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Pivoting to an Open and Competitive flexible procedure for Regulated Concession Contracts

1. Version Management

Authors	Doc. Version	Date of Change	Changes
John Valentine	0.4	-	First public version

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2. Overview

This article explores the key considerations to transition from using a DPS or framework to competitive tendering (an open or competitive flexible procedure) or direct award under the Procurement Act 2023 (PA23) for a concession contract, effective from 28 October 2024. It outlines the essential steps contracting authorities need to consider, including re-engaging with the market and developing new documentation to ensure a smooth and effective transition.

3. Introduction

Using a dynamic purchasing system (DPS) or framework offers several significant advantages, including streamlining the procurement process and significantly reducing the procurement cycle time. It provides a selection of pre-validated suppliers who have undergone vetting during the qualification phase and comes with standardised terms and conditions and templates, simplifying contract preparation and administration.

Transitioning from a DPS or framework to a competitive tendering or direct award procedure under the PA23 presents new opportunities and challenges. This article explores key considerations for this transition, outlining the essential considerations contracting authorities need to factor in, including re-engaging with the market and developing new documentation, to ensure a smooth and effective transition.

It is important to note that any procurement carries risks that are the responsibility of the contracting authority. Buyers are strongly advised to seek legal and commercial advice before undertaking any procurement activity. 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.

4. Transitioning

Switching from using a DPS or Framework to a competitive tendering or direct award procurement process involves several strategic, operational, and technical considerations. This article provides a breakdown of what contracting authorities should consider across the following five key procurement steps: 1. vision and ambition; 2. early market engagement; 3. set technical requirements; 4. prepare the tender pack; 5. engage the market and procure.

4.1. Vision and Ambition

To ensure a smooth transition from a DPS or Framework under PCR2015 to a new procurement approach (open, competitive flexible, or direct award) under the PA23, it is important to consider how the new approach aligns with and supports the long-term vision and strategic priorities of the EVI project. In doing so it is important to consider how the chosen procurement route will meet the project's timelines, goals and objectives. Additionally, securing the support of key stakeholders, including senior management, is essential for maintaining support throughout this transition. Regular communication and engagement with these stakeholders will help ensure that the procurement process remains aligned with the project's overarching vision and priorities, enhancing the likelihood of a successful transition.

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4.2. Early Market Engagement

The contracting authority may have already conducted thorough early market engagement to understand the current market landscape, including potential suppliers, technology trends, and potential risks. However, if transitioning from a DPS or framework, the contracting authority should consider re-engaging with potential suppliers, beyond the original DPS or framework, to inform them of the change in approach. This ensures that they are updated and prepared for the new procurement process, enables the contracting authority to gauge interest, and assess the feasibility of using lots, as required under the PA23, which requires consideration of lotting as well as providing reasons for not doing so. Additionally, testing timelines during market engagement ensures that any new deadlines are realistic and manageable. Documenting these activities and supplier feedback will be vital in creating an informed and accurate procurement strategy.

If the authority has already conducted thorough market engagement and has a procurement strategy, it will be important to articulate this in any new market engagement. If the result of the previous market engagement has shaped this strategy, it is likely that the wider market may still support this, in-turn streamlining the new process. It is also important to develop the market engagement questionnaire to meet the vision and objectives of the procurement which may already be reflected in the existing strategy.

Transitioning from a DPS or framework to an open procedure may also involve engaging with a broader market, rather than engaging solely with suppliers listed on the DPS or framework. By utilising an e-sourcing tool and publishing an appropriate notice, the contracting authority can effectively communicate with a wider range of potential suppliers. This broader engagement ensures a more competitive and diverse supplier base, enhancing the competition and value for money.

Contracting authorities should note that if the early market engagement is to be conducted on or after 28 October 2024 (the commencement of the PA23), a **Preliminary Market Engagement Notice must be published before publishing a Tender Notice**. A Contracting Authority may publish a Planned Procurement Notice before a tender notice. A planned procurement notice published at least 40 days, but no more than 12 months, before a tender notice is known as “qualifying planned procurement notice” and has the benefit of reducing the tender timescale to a minimum of 10 days , though such a reduction is not recommended for complex contracts.

4.3. Consideration of Lots

Contracting authorities that have not yet considered using lots must do so, as mandated by Section 18 of the PA23. Where the contracting authority considers that the contract could reasonably be supplied by lots but chose not to use lots, the authority must provide justification for not using lots in the Tender Notice. When evaluating the suitability of dividing requirements into lots, the table below offers key considerations to assist in this decision. It is crucial to align the requirements with market conditions and carefully weigh the pros and cons to determine if separate contracts are appropriate. **When a contract is divided into lots, the contracting authority must estimate the value of each of the contracts as including the value of all of the contracts, unless the authority has good reasons not to do so. It is important to note that dividing a contract into smaller lots with the sole purpose of bringing the procurement exercise below the regulatory value threshold is strictly prohibited. This practice undermines fair competition and transparency, and it is not in compliance with procurement laws.**

This table is not exhaustive, and contracting authorities should carefully evaluate the most appropriate approach for their specific requirements.

Considerations	Description
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<p>Competition and value for money</p>	<p>Lotting can foster a more competitive procurement environment, leading to better value for money. For instance, a large contract might attract only a few bidders capable of providing full service. By splitting it into smaller lots (geography, technology or by specific works and services) numerous smaller suppliers can compete, increasing competition.</p> <p>Conversely where a market is dominated by large suppliers, smaller lots might be unattractive, potentially reducing competition.</p>
<p>Market stimulation</p>	<p>Lotting encourages a dynamic market by preventing "monopolies" that can result from large, long-term contracts. This approach allows more suppliers to win business, fostering innovation and competition over time.</p>
<p>Risk distribution</p>	<p>Lotting mitigates risk by avoiding reliance on a single large contract, thereby reducing the potential impact of non-performance or the supplier entering insolvency. Lotting can also enhance supply chain resilience by distributing risk across multiple contracts, ensuring the contracting authority is not overly dependent on a single supplier.</p>
<p>Support for Small, Medium Enterprises (SMEs)</p>	<p>Lotting supports the development of a diverse supply base and promotes social objectives such as supporting SMEs. SMEs, which might find large contracts inaccessible, may be able to successfully compete for smaller lots. By encouraging local SMEs to bid, contracting authorities can stimulate local economies.</p>
<p>Economies of scale</p>	<p>Lotting can result in a loss of economies of scale that for example a regional contract can potentially deliver. Achieving economies of scale is an important consideration in the electric vehicle infrastructure (EVI) market and a key Local Electric Vehicle Infrastructure (LEVI) objective. Any lotting strategy should aim to maintain the benefits of scale with the benefits of increased competition, tailored solutions from specialised suppliers, and enhanced local supplier / SME engagement that a lotting approach can provide.</p>
<p>Cost of procurement</p>	<p>Lotting can potentially increase procurement costs due to the need to manage and bid for multiple opportunities. However, these additional costs may be offset by the benefits of increased competition, which can lead to better value for money, and by fostering innovation and efficiency through the participation of a diverse range of suppliers.</p>
<p>Cost of contract management</p>	<p>Managing multiple suppliers and contracts requires more resources, time, and effort compared to managing a single provider, potentially leading to higher contract management costs. However, these additional costs may be offset by the increased flexibility, risk distribution, and potential for higher</p>

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	quality services that come from working with multiple specialised suppliers.
Delivery risks	Where there needs to be consistency / integration, awarding contracts as lots may present challenges in respect of standardisation and integration. Lotting can also pose a potential risk if there is a point of failure in the resulting contracts and multiple suppliers (under separate contracts) do not take responsibility for the issue, leading to problems falling through the gaps. These challenges can be mitigated by implementing robust coordination and communication strategies.

4.4. Impact on timelines

It is vital for contracting authorities to consider the impact of transitioning from a DPS or framework to an open or competitive flexible procedure on the original timeline. This shift, including any re-engagement of the market, developing new documents, and following a new procedure, may introduce changes that affect key milestones, resource allocation, and overall project delivery schedules. Thoroughly evaluating these factors is essential to ensure a smooth transition and to mitigate any delays or disruptions to a delivery plan.

When reviewing the timeline, it is crucial to recognise that an open or competitive flexible procedure is likely to take longer compared to a DPS or framework. Ensuring suppliers have adequate time to review requirements and formulate responses is essential. Insufficient time can also lead to hastily prepared bids, a failed procurement, or a contract that fails to meet performance expectations. Additionally, bidders need time to secure internal governance and authorisation, which can take a week or more in larger organisations. Rushed processes may also result in bidders withdrawing. Contracting authorities should be aware that in public procurement, inadequate time allocation may be perceived as unfair and could lead to legal challenges. Moreover, expecting suppliers to work over holiday periods to respond to a tender may be viewed as unreasonable.

4.4.1. Creating a well-structured schedule

A well-structured schedule helps establish the timeline and clarifies the key activities, responsibilities, and deadlines. Engaging with stakeholders during a schedule creation is essential to determine the time required, resources needed, and to identify risks, issues, dependencies, and assumptions. Once the schedule is in place, it is critical to continuously track progress as this ensures that everyone is aware of overall progress and understands how to move forward collaboratively.

4.5. Set technical requirements

Transitioning from a DPS or framework provides an opportunity to review and align requirements with the PA23. Where possible, contracting authorities should consider reusing the statement of requirements developed for the DPS or framework to maintain consistency and save time.

Under the PA23, contracting authorities are also required to consider lotting and must provide justifications if they decide against it (see 4.3 above). Additionally, contracting authorities should note Section 56 of the Act which specifies that procurement documents should not refer to a specific design, licensing model, or description of characteristics if performance or functional requirements can be used instead. Furthermore, procurement documents should avoid referring to a United Kingdom standard unless it adopts an internationally recognised equivalent or there is no internationally recognised equivalent.

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When reviewing requirements, contracting authorities should also ensure that contract language is straightforward and concise. Obligations must be clear and unequivocal, using terms such as "the Supplier shall..." or "the Supplier is to...". Additionally, all terms should be precisely defined and consistently formatted (e.g., initial capitals or italics) to eliminate ambiguity and facilitate easy reference in the contract definitions.

It also important for contracting authorities to anticipate that suppliers may interpret terms differently based on their own experiences. To mitigate against this risk, it is important to ensure clarity in key areas such as:

- Reports - specify the format (e.g., email, form, written document) and essential components.
- Meetings - define the frequency, required attendees, and decision-making authority.
- Roles and authorisation - clearly state who has the authority to instruct the supplier.
- Equipment - provide detailed definitions for specific items to avoid assumptions.
- Processes - outline any necessary procedures to be followed.

4.6. Setting performance standards

When developing concession contract KPIs, contracting authorities should ensure that each KPI is clearly described and aligned with the objectives of the concession. This includes defining the KPI description to capture the specific service or performance aspect being measured and setting realistic and achievable thresholds to establish the minimum acceptable performance levels. The measurement period for each KPI should be defined to specify how frequently performance will be assessed, ensuring timely and relevant data. Contracting authorities must also outline methods and tools for collecting and verifying performance data, determining how KPIs will be evidenced and monitored. To maintain accountability, compensation triggers should be established to specify the conditions under which the concessionaire will be liable for compensation due to underperformance. This should be complemented by service credits, which serve as incentives or penalties to encourage compliance with performance standards. Finally, precise definitions of all terms and metrics used in KPIs should be provided to avoid ambiguity and ensure all parties have a mutual understanding of performance expectations.

KPIs should also be defined using SMART criteria (Specific, Measurable, Achievable, Relevant, Time-bound) and contracting authorities should aim for simple, precise English to ensure that bidders can understand the contract's intent.

Under Section 52 of the PA23, contracting authorities must establish and publish at least three key performance indicators (KPIs) before entering into a public contract with an estimated value exceeding £5 million. These KPIs will be detailed in the Contract Details Notice and used to assess contract performance under Section 71. **However, contracting authorities should note that Section 52 does not apply if they determine that the supplier's performance cannot be appropriately assessed using KPIs. Additionally, this requirement does not apply to concession contracts.**

The LEVI key performance indicators can be found [here](#)

4.7. Prepare the tender pack

Preparing the tender pack for an open or competitive flexible procedure under the PA23 will require revising or replacing existing documents that were originally prepared for a DPS or framework. This involves for example redesigning or updating the contract terms and conditions to reflect and reference the PA23, reviewing and updating the procurement process and instructions to bidders, reassessing the award criteria, updating the tender notices, and ensuring all cross-references are

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accurate across tender documents and schedules. However, in doing so, it is important to consider the following:

- **PA23:** Ensure that any new Invitation to Tender (ITT) templates, content, schedules, including the main contract terms and conditions, reflect the selected procurement route, LEVI Heads of Terms, Technical Schedules, KPIs, and evaluation criteria, and importantly the PA23 (it is advisable to seek legal advice to ensure that the new PA23 is reflected across the ITT).
- **Copyright Issues:** Note any copyright issues when modifying templates originally designed for the DPS or framework.
- **Cross-Referencing:** Ensure each document correctly cross-references with the main contract terms and conditions, as well as other relevant appendices / schedules.
- **IT Systems and Tools:** Ensure that the documents refer to the contracting authority and not the DPS or framework e-sourcing platform (see footnote above).

The LEVI Heads of Terms ([Concession Heads of Terms - National EV Insight & Support | Delivered by Cenex](#)) provide a starting point for identifying the contracting authority's position and the approach to be taken. Once agreed upon, they should be incorporated into the main contract.

The tender pack often include contract schedules. Contract schedules expand on and clarify parts of the main contract, often covering technical details (see [Technical Schedules - National EV Insight & Support | Delivered by Cenex](#)), forms, and other specifics. Some schedule will remain blank until populated with the tenderer's proposal. Separating schedules from the main contract can also make the document more manageable. It is important to ensure that schedules are properly cross-referenced in the main contract to maintain clarity and coherence.

Contracting authorities should be aware that a standard tender pack for an open procedure typically includes the following components. The suggested content is also relevant to Electric Vehicle Infrastructure (EVI) concession contracts:

- **Instructions to Bidders:**
 - **Introduction:** An overview of the contracting authority, its strategic aims, and objectives.
 - **Overview of Requirements:** Summary of requirements, strategic objectives, lot overview (if applicable), customer price calculation, review points, open book accounting, subsidy control, and adjustment arrangements.
 - **Contract Information:** Scope (contract length, estimated value, extension options), required insurances, social value, and environmental sustainability.
 - **General Tender Information:** Indicative tender timetable, the contracting authority's e-sourcing portal information¹, contact details, ITT information, clarification process, submission information, demonstrations, assessment summaries, and standstill period.

¹ An e-sourcing portal is an online platform that facilitates the procurement process by enabling contracting authorities to manage sourcing activities. It provides tools for creating and distributing tenders, collecting supplier bids, and conducting if required evaluations electronically. E-sourcing portals help streamline procurement workflows, improve transparency, and enhance supplier engagement. These portals often include features for document management, communication, and real-time tracking of the sourcing process, making it more efficient and effective.

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- **Award Criteria:** Award process, criteria and scoring methodology, economic and financial standing requirements (e.g., self-assessment). LEVI tender evaluation guidance can be found [here](#).
- **Rules of Participation:** Conditions of participation, tender conditions, freedom of information, confidentiality, and consortium participation.
- **List of suggested tender templates:**
 - **Statement of Requirements** (if applicable, broken down by lot)
 - **Contract Terms and Conditions**
 - **Commercial / Financial Template** (for bidders to complete for each lot (if applicable), including adding any assumptions)
 - **Tender Response sheet**
 - **Quality questions**
 - **Certificate of bone fides**
 - **Conflicts of Interest Declaration**
 - **Commercial sensitive information**
 - **Parent Company Guarantee**

- **Example schedules**

Note: The following schedules do not represent an exhaustive list and should be carefully reviewed against the schedules created under the DPS or framework to ensure completeness and accuracy.

- **Service Specification / Statement of Requirements:** Provides details of the requirements and any technical specifications for the EV charging equipment to be installed, including charging capacities, connector types, and compliance with relevant standards.
- **Commercials:** Reflects the tenderer's proposal. It includes the detailed financial terms, and other commercial aspects that were agreed upon during the tendering process, ensuring alignment between the proposal and the final contract.
- **Site Plan:** Details on the site selection process and approach, including any minimum site or area lists with all available information. See the LEVI [Heads of Terms](#) guidance (#4 Sites) for more information.
- **Installation:** Any details relating to the timeline and milestones for the installation of EV charging infrastructure at each site, including commencement dates and completion deadlines.
- **Service Level Agreement (SLA)/ Key Performance Indicators (KPI):** Defines the service levels, performance metrics, and any obligations of the concessionaire in operating and maintaining the EV charging infrastructure. The LEVI [Heads of Terms](#) guidance explains the principle behind a KPI clause. In addition, [KPI schedules](#) guidance is available on the Knowledge Repository.
- **Compliance:** Outlines the regulatory requirements and standards that the concessionaire must comply with, including safety regulations, environmental standards, and accessibility requirements.

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- **Contract Management:** Includes for example, roles and responsibilities for managing the contract, any reporting requirements, and contract variation process.
- **Data Sharing:** Establishes procedures for sharing data collected from EV charging stations, including usage statistics, transaction records, and other relevant information.

Each section should be detailed and structured to provide bidders with all necessary information to prepare and submit their tenders effectively and help ensure that all bids are evaluated fairly and transparently.

4.7.1. Award Criteria – MEAT to MAT

With the shift from MEAT (Most Economically Advantageous Tender) to MAT (Most Advantageous Tender) under the PA23, contracting authorities should consider several important factors. Although this represents a policy change, it does not fundamentally alter the practice of setting award criteria. Instead, it clarifies that contracting authorities can prioritise other criteria such as quality, sustainability, and social value when evaluating tenders. Key considerations for contracting authorities include:

- **Prioritising non-price factors:** The removal of "economically" from MEAT reinforces that tenders do not have to be awarded based on the lowest price or cost. Authorities can now give more weight to non-price factors, ensuring a more holistic evaluation of tenders.
- **Greater discretion in award criteria:** The shift to MAT provides contracting authorities with greater discretion in setting award criteria, allowing for the incorporation of a broader range of considerations, such as environmental impact and social value.
- **Value for money:** Despite the shift, value for money remains a central principle. Authorities should ensure that the criteria used still deliver overall value, considering both cost and non-cost factors.

For Local Electric Vehicle Infrastructure (LEVI) projects, contracting authorities should remember that several components, beyond price, can be part of the commercial evaluation. These include:

- Level of private sector investment and alignment with LEVI objectives, measured by the amount of charging capacity delivered for the proposed amount of LEVI funding.
- Alignment to commercial Heads of Terms.
- Appropriate Tariff Setting and Revenue Share (Aligning with Heads of Terms).
- Reasonable costs of infrastructure and delivery, ensuring value for money.
- Sustainable financial model, ensuring commercial success.

The LEVI guidance for tender evaluation can be found [here](#).

4.7.2. Establishing award criteria, assessment methodology and conditions of participation

When establishing award criteria, contracting authorities **must** refer to Section 23 of the PA23 to ensure that all criteria, including social, economic, and environmental aspects, relate to the subject matter of the contract. Additionally, the award criteria must be clear, measurable, and specific. They must comply with technical specification rules and provide a proportionate means of assessing tenders, having regard to the nature, complexity, and cost of the contract.

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Contracting authorities must also take into consideration the assessment methodology for evaluating tenders as articulated in Section 23 (3). This includes:

- Describing how tenders will be assessed according to the criteria.
- Indicating whether non-compliance with one or more criteria would result in disqualification.
- Demonstrating the relative significance of multiple criteria by:
 - Assigning a percentage weight to each criterion to reflect its importance.
 - Ranking them in order of importance if there is more than one criterion.
 - Describing it in another way.

Under the PA23, Section 23 (4), contracting authorities may set award criteria for the assessment of tenders by reference to lots. Specifically, they may limit the number of lots that may be awarded to any one supplier, and, in doing so, they must provide an objective mechanism for selecting suppliers in circumstances where a supplier might otherwise exceed the set limit.

In addition to award criteria, conditions of participation should be built into the tender process. Conditions of participation are assessed separately from the award criteria and, in an open procedure, can be assessed in parallel. These conditions focus on whether a supplier is capable and suitable to perform the contract, relating only to the supplier's legal and financial capacity or technical ability. If the contracting authority intends to adopt a competitive flexible procedure, the conditions of participation must be assessed before the evaluation of tenders.

4.7.3. Refining award criteria under the competitive flexible procedure

Transitioning from a DPS or framework to a competitive flexible procedure under the PA23 requires careful consideration in several areas:

- **Understanding refinement of award criteria:** Contracting authorities must have a clear understanding of the process for refining award criteria. Under the Act, authorities can refine award criteria in a competitive flexible procedure if the tender notice or associated tender documents explicitly allow for such refinement, and if the authority has not yet invited suppliers to submit tenders for assessment (Section 19).
- **Explicit allowance for refinement:** It is important to ensure that the tender notice or associated documents explicitly state the possibility of refining award criteria. This provision must be clear to all potential suppliers from the outset.
- **Adjusting criteria Importance:** When refining award criteria, authorities may also adjust the relative importance of the criteria under Section 23(3)(b). This adjustment should be done carefully to reflect the priorities of the project.
- **Maintaining integrity of the procedure:** Refinements must not alter the criteria in a way that would enable previously eliminated suppliers to re-enter the selection process. This is crucial for maintaining the integrity and fairness of the competitive procedure.
- **Modifying and republishing documents:** Upon making refinements, contracting authorities are required to modify and republish the tender notice and any associated tender documents affected by these changes. This step ensures that all potential suppliers are informed of the updated criteria and can adjust their submissions accordingly.
- **Clear communication:** Effective communication with all potential suppliers regarding any changes in the award criteria is essential to ensure transparency and fairness throughout the procurement process.

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- **Timeline adjustments:** It is important to consider any potential impacts on the procurement timeline due to the refinement of criteria and ensure that sufficient time is provided for suppliers to respond to the updated requirements.

By considering these factors, contracting authorities can effectively manage the transition from a DPS or framework to a competitive flexible procedure under the PA23, ensuring a transparent, fair, and efficient procurement process.

4.7.4. Developing the contract terms and conditions

Developing a concession contract under the PA23 involves several critical sections to ensure a comprehensive and effective agreement. Whether using a standard contract template or amending an existing contract, it is important to refer to the LEVI Heads of Terms and to seek legal advice to ensure that the contract terms and conditions are robust and aligned to the PA23 (e.g., transparency notices). A standard contract can include the following sections:

- Definitions and Interpretation - Clarifies terms and interpretation rules used throughout the contract.
- Concession Period - Specifies the duration of the concession agreement.
- Funding - Details the financial arrangements and sources of funding.
- Equipment - Describes the equipment provided and used in the concession.
- Leases - Covers lease agreements related to the concession.
- Installation Works - Outlines the installation process for the equipment and infrastructure.
- Consents/Planning Approval - Ensures necessary consents and planning approvals are obtained.
- Services - Defines the services to be provided under the concession.
- Tariffs - Specifies the tariff regime.
- Concession Fees - Details fees payable to the contracting authority.
- Records, Monitoring and Review - Covers record-keeping and performance monitoring.
- KPI Framework and Relief and Compensation Events - Sets key performance indicators and addresses relief and compensation events.
- Change Control - Manages changes to the agreement.
- Title and Risk - Allocates ownership and risk responsibilities.
- Intellectual Property - Protects intellectual property rights.
- Publicity - Regulates publicity and announcements.
- Personnel - Addresses staffing requirements and obligations.
- Insurance - Specifies required insurance coverages.
- Parent Company Guarantee - Requires a guarantee from the parent company.
- Exit Management - Plans for contract termination and transition.
- Liability - Defines liability for losses and damages.
- Indemnities - Sets out indemnity obligations.

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- Confidentiality - Ensures confidentiality of sensitive information.
- Data Protection - Complies with data protection regulations.
- Cyber Security - Ensures cyber security measures are in place.
- Freedom of Information - Addresses obligations under freedom of information laws.
- Compliance - Ensures compliance with relevant laws and regulations.
- Assignment and Subcontracting - Governs assignment and subcontracting of obligations.
- Non-Exclusivity - States that the agreement is not exclusive to one party.
- Notices - Specifies the procedures for giving formal notices under the contract.
- Event of Default and Remediation - Outlines what constitutes an event of default and the steps for remediation.
- Dispute Resolution - Establishes the procedures for resolving disputes.
- Force Majeure - Addresses the impact of unforeseen events beyond the control of the parties.
- Termination - Sets out the conditions and procedures for ending the agreement.
- Rights of Third Parties - Clarifies the rights of third parties under the contract.
- Continuing Obligations / Severability - Ensures that continuing obligations remain in effect and outlines the severability of contract terms.
- Governing Law and Jurisdiction - Determines the governing law and jurisdiction for the agreement.

4.7.5. Engage the Market and Procure

During the procurement phase, contracting authorities should implement their planned strategies, ensuring there is ample time to run the procurement. Additionally, contracting authorities need to consider several factors that differ from those in a DPS or framework, including:

- **Conditions of participation:** Unlike DPS and frameworks, which often have pre-qualified suppliers, the open procedure and competitive flexible procedure require that all suppliers be assessed under the conditions of participation. This assessment ensures a level playing field but also means that the evaluation process may take more time and resource, as each supplier's capability and suitability must be carefully reviewed. Unlike a DPS, where the contracting authority must invite all economic operators admitted to the DPS to submit a tender, under the competitive flexible procedure, only those that qualify will be invited to submit a tender.
- **Clarification questions (CQs):** Although DPS and frameworks allow for clarification questions, contracting authorities should note that, in accordance with Section 54 (1)(e) of the Procurement Act 2023, they must "regard the importance of avoiding unnecessary delay." This includes ensuring timely responses to supplier clarification questions and providing sufficient time for suppliers to finalise their bids and obtain any necessary internal sign-offs.

To avoid unnecessary delays, contracting authorities should keep a comprehensive record of all CQs and responses ensuring that a system is established. While many sourcing portals provide this functionality, it is also common for spreadsheet records to be used. Many questions may be duplicated or similar and establishing a review panel to identify duplicated CQs and provide a standard response should be considered. Responding promptly to the

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first question is crucial, as delays can lead to more duplicates, increasing the overall workload. Additionally, contracting authorities may see similar CQs appear across multiple lots. Once the final responses to CQs are provided, it may be necessary to update the Tender Pack (including the draft agreement, requirements, etc.) to ensure clarifications are adequately addressed, as no CQs or responses will form part of the agreement.

Contracting authorities should also ensure that responses do not undermine the requirements or commercial terms. It is important to understand why tenderers ask CQs and address their concerns without compromising the integrity of the procurement process.

- **Refining award criteria:** Under a competitive flexible procedure, award criteria can be refined if explicitly stated in the tender documents and before final tenders are submitted (Section 19). This refinement process is unique to competitive flexible procedures and not typically part of a DPS or framework and must therefore be factored in and managed carefully during the procurement phase.

In refining the competitive flexible procedure award criteria (incl. sub-criteria) you must pay attention to not disadvantage suppliers e.g. would the change result in which bidders were interested in the opportunity at the outset; or has the scope/outcome been amended to such an extent that it changes the original intent of the award criteria, effectively disadvantaging suppliers deselected from earlier rounds.

Refining weightings allocated to criteria is also acceptable, as long as it remains within the original range set out in the original notice/tender documents e.g. original range was 10-30%, can be a fixed % within these parameters at a later competitive flexible procedure stage

- **Assessment summary:** Unlike a DPS, where there is no obligation to notify DPS suppliers of a decision to award a contract, provide a debrief, or run a standstill period, the open and competitive flexible procedure under the PA23 requires contracting authorities to provide assessment summaries to all suppliers who submitted an evaluated tender and run a standstill period. The assessment summaries should be submitted at the same time and include detailed information about the evaluation and the outcome. Further detail on what is to be included in the assessment summary is found under Procurement Regulations 2024, Section 31.
- **Contract award notice:** Before entering into a public contract and after providing assessment summaries, a contracting authority must publish a Contract Award Notice (CAN) (Section 50). Unlike a DPS or call-off contracts under a framework, where there is no obligation to publish a contract award notice under PCR 2015, contracting authorities are required to publish a CAN when using an open or competitive flexible procedure under the PA23.
- **Standstill:** Under a DPS or call-off under a framework (PCR 2015), there is no mandatory obligation to hold a standstill period. Under the PA23 (Section 51), contracting authorities should adhere to the mandatory standstill period of 8 working days, beginning with the day on which the Contract Award Notice is published. Contracting authorities should not enter into the contract until the 8 working days have been observed.

4.7.6. Direct Award

During the procurement phase, contracting authorities have the liberty to switch to direct award where no suitable tender or request in response to a competitive tendering procedure has been received, and the contracting authority considers that the situation has made it impossible to award the contract using a competitive tendering procedure. The contracting authority may carry out a

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selection process or take other necessary steps, including market engagement, for the purpose of the direct award. A direct award cannot be made to a supplier who is an excluded supplier.

It is important to note that LEVI conditions require competitive procurement. More information can be found here:

<https://energysavingtrust.org.uk/grants-and-loans/local-electric-vehicle-infrastructure-scheme> >
[LEVI Fund Information Pack](#)

5. Key Takeaways:

- Transitioning from a DPS or Framework to open or competitive flexible procurement in compliance with the PA23 requires the contracting authority to consider strategic, operational and technical steps.

Market Engagement

- Consider what market engagement is required in transitioning to the new approach. As a minimum, the new Act will require an update to the market of the procurement approach (transition from DPS or framework to an open or competitive flexible under the PA23)
- You should in any case ensure the new procurement route (open or competitive flexible) aligns with the long-term vision and strategic objectives of the contracting authority's project. Engage relevant stakeholders, including senior management, to secure their support throughout the procurement process.
- Re-engage with potential suppliers to gauge interest and inform them about the new procurement route. Document market engagement activities and feedback to create an informed procurement strategy.
- Engage with a broader market rather than relying solely on existing suppliers. Publish notices in compliance with the PA23, including Preliminary Market Engagement Notices and Planned Procurement Notices.

Lots

- Assess the suitability of dividing the requirement into lots, weighing the pros and cons. Ensure compliance with Section 18 of the PA23, providing reasons if not using lots.

Impact on Timelines

- Evaluate the impact of transitioning on the original timeline, considering key milestones, resource allocation, and overall project delivery schedules. Allow suppliers adequate time to review requirements and formulate responses to avoid legal challenges and ensure fair competition.

Process and Requirements to Tender

- Review and align requirements with the PA23. Update procurement documents, including the statement of requirements, technical specifications, and contract language to ensure clarity and compliance.
- Develop clear and achievable KPIs aligned with the concession's objectives. Ensure they are SMART (Specific, Measurable, Achievable, Relevant, Time-bound) and comply with Section 52 of the PA23, if applicable.

LEVI Support Body



- Revise or replace existing documents to reflect the new procedure. Ensure the tender pack includes comprehensive instructions, updated award criteria, and necessary schedules to provide bidders with all required information.
- Establish clear, measurable, and specific award criteria that comply with Section 23 of the PA23. If refining criteria in a competitive flexible procedure, do so before inviting final tenders and ensure transparency in any changes made.
- Develop robust contract terms and conditions, seeking legal advice to ensure alignment with the PA23. Include detailed sections covering definitions, concession period, funding, services, KPIs, dispute resolution, and termination to ensure comprehensive and effective agreements.

5.1. Additional Resources:

[Guidance-Time-Periods-FINALv2.pdf \(publishing.service.gov.uk\)](#)

[Microsoft Word - Bid evaluation guidance note May 2021.docx \(publishing.service.gov.uk\)](#)

<https://www.gov.uk/government/organisations/government-commercial-function>