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An Overview of the Key Elements of the Procurement Act 2023 and Concession Contracts

1. Version Management

Authors	Doc. Version	Date of Change	Changes
John Valentine	0.7	-	First public version

NOTICE

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2. Overview

This article provides information on the background to the Procurement Act 2023 (PA23), its scope and objectives, transition, and implementation relating to concession contracts only. It does not aim to provide a full overview of the PA23 and does not cover frameworks or dynamic purchasing systems. It also provides information on available procurement procedures (open and competitive flexible) and outlines how each procedure might work for a concession contract. Detail is also provided on new transparency requirements, the central digital platform, supplier selection, debarment, conflict of interest, assessment, and award. If you are planning to procure via any [procurement route](#) on or after 28 October 2024 and are not procuring via a dynamic market (DM), framework agreement or contract awarded before this date, then this legislation will apply to your procurement.

Important Note – Application for Procuring Authorities in Scotland

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Section 126 of the PA23 states that the Act will extend to Scotland. However, Section 2(5) of the Act makes express provision to exclude the application of its provisions to a "devolved Scottish authority" (meaning an authority which has functions which are exercisable only in or as regards to Scotland and (a) none of its functions relate to reserved matters; or (b) some of its functions relate to reserved matters and some do not). Therefore, the PA23 will not apply to devolved Scottish authorities, which instead will continue to be governed, in relation to the procurement of public contracts, by the Scottish Procurement Regulations (the Public Contracts (Scotland) Regulations 2015, the Utilities Contracts (Scotland) Regulations 2016 and the Concession Contracts (Scotland) Regulations 2016). Scottish authorities will fall under the PA23 if they use frameworks or DM set up by UK, Welsh or Northern Irish bodies awarded on or after 28 October 2024, however, it is recommended that legal advice should be sought as to the application of the Scottish regulatory framework and the PA23.

3. Introduction

The PA23 is an Act of Parliament governing public procurement in England, Wales, and Northern Ireland and due to come into effect on 28 October 2024. The new legislation brings different regulations under a single regime which were previously separately regulated, for example, by the Concession Contracts Regulations 2016 (CCR 2016) and the Public Contracts Regulations (PCR 2015).

The PA23 brings some changes for all procurements and will have an impact on how contracting authorities and suppliers prepare and conduct procurements and bid for opportunities. Therefore, contracting authorities will need to adapt their planning, delivery of procurement activities, and contract management processes to meet the requirements set out in the PA23.

4. Transition

A transition period will precede the implementation of the new procurement legislation on 28 October 2024. Local authorities (LA) should note that procurements that began under the previous legislation (PCR 2015, CCR 2016, Utilities Contracts Regulations 2016 (UCR 2016), Defence and Security Public Contracts Regulations (DSPCR) 2011) before 28 October 2024, must continue to operate under those respective regulations until their completion or the expiry of the contract.

Existing contracts awarded under previous legislation will also continue to be governed by the regulations in place at the time of their award until they expire or are terminated. Frameworks and DPS set up under previous legislation can also continue to be used for new procurements but must end by October 27, 2028, or their established end date, whichever is earlier.

Procurements that commence after the entry into force of the PA23 (28th October 2024) must be conducted by reference to the Act only.

To be as considered as 'commenced' under the previous legislation, the following conditions must be met:

- A concession contract notice, contract notice, voluntary transparency notice, below-threshold contract opportunity, utilities notice, or sub-contract notice was published under the previous legislation.
- Prior to 26 May 2023, a Prior Information Notice (PIN) was used as a call for competition by a sub-central contracting authority.

If a PIN was published before the Act took effect but wasn't used as a call for competition by a sub-central contracting authority before 26 May 2023, the procurement must follow the PA23 rather than the previous regulations. Any new procurement falling within the scope and thresholds of the new legislation (from 28 October 2024) will have to abide by the new PA23.

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To facilitate a smooth transition, the Cabinet Office has launched '[Knowledge Drops](#)' and a comprehensive 10-part learning programme as part of their Learning and Development initiative. These resources aim to equip contracting authorities and suppliers with the necessary knowledge and skills to navigate the changes effectively.

[The Official Transforming Public Procurement Knowledge Drops - GOV.UK \(www.gov.uk\)](#)

Important Note:

It is important to note that planning and running a procurement carries risks that are the responsibility of the contracting authority. Contracting authorities are strongly advised to seek legal and commercial advice before undertaking any procurement activity. For further detailed guidance, contracting authorities are advised to refer to the full text of the [Procurement Act 2023](#) and related government documentation. DfT makes no representation or warranty, express or implied regarding the accuracy or completeness of this checklist nor does DfT accept any liability for any statement, opinion or conclusion it contains, or any omission from it.

5. Background

As set out in the [The Procurement Act - a summary guide to the provisions - GOV.UK \(www.gov.uk\)](#), the key objectives of developing the PA23 was to:

- Speed up and simplify procurement processes and streamline procedures to make them more efficient and less burdensome, by modernising and unifying procurement systems and consolidating over 350 different regulations.
- Prioritise value for money, ensuring that public funds are spent wisely, delivering maximum benefit for every pound spent.
- Generate social value by creating opportunities that enhance community well-being and support sustainable development.
- Unleash opportunities for small businesses, charities, and social enterprises by opening doors for a diverse range of organisations to participate in public procurement, fostering innovation and inclusivity.
- Place transparency and integrity at the heart of our procurement system.

The Procurement Bill, encompassing the new procurement regulations received Royal Assent in October 2023.

6. Procurement Objectives

The PA23 (Section 12) outlines the specific objectives which contracting authorities “must have regard to” when conducting a procurement:

- (a) **delivering value for money.**
- (b) **maximising public benefit.**
- (c) **sharing information** for the purpose of allowing suppliers and others to understand the authority’s procurement policies and decisions.
- (d) **acting**, and being seen to act, **with integrity.**

Similar to the principle of equal treatment and non-discrimination under PCR 2015, section 12 also states that contracting authorities “must” treat suppliers the same unless a difference between the suppliers justifies different treatment.

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7. Concession contracts under the Procurement Act 2023

The PA23 permits the use of concession contracts under Section 8.

Under Section 8 (1), a concession contract is defined as a contract for the supply, for pecuniary interest, of works or services to a contracting authority where:

- (a) At least part of the consideration for that supply is a right for the supplier to exploit the works or services.
- (b) The supplier is exposed to a real operating risk under the contract.

Under the new PA23, contracting authorities must also be aware that certain legislation **does not apply** to concession contracts, and some procurement routes are restricted. Specifically, the use of dynamic markets (DM) and frameworks for awarding concession contracts is limited unless they relate to utilities. Electric Vehicle Infrastructure (EVI) service providers are not utilities as covered by the [guidance on Utilities Contracts](#) (section 6 of the PA23).

Contracting authorities must navigate these specific exemptions and restrictions to ensure compliance with the Procurement Act 2023 when dealing with concession contracts.

Area	Provision	Description
Dynamic markets and frameworks	Sections 34(7) and 45(8)	Competitive awards through dynamic markets or frameworks cannot be used for concession contracts unless they are utilities concession contracts.
Key Performance Indicators (KPIs)	Section 52(6)	The requirement to set at least three KPIs for public contracts with an estimated value exceeding £5 million does not apply to concession contracts.
Implied Payment Terms	Section 68(1)	The requirement that any sum due under a public contract must be paid within 30 days does not apply to concession contracts.
Payments Compliance Notice	Section 69(6)	The requirement to publish a payments compliance notice within 30 days of making a payment under a public contract does not apply to concession contracts.
Payment Terms in Sub-Contracts	Section 73(6)	The implied payment terms in every public sub-contract do not apply to concession contracts.

8. Procurement routes available under the Procurement Act 2023

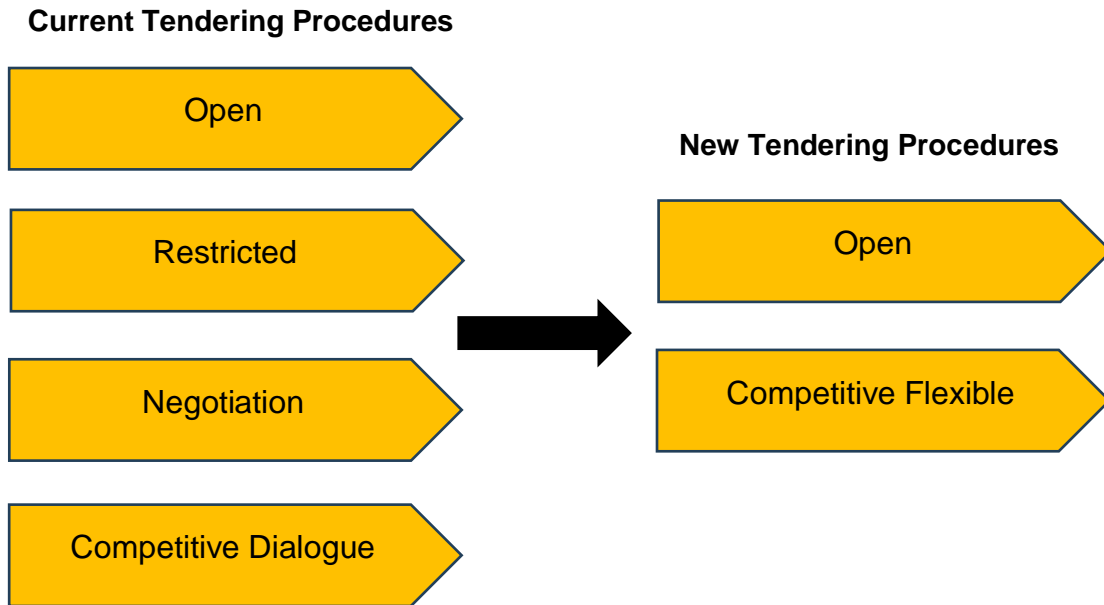
The PA23 offers several procurement routes for contracting authorities to utilise, each designed to cater to different procurement needs and complexities. Understanding these routes helps contracting authorities select the most appropriate method while ensuring compliance under the new regime.

In previous regulations, there were four procedures: open, restricted, competitive procedure with negotiation and competitive dialogue. These have now been streamlined to two primary procedures in the PA23: open and competitive flexible.

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Diagram 1: Streamlining of the Procedures



Note: Dynamic purchasing systems and frameworks awarded under PCR 2015 will continue be available under the new legislation until they expire or 27 October 2028 whichever comes first. Under the new regime, new dynamic markets and frameworks can be established but must comply with the new regime but cannot be used for concession contract.

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The table below explains the applicable scenarios for these routes and their suitability for EVI concession contracts commencing on or after the 28 October 2024.

Table 1: Procurement routes available for EVI concession contracts

Route	Description	Applicable scenarios	EVI concession contracts
Open	A single-stage process where any interested supplier can submit a tender.	Suitable for clear, well-defined requirements.	Yes
Competitive flexible	A flexible method that can involve multiple stages, the limiting of the number of participating suppliers, refinement of award criteria, and negotiation.	Ideal for complex procurements requiring tailored approaches and negotiations or dialogue to achieve the best outcome.	Yes
Dynamic Markets (awarded under PA 23)	Open for applications throughout its term, with no limit on the number of members.	Suitable for any type of procurement, particularly repeat procurements.	No
Framework Agreements (awarded under PA 23)	Pre-established agreements with suppliers that set terms and conditions for specific purchases.	Useful for repeated procurements. A new "open" framework allows for the addition of new suppliers.	No
Dynamic Purchasing Systems (awarded under PCR 2015)	Open for applications throughout its term, with no limit on the number of members.	Suitable for any type of procurement, particularly repeat procurements.	Refer to: Routes to Market - National EV Insight & Support Delivered by Cenex
Frameworks (awarded under PCR 2015)	Pre-established agreements with suppliers that set terms and conditions for specific purchases.	Useful for repeated procurements. Once established the framework remains "closed" to new suppliers for its duration.	Refer to: Routes to Market - National EV Insight & Support Delivered by Cenex
Direct Awards	Allowing contracts to be awarded directly without	Used in situations such as extreme urgency, protection of life, or where there is only one	No

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	competition in specific circumstances.	supplier capable of meeting the requirement.	
Light touch regime	Flexible regime for specific types of contracts, including light touch concession contracts.	Applicable to certain social, health, and education services.	No

9. Process Changes under the Procurement Act 2023

9.1. Transparency Requirements

The PA23 aims to simplify procurement and increase transparency and visibility to suppliers. A part of achieving this includes contracting authorities having to publish a new set of notices throughout the procurement process and after award. Implications for a contracting authority include :

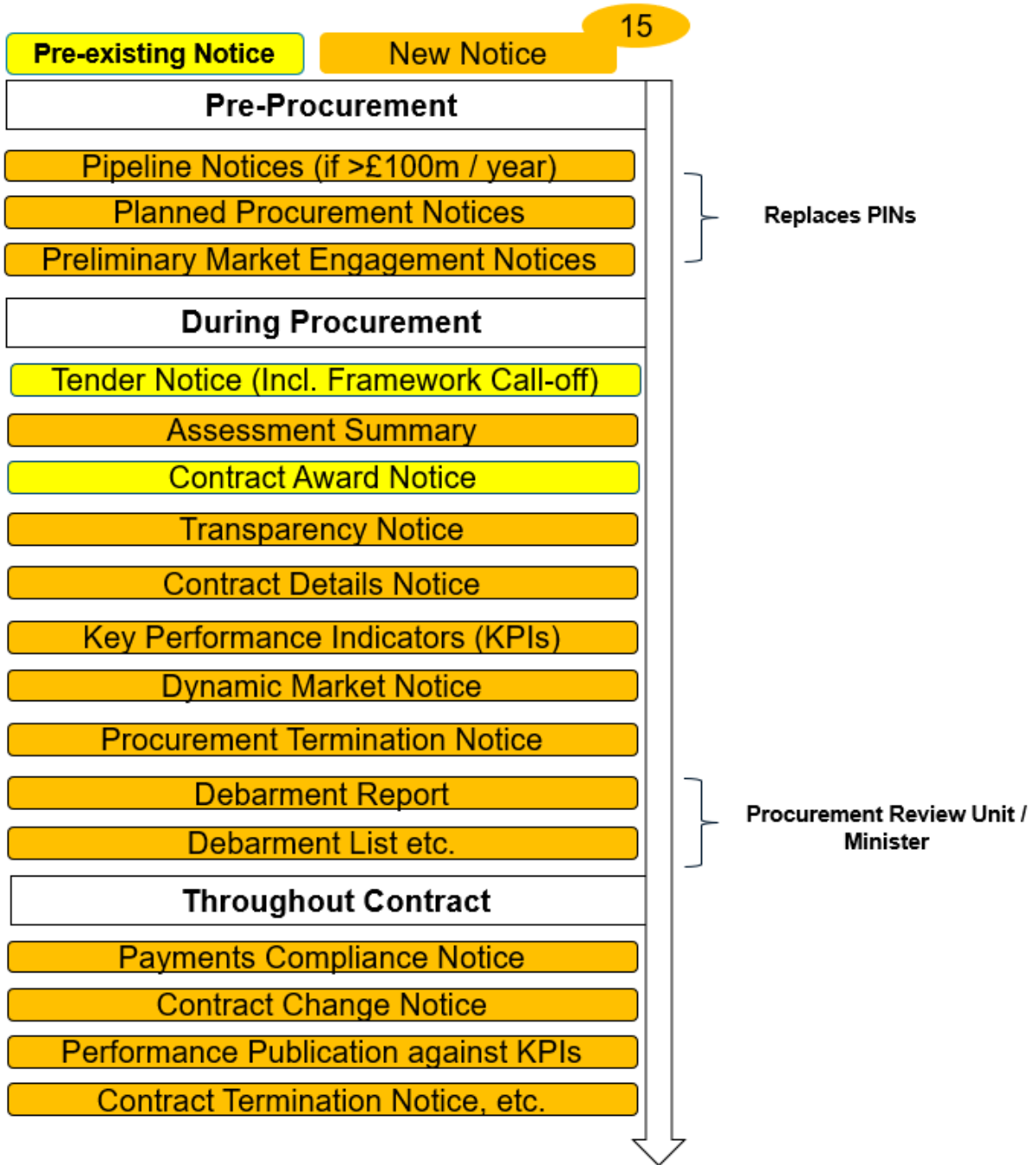
- Building in time to develop and publish the notices.
- Increasing awareness on tender evaluation, contract changes and extension.
- Ensuring IT systems gather the right data to support the publication of required notices in time.

The figure below shows the notices required and compares them to notices required under previous regulations. The orange boxes show new notices and yellow boxes show pre-existing ones.

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Diagram 2: Transparency changes



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9.2. Central Digital Platform

The Cabinet Office plans to introduce a central digital system designed to enhance transparency and streamline procurement management. This new platform will serve as a single access point for all procurement procedures, replacing the current Find a Tender (FTS) platform used for public sector notices. By consolidating notices and supplier information into one accessible system, the central digital platform aims to improve efficiency and make management easier. Users will benefit from a single account through which all procurement activities can be accessed, managed, simplifying the process, and promoting greater transparency across public sector procurement. The key features are summarised here:

- The digital platform will enable notices and documents to be accessible by electronic means, free of charge and through a single point of access.
- Relevant procurement notices and information will be held in one place, generating clarity for suppliers and fairer and open competition agreements.
- Opportunity for meaningful analysis of public procurement data at an aggregated level.
- Where contracting authorities are required to publish notices and/or documents, this will be done through the digital platform.

9.3. Supplier Selection, Debarment and Conflict of Interest

Under the PA23, there is a stronger emphasis on enabling contracting authorities to exclude potential suppliers from procurements. A public debarment list of suppliers will be introduced as part of the new central digital platform. This list aims to protect contracting authorities from suppliers who must or may be excluded from procurements. A Procurement Review Unit (PRU) has been established to ensure effective and comprehensive debarment investigations are conducted, and to make appropriate recommendations.

9.4. Conflict of Interest

The PA23 places a stronger emphasis on managing conflicts of interest, promoting fairness and integrity in public procurement to ensure that all suppliers compete on a level playing field. Contracting authorities are required to:

- **Identify and review conflicts of interest:** Contracting authorities must proactively identify and review both actual and potential conflicts of interest. This includes a broader definition of individuals acting on behalf of or influencing procurements.
- **Mitigate unfair advantage or disadvantage within a procurement:** Contracting authorities must take all reasonable steps to ensure that conflicts of interest do not create unfair advantages or disadvantages within a procurement. Where any advantage from a conflict of interest cannot be avoided or suppliers with an advantage refuse to take appropriate steps, the contracting authority must exclude such suppliers in terms of assessing tenders, awarding contracts, or participating in any competitive tendering procedure.
- **Prepare and monitor conflict assessments:** Before publishing any tender, transparency notice, or dynamic market notice, contracting authorities must prepare a conflicts assessment. This assessment must be continuously reviewed and updated to ensure ongoing compliance throughout the procurement process.

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9.5. Bid Assessment and Award

Under the new PA23, there will be a move away from Most Economically Advantageous Tender (MEAT) to Most Advantageous Tender (MAT). The use of MAT and removal of 'economically' is aimed at encouraging and giving comfort to contracting authorities in taking on social and environmental considerations and enabling contracting authorities to expand the use of criteria when evaluating tenders, shifting the focus from purely cost-effectiveness to include other factors.

For procuring or commissioning EVI, this means a stronger focus on quality, delivery, and social elements alongside the commercial. Please see the [LEVI Invitation to Tender Evaluation Guidance \(Concession\)](#) for more information.

The standstill letter, often referred to as the debrief letter, has been replaced by an assessment summary. This new document will provide suppliers who submitted assessed tenders (as defined in Clause 50) with the scores awarded to their bids as a result of the final assessment process. Each supplier will receive a private assessment summary pertaining to their bid. Additionally, unsuccessful suppliers will also receive a copy of the winning supplier's assessment summary. This change enhances transparency and allows suppliers to better understand the assessment process and their performance relative to competitors.

9.6. Procurement Processes Available for Concession Contracts

In considering the appropriate procedure to follow, contracting authorities should reflect on the objectives outlined in [Section 12 of the PA23](#) and any practical implications of running the procedure. When selecting an approach, contracting authorities must also consider proportionality, ensuring the procedure aligns with the complexity, characteristics, and cost of the requirement.

Two competitive procedures are suitable for concession contracts under the PA23: the open procedure and the competitive flexible procedure.

9.6.1. Open Procedure

The open procedure is a single-stage process similar to that under PCR 2015, designed to enhance transparency and ensure broad competition. It is ideal for straightforward procurements but does not allow for multiple stages, down-selection, or negotiations.

9.6.2. Competitive Flexible Procedure

The competitive flexible procedure provides contracting authorities with the flexibility to tailor the procurement process to the specific needs of the contract. This procedure can involve multiple stages where the number of suppliers is gradually reduced, and the award criteria can be refined at each stage. The competitive flexible procedure also allows for contracting authorities to enter negotiations or dialogue with suppliers at various stages to refine proposals and ensure the best value for money.

Multiple stage procedures can offer benefits in relation to flexibility and quality of solutions, however it is important to recognise that these are complex, demand substantial planning, time, resource, and effort to achieve success. Contracting authorities should factor in these practical considerations when selecting the procedure as well as the impact on bidders. Negotiation and competitive dialogue involve detailed discussions and potentially multiple rounds of submissions, which can be resource intensive.

9.7. Refinement of Award Criteria

The PA23 allows contracting authorities to refine the award criteria as part of the competitive flexible procedure. This can be conducted at each stage if this right has been reserved in the tender notice

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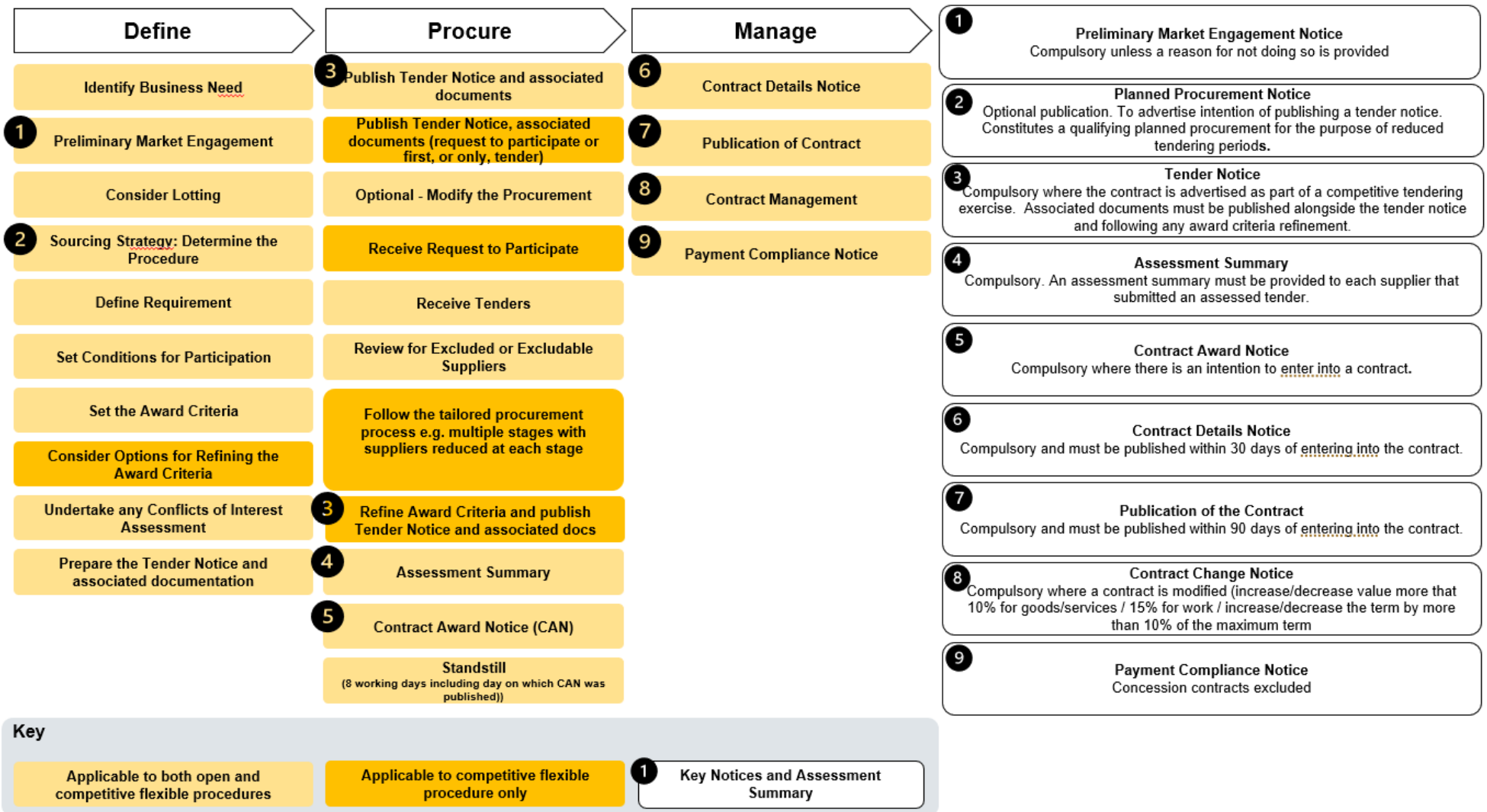
and associated documents and as long as the authority is yet to invite suppliers to submit tenders. The refinement can be in relation to selection criteria or the relative importance of the award criteria. Furthermore, a contracting authority cannot refine award criteria if in doing so it would have allowed previously eliminated suppliers to advance in earlier rounds.

If the contracting authority refines the award criteria, it must republish the tender notice and any associated documentation that has been affected by the refinement.

9.8. Process Steps to Consider

Following the define, procure, and manage commercial lifecycle, the process flow diagram on the next page illustrates the high-level steps contracting authorities should consider when running an open or competitive flexible procedure. It also outlines the core transparency requirements for a concession contract. It is important that contracting authorities recognise that the competitive flexible procedure allows for the design of a process tailored to the contract requirement. It is therefore important that this is adjusted to reflect the agreed process.

Diagram 3: The high-level process steps for open and competitive flexible procedures



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9.9. Lots

Before publishing a tender notice, a contracting authority “must” consider whether the requirement could be supplied under multiple contracts and if such contracts could be awarded by reference to lots. The contracting authority also has the option to limit the number of lots a single supplier can tender for and win. However, to implement such limitations, the contracting authority must establish an objective mechanism to justify these decisions.

When planning to set up a LEVI Concession, contracting authorities might consider dividing the procurement into specific lots to efficiently address diverse aspects of the project, foster competition, and attract specialised expertise (e.g., installation; technology provision; maintenance; or by geography). By segmenting these services into distinct lots, a contracting authority can manage each component separately and potentially open up opportunities for a variety of suppliers to contribute their specific expertise to different parts of the project.

9.10. Planned Procurement Notice

Contracting authorities may publish a planned procurement notice, similar to a prior information notice (PIN), between 40 days and 12 months before the tender notice. This notice should state the expected procedure, either open or competitive flexible.

9.11. Preliminary Market Engagement Notice

It is considered best practice to conduct preliminary market engagement to develop the contracting authority’s requirements and approach to the procurement. This can include market engagement to help design a procedure (competitive flexible); develop conditions of participation or award criteria; prepare the tender notice and associated tender documents; identify suppliers that may be able to supply the concession contract; share and test the likely contractual terms; and build capacity among suppliers in relation to the concession being awarded.

If preliminary market engagement is conducted, a preliminary market engagement notice must be published beforehand, or reasons for not doing so must be provided in the tender notice.

9.12. Tender notice

The contracting authority must publish a tender notice (replacing a contract notice) on the central digital platform (replacing the FTS) for an above threshold competitive procurement. Guidance on thresholds can be found [here](#). The notice should include all relevant details about the procurement, the process to be followed, including the criteria for selection and award.

For an **open procurement**, the notice should specify the procurement procedure (i.e. open), the duration of the contract, the scope of works or services, eligibility criteria, and how interested parties can obtain the tender documents. If lots are not used, the notice must explain why. Further information on the open procedure tender notice and its’ content can be found [The Procurement Regulations 2024 \(legislation.gov.uk\)](#)¹

For a **competitive flexible procurement**, the notice must also specify the procurement procedure (i.e. competitive flexible), include a description of the process to be followed during the procedure, including whether the procedure may include negotiation at any stage, if refining award criteria will be conducted, and a summary of how it will be done. It should also include information on the maximum and minimum number of suppliers and criteria for selection, and details on how to submit

¹ The PA23 was enacted by Parliament on 26 October 2023. The Procurement Regulations 2024, as subordinate legislation, detail the practical implementation of the PA23.

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requests to participate and submit tenders. Further information on the tender notice for competitive flexible procedure can be found at [The Procurement Regulations 2024 \(legislation.gov.uk\)](https://legislation.gov.uk)

9.13. Tender submission and time limits

In the open and competitive flexible procedures, contracting authorities will need to allow sufficient time for suppliers to prepare and submit tenders by the specified deadline. When setting time limits, a contracting authority must consider several factors to ensure fairness and efficiency. These include:

- the complexity and specifics of the contract;
- practical considerations including any requirements for an industry day, site visits and other necessary actions;
- consideration for suppliers to manage any potential sub-contracting;
- under the competitive flexible procedure, the timeline should account for the efficient management of staged engagements with suppliers, including the evaluation and agreement on negotiation topics;
- for the competitive flexible procedure, contracting authorities should consider potential document modifications, such as refinements to the award criteria, and factor in the complexity and time required to update the tender notice and associated documents;
- contracting authorities should also factor in any internal approvals needed;

It is important that under both the open and competitive flexible procedures, time limits must be consistent and the same for each supplier involved in the process;

- The minimum tendering period under the open and competitive flexible procedure is 25 days from publication of the tender notice and receipt of tenders. Contracting authorities should note that more time, will be required for large or complicated procurements, or if running a competitive flexible competition;
- For the competitive flexible procedure, contracting authorities will need to design the approach they wish to adopt and to communicate this in the tender notice. There are various options available to contracting authorities including a straightforward two-stage process, whereby suppliers are down-selected based on legal, financial, and technical capacity (as outlined in the tender notice) to perform the contract, with qualifying suppliers invited to bid against the tender documentation. Alternatively, and depending on the complexity of the requirement, contracting authorities can also decide to include negotiation or dialogue, by designing a process with clear stages and cycles of engagement. If a contracting authority selects a more complex process, it is vital that sufficient time is factored in; and
- The standstill period has been changed to 8 working days (10 calendar days under PCR 2015) including the day that the Contract Award Notice was published.

10. Key Takeaways

- The PA23 combines the current regulations under which different types of procurement have been covered so far. It also brings significant changes to public procurement processes to increase transparency and manage the procurement lifecycle through a single digital platform.

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- Local Authorities are strongly advised to communicate with their procurement teams in advance, seek legal and commercial advice and conduct their own due diligence before planning and conducting a procurement under the PA23.
- The PA23 prohibits the use of Dynamic Markets and frameworks for concession contracts. After 28 October 2024, existing DPS and Frameworks set up under the current regulations can continue to be used until they expire or until 27 October 2028, whichever comes first.
- The changes brought in by the new legislation present a number of opportunities for contracting authorities and suppliers, but also requires contracting authorities to consider how to prepare for the practical changes needed to deliver the reforms.
- The increase in transparency requirements will provide a number of benefits, however, contracting authorities will need advanced planning and resources to ensure that the right data and information is available at the right time to support their publication.
- The move from MEAT to MAT and removal of “economically” provides contracting authorities with greater discretion to broaden award criteria. However, it is important that contracting authorities plan early and engage industry to ensure that the award criteria is fit for purpose.
- The new competitive flexible procedure provides greater flexibility by providing room for tailoring the approach and maximising opportunities for better solutions and minimising the risk of no bids / poor bids. It is however important that contracting authorities allow sufficient time to prepare and plan the process, and that sufficient time and resource is allocated to manage the process efficiently and compliantly. Consideration of suppliers’ time, resource, and capability commitments to respond effectively should also be factored into planning.
- Contracting authorities must consider whether the requirement to be supplied under the contract could reasonably be supplied under more than one contract, and, whether such contracts could appropriately be awarded by reference to lots. Contracting authorities should consider conducting a delivery model assessment to either rule in or rule out lots.
- Contracting authorities will need to decide early whether they intend to refine the award criteria (only permitted under the competitive flexible procedure) during the procurement process. Providing for the refinement of award criteria in the tender notice and associated documents should be considered.
- Contracting authorities will need to decide early whether they intend to limit the number of participating suppliers (only permitted under the competitive flexible procedure) generally or in respect of tendering rounds or other selection processes. This will need to be considered early on and communicated via the tender notice or associated documents.
- Contracting authorities will need to be aware that certain legislation does not apply to concession contracts e.g. payment notices.

11. Additional Resources:

[The Official Transforming Public Procurement Knowledge Drops - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

[Procurement Act 2023 \(legislation.gov.uk\)](https://legislation.gov.uk)

[The Procurement Regulations 2024 \(legislation.gov.uk\)](https://legislation.gov.uk)