ensure the council is ready for the new requirements.

The government have produced some bite sized knowledge drop videos on the new Act. It is strongly recommended that all stakeholders involved in the procurement process for the council take time to watch these. This link has been circulated to internal stakeholders via our ongoing reporting and training sessions and external stakeholders via the TBC website and our comms to suppliers. A link to the knowledge drops can be found here; <https://www.gov.uk/guidance/the-official-transforming-public-procurement-knowledge-drops>

In preparation for the Procurement Act 2023 a review of the Procurement Strategy has also taken place and the revised strategy for approval is attached at Appendix 2.

The Procurement team have also requested that South Staffordshire's Legal team review the Council's current contract terms and conditions and information to supplier documents to ensure they are compliant under the new act.

The Council's Financial Regulations and Constitution will also need to be updated once the Procurement Act 23 comes into force. The team are working on this and revising as and when new information is published. This is planned to be reported to Audit & Governance Committee for approval in March 2025 unless the implementation date for PA 2023 is delayed.

## **Social Value**

The 2012 Public Services (Social Value) Act and more recently Procurement Policy Statement (6/20) places an obligation upon all councils to consider how they can secure

social, economic and environmental benefits from the procurement of public contracts. The Public Services (Social Value) Act 2012 states: "If a relevant authority proposes to procure or make arrangements for procuring the provision of services, or the provision of services together with the purchase or hire of goods or the carrying out of works...the authority must consider how what is proposed to be procured might improve the economic, social and environmental well-being of the relevant area and, in conducting the process of procurement, how it might act with a view to securing that improvement."

In order to achieve this, the Council can seek measurable and verifiable social value outcomes that:

1. are relevant to what is proposed to be procured and proportionate to the contract / grant value,
2. can legitimately be included in contract / grant specifications and
3. contribute to achieving the Council's priorities

Social Value has been defined as the additional benefit to the community from a commissioning/procurement process over and above the direct purchasing of goods, services and outcomes. To fully deliver social value and have it embedded and considered, officers must move away from just considering the core service being delivered by a supplier to one that recognises the overall value of outcomes delivered.

To embed Social Value into our procurement process, a Social Value Policy has been drafted and approved by CMT and now requires approval from Cabinet (see Appendix 3). Outcomes and pledges have been drafted by our Climate Change Officer in consultation with the social value working group (see Appendix 4). The proposal is that suppliers will be asked to select a number of pledges based on the value of their contract and commit and evidence this as part of the procurement process. Social Value outcomes will then be measured and recorded by the contract manager and reported on an annual basis to CMT. The policy is proposing to include social value in all procurement over £10,000 and provides some easy pledges which suppliers should not find difficult or onerous to make. Some of the pledges are also linked to our climate change objectives.

Procurement have already seen positive engagement with the policy from suppliers when it was piloted and tested, and the following pledges have already been made:

1. Undertake biodiversity initiatives such as tree planting or provide a bug hotel for the green spaces within the portfolio.
2. Undertake 1 x community litter pick each year with Tamworth Council staff at a local park/beauty spot.
3. Provide 2 x staff members to volunteer at a local food bank for an 8-hour day with Tamworth Council staff.
4. Continue to employ locally, supporting the local community.

### **Options Considered**

None

### **Resource Implications**

The majority of the Council's procurement is currently under threshold, additional advice or support may be required for more complex and high-risk procurement projects due to the team's resources. There may be a small cost for external legal advice on the Council's Terms & Conditions and Instructions to Supplier documents to ensure they are in line with the new regulations.

### **Legal/Risk Implications Background**

The Government's procurement review unit will be monitoring the central digital platform and the Council's compliance. The unit will have the powers to conduct investigations and report back any non-compliance. Failure to implement the new procurement act will also increase the risk of supplier legal challenge which if successful could include legal costs and compensation up to contract value.

### **Equalities Implications**

The social value policy should have a positive impact on the community, but this will be dependent on the pledges made by our suppliers.

### **Environment and Sustainability Implications (including climate change)**

The social value policy and pledges consider climate change and will have a positive impact on the environment, the community and the local economy.

### **Report Author**

Emma Dyer – Operations Accountant

### **List of Background Papers**

Transforming Public Procurement  
Procurement Act 2023

### **Appendices**

Appendix 1 Procurement Act 23 Action Plan  
Appendix 2 Procurement Strategy  
Appendix 3 Social Value Policy  
Appendix 4 Social Value Pledges