

# The Procurement Act 2023 is now law – What does it mean for you?

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**Room:** Photography Room



National Housing  
Maintenance Forum

**NHMF**  
Maintenance  
Conference  
**2024**



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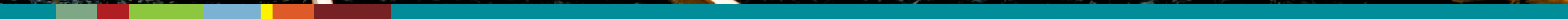
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# HOW DID WE GET HERE AND WHERE ARE WE GOING?

- Green Paper Consultation
- Procurement Bill
- Procurement Act Enacted 26 October 2023
- 128 clauses and 11 schedules.
- Consultation on Regulations completed
- Statutory guidance on its way
- Learning and Development Programme
- Get ready for new regime coming into force in 2024 (6 month grace period)



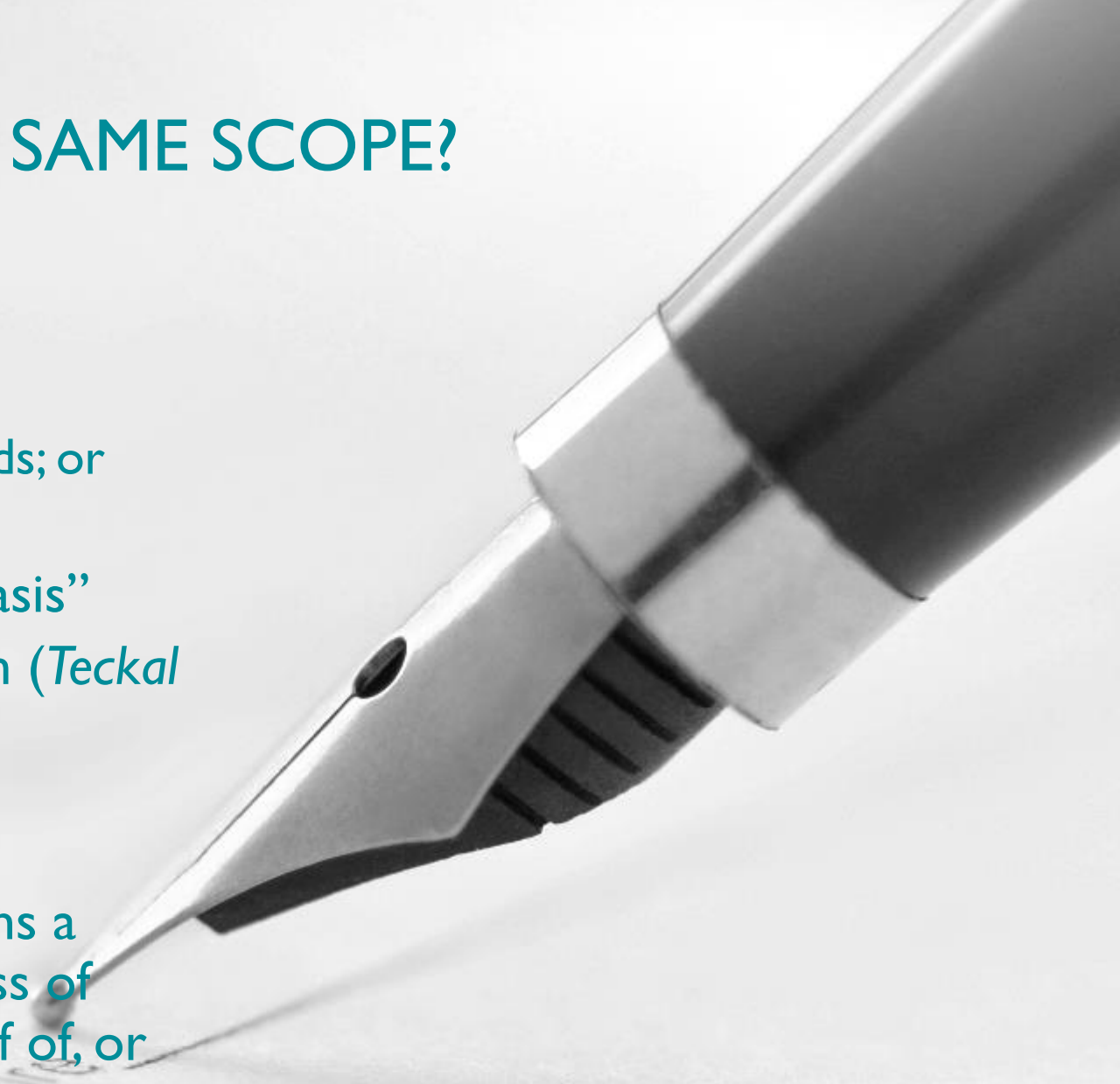
# Key aspects of Reforms

- New concept of “covered procurement”
- New definitions
- New valuation and aggregation rules
- Streamlined procurement procedures
- New objectives and principles
- Comprehensive suite of notices
- Conditions of participation and award criteria
- New exclusions and debarment regime
- Frameworks and dynamic markets
- Standstill and notification obligations
- Challenges
- Contract variations



# CONTRACTING AUTHORITY – SAME SCOPE?

- a public authority,
- public authority = any (legal) person
  - Wholly or mainly funded out of public funds; or
  - Subject to public authority oversight and “does not operate on a commercial basis”
- Commercial subsidiary –vertical exemption (*Teckal* group structure)
  - “treated as public authority” for relevant subcontracts
- “centralised procurement authority” means a contracting authority that is in the business of carrying out procurement for or on behalf of, or for the purpose of the supply of goods, services or works to, other contracting authorities.



# EXEMPTIONS – NOTE ANTI-AVOIDANCE PROVISION

- Exemption disappplied where CA considers the goods/work /services representing main purpose of the contract could reasonably be supplied under non-exempt contract
- Final version of Act - no longer applies to Teckal/Hamburg (group structure/horizontal co-operation) arrangements
- BUT – still applies to
  - Land transactions – what about development agreements/package deals?



# VALUATION AND AGGREGATION RULES

- Maximum amount payable under the contract
- Includes amounts already paid
- No specific point of valuation
- Mixed contracts
- Anti-avoidance provisions
- Cases where an estimate is not possible





# NEW PROCUREMENT OBJECTIVES AND PRINCIPLES

- In carrying out a covered procurement, must have regard to the importance of:
  - Delivering value for money
  - Maximising public benefit
  - Sharing information with tenderers or the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions
  - Acting (and being seen to act) with integrity
- Equal treatment principle still the same?
- Removal of SME barriers



# NATIONAL PROCUREMENT POLICY STATEMENT

- Sets out the Government's strategic priorities in relation to procurement
- Separate Welsh version
- Duty to “*have regard*” – means follow unless good reason not to

*Oratory School v Schools Adjudicator case*

*R (Good Law Project & others) v Secretary of State for Health and Social Care*



# WHAT PROCUREMENT PROCEDURES ARE AVAILABLE?

- Preliminary market engagement
- Open procedure – as now
- Competitive flexible procedure
  - anything the contracting authority likes
  - subject to compliance with objectives and principles etc.
- Direct award
  - Limited circumstances
  - Similar to current but slightly wider (e.g. user choice for light touch services)
  - Direct award to protect life etc.
  - Switching to direct award



# OBLIGATION TO PUBLISH NOTICES

- Central online portal
- Pipeline, planned procurement and preliminary market engagement notices
- Tender notice and “associated tender documents”
- Transparency Notice
- Contract award and contract details notices – or procurement termination notice
- Contract change notice, contract performance notice (KPIs), payments compliance notice, info about payments over £30,000, contract termination notice (incl. on expiry)



# CONDITIONS OF PARTICIPATION

- Prequalification / selection criteria
- Proportionality requirement
- Legal and financial capacity
- Technical ability
  - but not previous work for authority
  - must comply with rules on technical specs and permit equivalent qualifications
- Potentially more flexibility over “means of proof”



# NEW CONFLICTS OF INTEREST ASSESSMENT

- Must take “all reasonable steps” to identify and keep under review actual or potential conflicts of interest
- Applies to anyone “acting for authority” or “influences a decision” – including external advisors
- Must take reasonable steps to prevent unfair advantage or disadvantage
- Must prepare a “conflicts assessment” before submitting tender notice, keep it under review, and confirm they have done so when publishing contract details notice and contract change notice



# SUPPLIER EXCLUSIONS

- Excluded and excludable suppliers
- The debarment list
- Opportunity to challenge and appeals
- Prior poor performance of public contracts
- Acting improperly in procurement procedure



# AWARD CRITERIA – from MEAT to MAT

- Value for money – but without economic advantage?
- MAT determined by reference to award criteria
- Scope for many different pricing/quality models
- Can “refine” criteria and weightings pre ITT in competitive flexible procedure





# FRAMEWORKS

- A new concept?
- Substantive competition required to appoint providers?
- No limits on number of suppliers!
- More flexibilities (retained flexibilities for defence and utilities)
- Below threshold value call-offs unregulated
- Open and closed frameworks – “nothing new under the sun”



# DYNAMIC MARKETS

- Prequalified “approved list” – utilities/public sector hybrid?
- Can apply to any works / services / supplies
- Can reference when using competitive flexible procedure
- Fees chargeable as percentage of estimated contract value
- Still very few details yet on how it is intended to operate



# STANDSTILL

- “Mandatory” and “Voluntary” standstill periods
- Contract award notice will start standstill period
- “Assessment summary” of each supplier’s tender and the MAT
- 8 working day standstill period



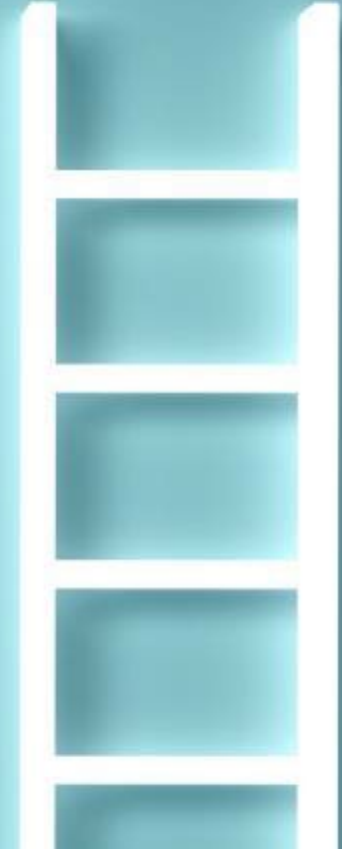
# CONTRACT MANAGEMENT

- “Procurement” includes contract management – think about objectives!
- Prohibition on managing contract “except in accordance with the Procurement Act”
- Implied terms
- Threshold for compulsory KPIs £5million



# CHALLENGES

- Challenge period still 30 days from knowledge
- Automatic suspension still applies to challenges inside standstill period – more procurement-specific test
- Pre-contract court can order contracting authority to “take any action”
- Longstop 6 months for ineffectiveness – now called “set aside”
- Procurement oversight and investigations



# VARYING CONTRACTS

- Revised and additional grounds – e.g. materialisation of known risk
- Contract change notice (unless de minimis)
  - before change is made
  - “voluntary standstill period”
- Publication of amended contracts valued over £5million (where CCN required)
- With more flexibility comes more transparency!



# PREPARING FOR IMPLEMENTATION

- Consider training requirements for different departments
- Update policies, contract procedure rules etc
- Amend procurement document templates, contract and framework agreement templates standstill letter templates
- Establish protocols for publishing notices, conducting conflict assessments etc.





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## QUESTIONS?

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