MAYOR OF LONDON

GN3

London Development Toolkit

Guidance Note 3

Procurement strategy

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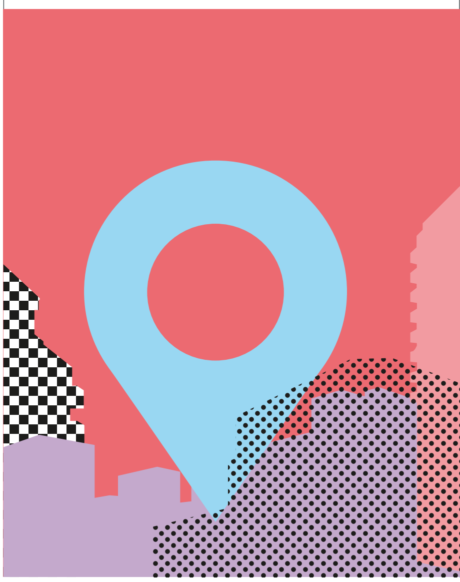

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Introduction

Once a landowner has established its vision and objectives for a project, and has identified a preferred delivery structure, it can consider how best to procure the contract.

This guidance note provides an overview of the Procurement Act 2023 (PA23), which came into force in February 2025. It also explores its key implications for public landowners when preparing for a procurement. It provides an overview of:

- **the Act and its objectives; relevant thresholds; guidance; and transitional arrangements**
- **PA23 notices**
- **preliminary market engagement**
- **available procurement procedures, and on designing a competitive flexible procedure**
- **flexibility that is built into the PA23**
- **contract management.**

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The PA23 represents a significant change from previous regulation, such as the Public Contracts Regulations 2015.

There is now a host of accompanying government guidance to consider, with more expected. There are also new transparency requirements that apply throughout the life of a contract.

The procedures for procuring are more flexible; landowners should feel encouraged to be creative in designing procedures that meet their requirements.

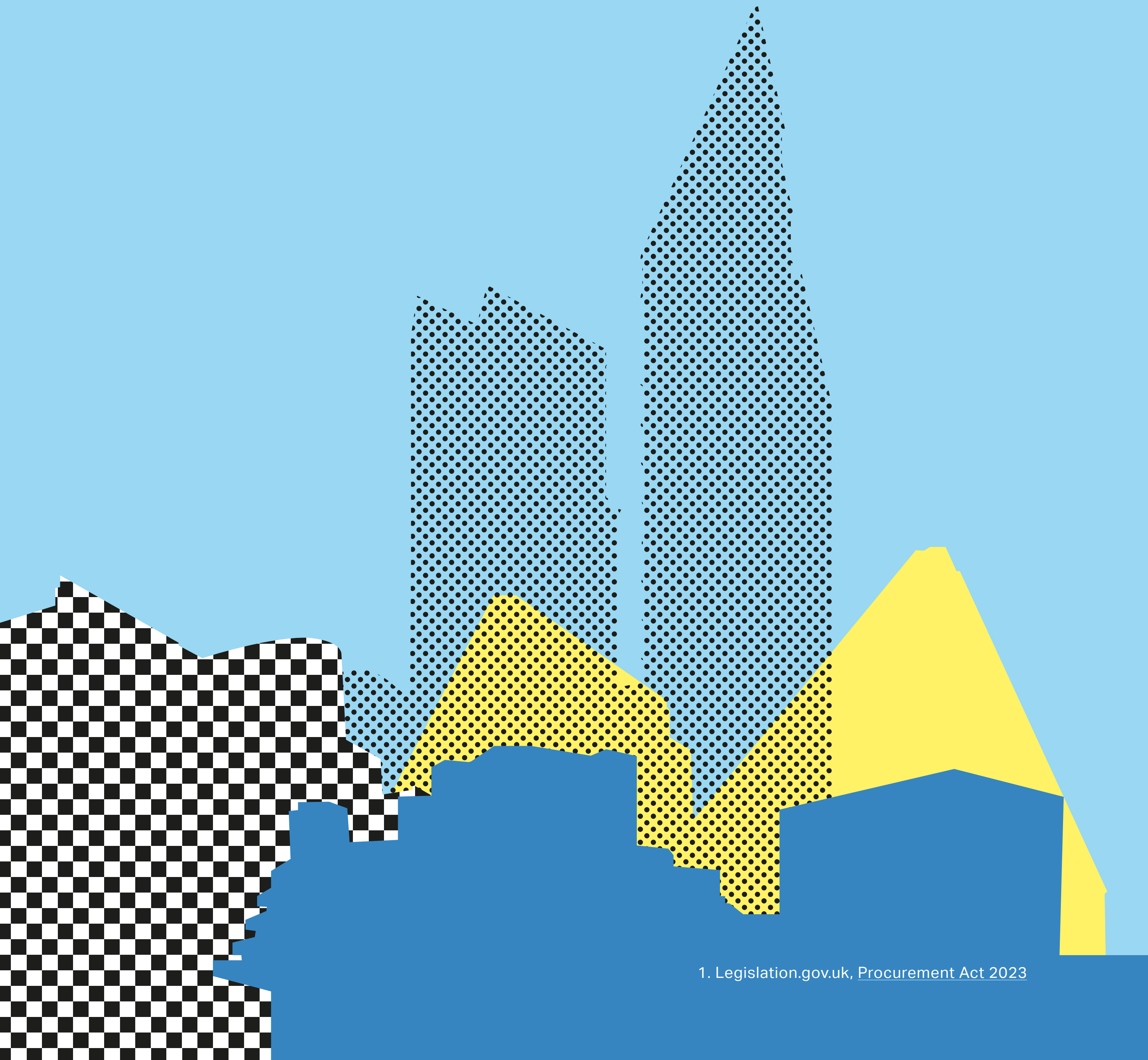
This guidance note assumes that the project will be delivered under a contract that is subject to the rules of the PA23. It does not deal with direct award or the land use exemption (agreements sitting outside the procurement regime, which are structured to not be works contracts).

This guidance note does not constitute commercial or legal advice and landowners should take their own advice when planning development on their land.

“The procedures for procuring are more flexible; landowners should feel encouraged to be creative in designing procedures that meet their requirements.”

1 The Procurement Act 2023 (PA23)

The PA23[1] regulates how goods, works and services contracts are procured by public bodies (in this context, a public landowner).



1. Legislation.gov.uk, Procurement Act 2023

The PA23's core purpose is to regulate procurement activity, including how the opportunity is advertised; the process leading to the selection of a preferred supplier (in this context, a developer partner); and how the subsequent contract is managed. It also implies certain contractual terms, such as payment periods and termination provisions.

The PA23 introduces additional measures to monitor the performance of contracts during their term – such as publishing information on poor performance or contract breach. There are also safeguards to protect against substantial modifications to public contracts.

PA23 objectives

All procurement activity must consider the PA23 objectives:

- **Delivering value for money –** this is not a new concept, and it requires landowners to identify what "value" means for them. The Treasury definition looks at the optimal whole-life blend of economy, efficiency and effectiveness that achieves the intended outcome of the business case. It is similar to the "best value" duty in section 3(1) of the Local Government Act 1999.

  It is a deliberately wide concept that is left undefined and reflects the various factors that can influence value for money.

  A key point that the PA23 draws out is that value for money means more than the most financially advantageous tender. This is emphasised in the Act's new focus on the "most advantageous tender", as opposed to the "most economically advantageous tender". This concept is explored more closely in guidance note 4, setting a brief and managing a procurement.

- **Maximising public benefit –** this could be viewed as an aspect of value for money. It more specifically focuses on "the public good" and could include issues such as social value, sustainability, delivering affordable homes and job creation.

"A key point that the PA23 draws out is that value for money means more than the most financially advantageous tender. This is emphasised in the Act's new focus on the "most advantageous tender", as opposed to the "most economically advantageous tender"."

- **Sharing information**, for the purpose of allowing developers and others to understand the landowner's procurement procedures and decisions. This is in addition to the transparency requirements mandated throughout the PA23, such as publication of notices.

  Under the PA23, the landowner must ensure developers can understand the procurement and the decisions taken. Landowners will be familiar with sharing information through procurement activity conducted under the Public Contracts Regulations 2015. This activity includes providing a comprehensive and clear set of instructions; establishing a data room of core information; sharing clarification questions and answers; and providing feedback.

- **Acting, and being seen to act, with integrity –** this reflects the need for sound management and probity, preventing issues such as misconduct, bribery, collusion and conflicts of interest.

- Recognising that **small and medium-sized enterprises** (SMEs) may face particular barriers to participation; and considering whether such barriers can be removed or reduced.

Having regard to the **National Procurement Policy Statement.**[2]

Additionally, landowners must treat all suppliers (developers) in the same way, unless a difference between them justifies different treatment. Where a landowner considers that different treatment is justified in a particular case, it must take all reasonable steps to ensure it does not put a developer at an unfair advantage or disadvantage.

Throughout a procurement, these objectives should be built into decision-making processes. This will include all activity – including market engagement; setting the procurement strategy and requirements; drafting the contract; running the procurement; and the ongoing management of the contract, once awarded.

These objectives may not always align, and the explanatory notes[3] to the PA23 indicate that the core objectives are the first four listed above (value for money, public benefit, sharing information and integrity). These would therefore take precedence.

However, it is notable that the "same treatment" objective is the only mandatory objective. It is therefore likely to apply in all circumstances, even where this contradicts the core objectives.

In each procurement, landowners should consider each objective and ensure they are achieved; or, if not, whether that is justified and reasonable.

2. National Procurement Policy Statement
3. Explanatory Notes: Procurement Act 2023, chapter 54

At each key decision stage of a procurement (for example, governance approvals or gateway papers), it is sensible to record how these objectives have been considered, as part of the audit trail.

Whilst an audit trail must show that the objectives have been considered, the PA23 gives considerable discretion to landowners when determining their procurement and contracting strategies.

Thresholds

The PA23 rules apply to contracts with a value over a certain threshold, as set out at schedule 1 of the Act[4]. Contracts below these thresholds known as “below threshold contracts” can be procured through a lighter-touch regime, as set out in Part 6 of Chapter 6 of the PA23[5].

It is likely that contracts containing positive obligations on a developer for the delivery of development projects on public land will have a value over the relevant threshold (£5,372,609 including VAT at the time of publication of this note) and so will need to be procured following the rules of the PA23.

4. Procurement Act 2023
5. Procurement Act 2023

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Legislation and guidance

The PA23 stems from international treaties and agreements that contain provisions relating to public procurement. The most relevant is the World Trade Organization's Government Procurement Agreement. The PA23 is drafted to comply with these instruments; and provides rights to suppliers based in "treaty states" (i.e., states that, with the UK, are party to agreements that include public procurement provisions).

The PA23 repeals and replaces various regulations including the Public Contracts Regulations 2015; the Concession Contracts Regulations 2016; the Utilities Contracts Regulations 2016; and the Defence and Security Public Contracts Regulations 2011. It is the product of significant consultation and debate in parliament. See the Green Paper[6] and the government's response[7] for further background detail.

The Procurement Regulations 2024[8] accompany the PA23. They provide detail on the various notices that public bodies must publish before, during and after a procurement.

In addition to the primary legislative instruments, landowners should also consult the suite of government guidance that provides more detailed advice on the application of the Act:

- **learning and guidance on the PA23**
- playbooks, particularly **the Construction Playbook**, last published when the Public Contracts Regulations 2015, et al were in force
- **the National Procurement Policy Statement**.

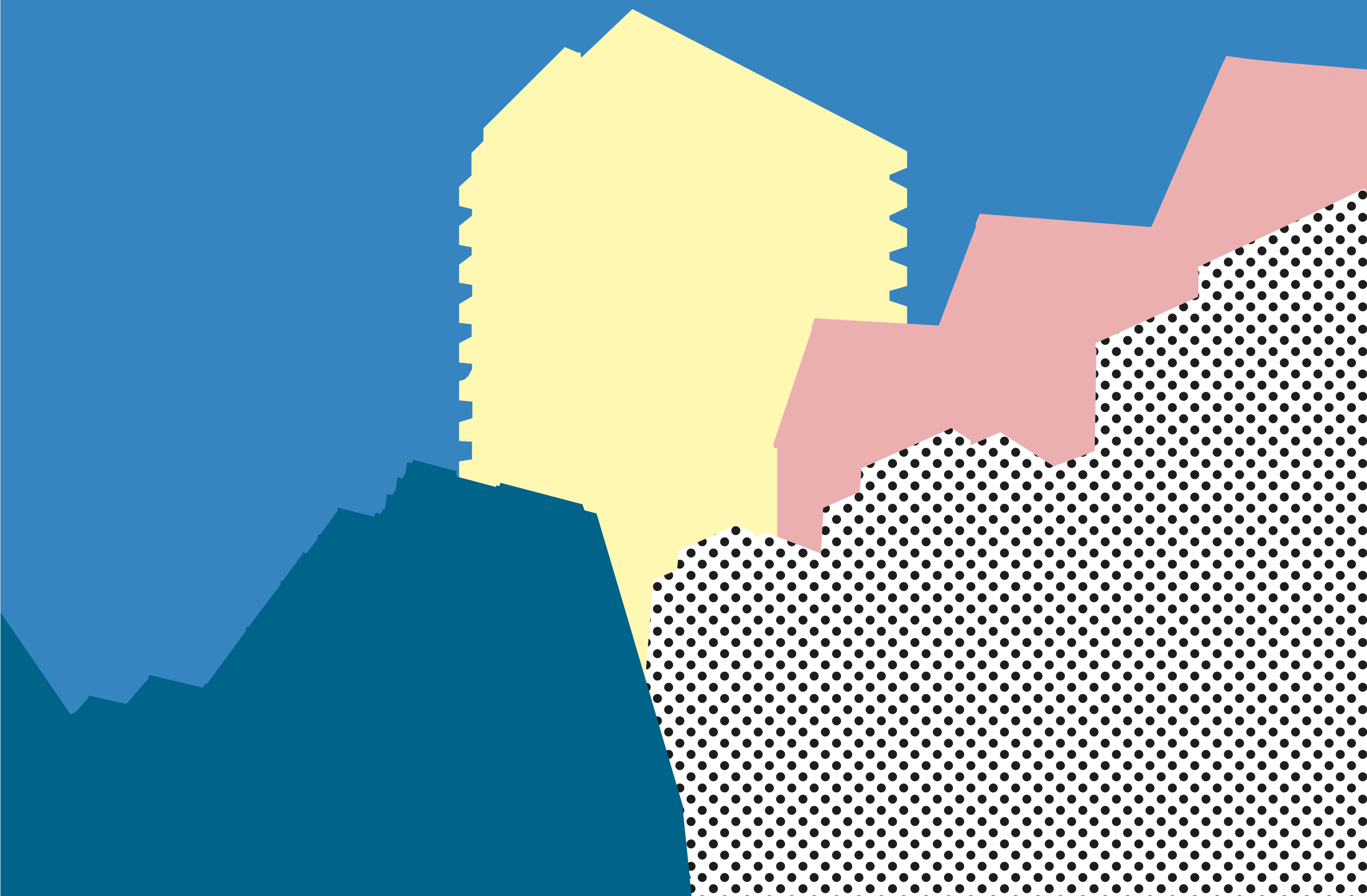
Transitional arrangements

The PA23 came into force on 24 February 2025. Procurements that began before this, where a contract notice had been published under the Public Contracts Regulations 2015, will remain subject to the law that applied at that time. The same applies to any contract awarded under that law. Take, for example, a contract notice published on 1 February 2025, with the contract awarded on 1 September 2025. The procurement and the contract will be subject to the Public Contracts Regulations 2015. The government has published further information on transitional arrangements.[9]

6. Transforming Public Procurement
7. Transforming Public Procurement: Government response to consultation
8. The Procurement Regulations 2024
9. Guidance: Transitional and Saving Arrangements

2 PA23 transparency and notices

The PA23 includes a significant increase in the number of notices that a landowner must publish, as part of the PA23's transparency agenda.



The table below sets out all the notices that might be published; these are organised chronologically. Some are mandatory, and others are discretionary.

Publishing the discretionary notices is recommended to encourage market participation. For example, a Pipeline Notice gives advance notice of upcoming procurements; and helps to ensure developers are ready to engage and have sufficient capacity. This is particularly important for SMEs.

NOTICE NAME	MANDATORY OR DISCRETIONARY	PURPOSE AND REQUIREMENTS	TIMING OF PUBLICATION	PA23 REFERENCE	PROCUREMENT REGULATIONS 2024 REFERENCE
PIPELINE	Discretionary Note: this is mandatory where the landowner considers that it will, in the coming financial year, pay more than £100m under relevant contracts.	Sets out contracts that have an estimated value of £2m or more, and are due to be procured in the next 18 months	Must be published within 56 days of the first day of the relevant financial year. 'Financial year' means: • the period of 12 months beginning on 1 April • each successive period of 12 months.	Section 93	Regulation 15
PRELIMINARY MARKET ENGAGEMENT	Mandatory (when conducting preliminary market engagement).	Notifies the market that a landowner is seeking to consult on a potential future procurement	Prior to or at the start of a preliminary market engagement exercise	Section 17	Regulation 17
PLANNED PROCUREMENT	Discretionary	Advises the market of an upcoming procurement, before it commences. Akin to the prior information notice (PIN) under the previous regulations	This can be published at any time before a procurement has begun. A planned procurement notice can also be a "qualifying planned procurement notice" where it is published at least 40 days, but not more than 12 months, before the tender notice's publication date. This may have timing advantages: where a qualifying planned procurement notice has been published, the minimum tendering period for the procurement can be reduced to 10 days.	Section 15	Regulation 16
TENDER NOTICE	Mandatory	A key notice which commences a procurement. Notifies the market that the landowner has begun an open or competitive flexible procedure. This notice, and what needs to be published is explored in more detail in guidance note 4: setting a brief and managing a procurement.	At commencement of a procurement	Section 21	Regulations 18 to 22
TRANSPARENCY NOTICE	Mandatory	When the landowner is directly awarding a contract	Prior to award	Section 44	Regulation 26
PROCUREMENT TERMINATION NOTICE	Mandatory (where procurement process is terminated)	Notifies the market that a procurement has come to an end without the award of a contract	When procurement is terminated	Section 55	Regulation 37

NOTICE NAME	MANDATORY OR DISCRETIONARY	PURPOSE AND REQUIREMENTS	TIMING OF PUBLICATION	PA23 REFERENCE	PROCUREMENT REGULATIONS 2024 REFERENCE
CONTRACT AWARD NOTICE	Mandatory	Communicates the outcome of the procurement; and starts the standstill period before awarding a contract through an open or competitive flexible procedure	When procurement procedure has concluded, and a preferred developer has been identified	Section 50	Regulations 28 to 30
CONTRACT DETAILS NOTICE	Mandatory	Details of the awarded contract – including a redacted contract and KPI information (for public contracts with a value of £5m and above)	When contract has been entered into	Section 53	Regulations 32 to 35
CONTRACT PERFORMANCE NOTICE	Mandatory	To report on the contracted developer's performance against KPIs, and publish poor performance/ contract breach	Published annually	Section 71	Regulation 39
CONTRACT PAYMENT NOTICE	Mandatory	Notes where payments over £30,000 have been made to the developer	Published quarterly	Section 70	N/A
PAYMENTS COMPLIANCE NOTICE	Mandatory	Details of landowner's performance against 30-day payment terms	Published twice annually	Section 69	Regulation 38
CONTRACT CHANGE NOTICE	Mandatory	Publishes details of a contract modification (a voluntary standstill period of no less than eight working days can provide protection against challenge)	Before contract is modified	Section 75	Regulation 40
CONTRACT TERMINATION NOTICE	Mandatory (where contract is being terminated)	Notifies the market that a contract has come to an end	At termination of a contract	Section 80	Regulation 41

Central digital platform

The government has developed a new central digital platform for procurement activity.[10] It is an important repository of information and market intelligence. Landowners will publish their procurement notices on it, and will be able to see:

- who is currently supplying the public sector's similar requirements
- performance reviews of developers on similar projects, indicating what has gone wrong and why
- other contracting authority pipelines, helping the landowner to understand what the market's capacity may be for future procurements
- a list of all frameworks and dynamic markets, which may be available as alternative routes to market.

GLA, Brent Social Housing

10. Central Digital Platform – factsheet

3 Preliminary market engagement

Preliminary market engagement is a crucial part of the procurement process. It is an opportunity to engage with developers directly; inform potential developers about upcoming opportunities; gather market intelligence; and refine a project's objectives, delivery structure and procurement strategy, based on feedback.

Preliminary market engagement has been a core element of government's messaging around the PA23. It is also strongly encouraged by the Construction Playbook. This is a government guidance document that sets out best practice and provides a range of useful tools that landowners must consider when procuring works contracts.

Preliminary market engagement will almost always be an appropriate activity for public landowners when preparing for a developer procurement. Only where there is a concrete and immovable strategy, or very simple requirements, is pre-market engagement unlikely to add value.

It is particularly effective at supporting SME involvement in regulated procurement processes. The PA23 includes a specific obligation to consider SMEs and remove barriers to their involvement.

> Preliminary market engagement will almost always be an appropriate activity for public landowners when preparing for a developer procurement.

Options and timing

The PA23 lists the permitted purposes of engagement, and is deliberately broad. Government guidance[11] states that it can be used when:

- developing the landowner's requirements and approach to a procurement
- designing a procedure, conditions of participation or award criteria
- preparing a tender notice and associated tender documents
- identifying developers that may be able to supply the goods, services or works required
- identifying likely contractual terms
- building capacity among developers in relation to the contract being awarded.

Engagement may be appropriate at various stages before a developer partner procurement is commenced. It might be useful, at project feasibility stage, when the landowner is identifying and testing development options for a site. It may also be helpful when the landowner's plans are more advanced, e.g., to test a preferred approach or delivery structure.

11. Guidance: Preliminary Market Engagement

The engagement itself can be conducted in several ways:

- questionnaires – asking potential developers to provide views on specific issues
- supplier days – presenting plans to the market, and potentially gaining feedback from the audience (e.g., either live, as follow-up or by providing questionnaires at the end)
- visiting example developments – to understand what developers have achieved elsewhere
- workshops – working with potential developers to design a solution
- presentations – where potential developers can present their suggestions and views
- one-to-one discussions – these can be particularly useful where potential developers cannot discuss their ideas in an open forum
- a combination – e.g., presentations followed by one-to-one discussions with specific potential developers.

In each of these scenarios, it is important to record the activity (see section 98 of the PA23); and to ensure the procurement strategy/specification has been designed to achieve the procurement objectives, and has not been designed specifically to suit (or disadvantage) a particular developer(s).

It is permissible to engage with a select number of chosen developers. However, best practice would be to open this up to the market more broadly, and engage with all interested parties.

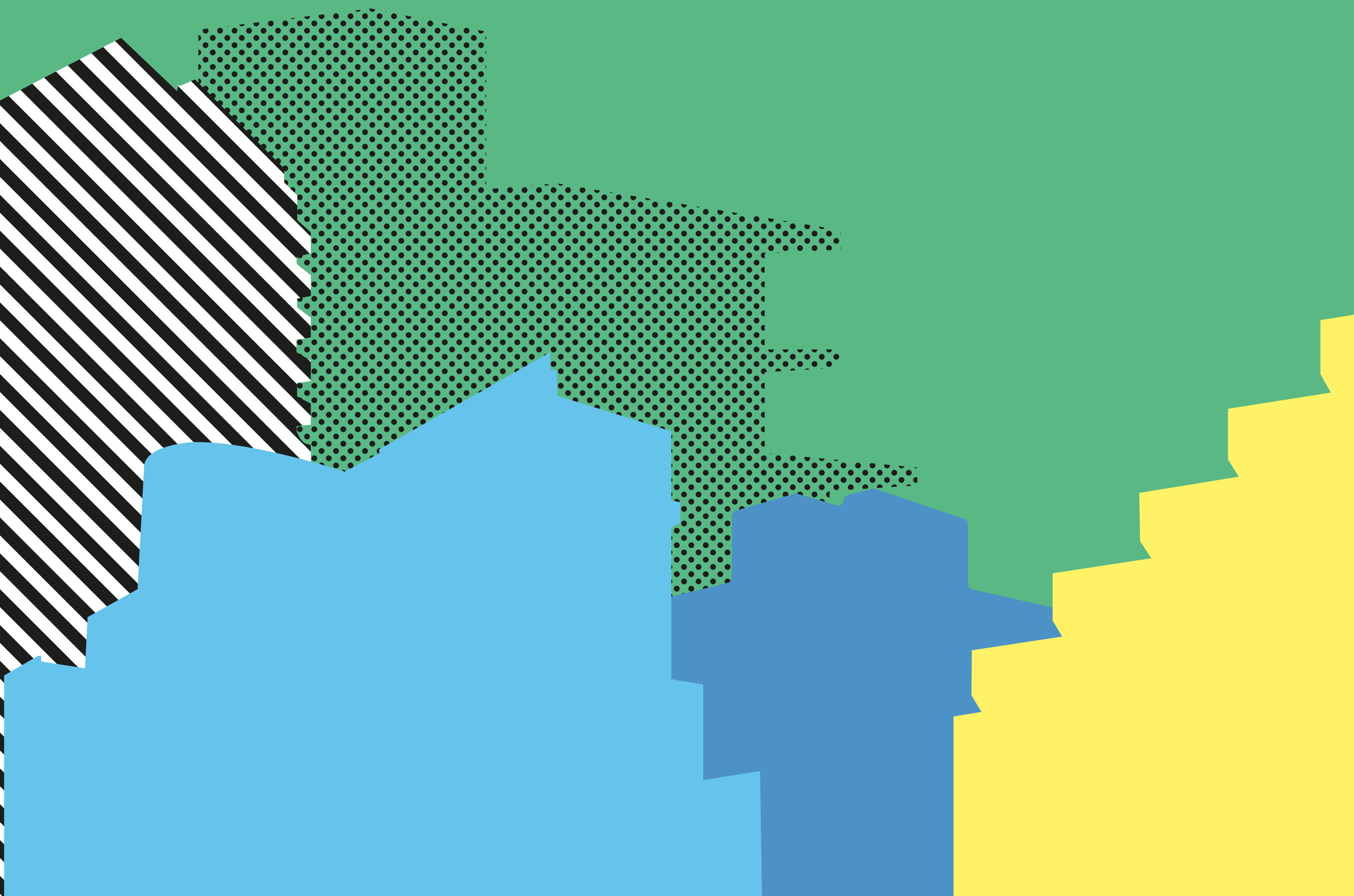
There should be sufficient time for interested parties to engage. For example, a detailed engagement exercise requiring written responses, conflicts checks, etc., may require more time than a simple supplier day presentation held online.

Preliminary market engagement notice

To commence consultation with the market, a Preliminary Market Engagement Notice should be issued (see section 17 of the PA23) to inform the market. This notice should include:

- landowner information
- the title of the procurement
- the contract subject matter (i.e., what the contract is for)
- either:
  - — the date the preliminary market engagement will close
  - — if the notice concerns activity that has already taken place, the date when it closed
- a description of the engagement process – e.g., the location, date and time of events in which developers can submit interest
- anything else deemed relevant.

4 Designing a procurement procedure



Available procedures

This chapter explains the procurement procedures available under the PA23. It explores the key stages of a procurement, and the key elements for landowners to consider when designing a procurement.

Under the PA23 there are less prescribed procedures than under previous regulations. There are now only three:

- **direct award –** where a contract is awarded directly to the supplier (in this context, a developer) chosen by the contracting authority (in this case, the public landowner), without a competitive tendering procedure
- **open –** a single stage procedure whereby any interested developer can submit a tender and the landowner will decide whom to award the contract to on the basis of that tender
- **competitive flexible –** any other competitive tendering procedure.

This guidance focuses on the competitive flexible procedure (CFP). This is likely to be the most appropriate procedure for the development projects within the scope of this toolkit.

An open procedure is unlikely to be suitable. This is because procuring a developer partner for a site is complex, and can be costly and time-consuming for both the landowner and the developer. As such, landowners will likely want to shortlist the most appropriate developers to bid for an opportunity. Shortlisting is not possible under the open procedure.

Direct award is permissible in limited circumstances. It is unlikely to be appropriate when procuring a developer partner; and is beyond the scope of this toolkit. Where direct award is being considered, landowners should seek legal advice to confirm they have an appropriate justification.

Frameworks

Frameworks offer an alternative procurement approach to the stand-alone procedures described above. A framework is a "contract between a contracting authority and one or more suppliers that provides for the future award of contracts by a contracting authority to the supplier or suppliers"[12] (section 45(2)).

In a development context, a framework would be a group of pre-selected developers which the landowner could offer development opportunities to as they arise during the life of the framework. Landowners could award individual call-off contracts for different projects following a competition (although these could be awarded without competition, depending on the terms of the framework).

12. Guidance: Frameworks (HTML) - GOV.UK

Depending on their pipeline and resources, landowners could consider procuring a framework. These can be closed frameworks where the framework developers are selected at the outset, or an open framework where new developers can join during the life of the framework.

Alternatively, landowners could utilise a dynamic purchasing system such as Homes England's Dynamic Purchasing System[13] to find developer partners.

Competitive flexible procedure

The CFP does not prescribe a particular procedure. It provides considerable and helpful discretion to landowners in designing a procedure. The PA23's main legal requirement is that "the procedure is a proportionate means of awarding the public contract, having regard to the nature, complexity and cost of the contract". (See section 20(3) of the PA23.)

The chosen procedure must also:

- reflect the procurement objectives of the Act (delivering value for money, maximising public benefit, sharing information, acting with integrity, same treatment, removing barriers for SME participation and having regard to the National Procurement Policy Statement)
- meet the procedural requirements of the Act including the publication of notices and minimum time periods for developers to respond.

The CFP replaces the previous, more prescriptive procedures (restricted; competitive dialogue; competitive with negotiation) and allows the landowner to design a process that it considers appropriate.

It can design a procedure similar to one in the previous legislation; tailor a previous procedure; or design its own entirely. It gives the landowner significant latitude to design new and creative processes to meet its needs.

> "The CFP does not prescribe a particular procedure. It provides considerable and helpful discretion to landowners in designing a procedure."

13. The Delivery Partner Dynamic Purchasing System (DPS) - GOV.UK

The basic structure of a CFP will likely be as follows:

1. Plan and design a procedure and preliminary market engagement.
2. Publish the tender notice to start the procurement.
3. Conditions of participation or participation stage – similar to the selection stage under the previous regulations. Any interested developer can submit a request to participate, and the process is used to shortlist the most appropriate developers to tender. At this stage, excluded or excludable developers should also be identified.
4. Tender submission – there could be multiple tender stages with or without dialogue or negotiation.
5. Evaluation.
6. Identify the most advantageous tender.
7. Notify bidding developers of the outcome by issuing assessment summaries (these used to be referred to as Alcatel or award letters) and the Contract Award Notice.

Designing a CFP

When designing a CFP, the landowner should consider the nature of its requirements and the likely target market of developers. It should design a process that is streamlined and efficient whilst extracting maximum value.

Government guidance[14] on CFP usefully provides some example processes. These range from a simple two-stage procedure (akin to the “restricted procedure” under the previous regulations) to more complex, multi-stage processes involving negotiations.

The PA23 is deliberately more permissive – but it should be noted that it does not introduce or permit truly novel procurement practice. Much of the flexibility in the PA23 could always be built in under the Public Contracts Regulations 2015, et al.

For development projects, landowners could consider building the following strategic features into the basic procedure set out above to drive value.

14. Guidance: Competitive Tendering Procedures, Annexes A to F

APPROACH	HOW IT MIGHT WORK	WHEN IT IS USEFUL	CONSIDERATIONS
HAVING MULTIPLE TENDER STAGES	An initial tender stage may be included, involving more developers (for example, five). The landowner requests outline development proposals from the developers. These proposals are evaluated. The highest-scoring developers are invited to the next, more detailed, tender stage(s). These developers develop their proposals in more detail. There may be further rounds of shortlisting. Eventually, the remaining developers submit their final proposals (their tenders). Process can include negotiations (see below) to develop the proposals.	It can be used to reduce the supplier pool where there is healthy competition, by reference to how they will approach the project rather than previous experience. Can help develop proposals incrementally and collaboratively to reach the best possible solution. Also useful where the landowner: does not have a fixed view on what it is seeking to deliver; or wants market input to help understand what is possible. The process can be used to develop and refine requirements (as in competitive dialogue under the Public Contracts Regulations 2015).	Having multiple stages can be costly and time-consuming. Developers are often asked to prepare detailed designs speculatively with no certainty of success. On each project, landowners should consider whether having multiple tender stages is appropriate and proportional. Is there market appetite for developers to engage in the proposed process? What is the impact on SMEs who would like to bid? The landowner will need to create a process that will: • allow it to make decisions on who to take forward at each stage, ensuring its objectives are being considered and delivered • ensure developers can commit to their responses; and remain consistent with them throughout the competition • maintain interest and momentum throughout, sticking to programme as far as possible Award criteria for each stage of the procedure may be different. Landowners should clarify the process, and set out all criteria at the beginning, so that developers can understand the process and how decisions will be taken.
NEGOTIATIONS	Negotiation or dialogue sessions allow landowners to engage with participating developers during a procedure. Proposals and requirements can be discussed and developed. Sessions should be focused on specific topics. Agendas should be set in advance and stuck to, as far as possible. The same attendees from the landowner side should attend each session (or, if not the same people, at least those with the same level of seniority). Negotiation sessions should not be evaluated.	For complex development projects, negotiation is invariably of value. It will enable developers to understand the landowner's requirements; and allow for proposals to be refined in a positive manner.	Consider proportionality – use negotiation/dialogue sparingly, and where it really drives value. Consider "same treatment" – ensure that all developers are treated the same, and are given the same opportunities and information. Transparency – record the sessions in the form of minutes. Consider whether discussions with one developer need to be shared with others (being mindful of confidentiality).

> On each project, landowners should consider whether having multiple tender stages is appropriate and proportional.

APPROACH	HOW IT MIGHT WORK	WHEN IT IS USEFUL	CONSIDERATIONS
SITE VISITS	Under the PA23, it is possible to assess the experience at any stage during the process (it no longer has to be at the first stage). Landowners might therefore use outline proposals (see above) to shortlist developers. Having received detailed proposals from preferred developers, they can then visit examples of where these proposals have been put into practice. This can be used to validate the claims/promises in the proposals.	During a tender process, visiting bidding developers' former or current projects can be useful in validating their past experience of delivering quality schemes. Landowners will need to be clear if and how the site visits will be evaluated.	Ensure the process, and any impact it may have on evaluation, are clearly set out in the procurement documents.
PREFERRED BIDDER NEGOTIATIONS	Once a preferred developer has been identified, it is possible to clarify or confirm the commitments made in their proposal; and turn these into appropriate contractual terms. There may be several issues left to negotiate and resolve, that weren't included in the evaluated part of the procurement (i.e., did not form part of the award criteria).	On most development projects, where there are ancillary issues to formalise before contract signature.	It will be important to ensure that this process does not allow the preferred developer to roll back on its proposals. Doing so may mean it is no longer the "most advantageous tender". Where possible, this process should be limited to confirming the commitments made in the developer's proposal (as this was evaluated). Items where there is more substantive negotiation should concern issues that did not form part of the award criteria, and do not materially impact on them.

> Given the flexibility under the PA23, it is more important than ever to ensure that the landowner's tender documents explain the stages of the procurement thoroughly and transparently. There should be clarity on how and when each stage will be run; and what is required from bidding developers. The evaluation and shortlisting process should also be clear. Best practice is to publish all of this information at the beginning of a procurement process.

Lots

As part of the procurement planning process, landowners must also consider using "lots" in their procurements (see section 18 of the PA23). Using lots means splitting a larger single procurement opportunity into smaller components. These can then be then awarded to different suppliers under separate contracts. This aims to reduce risk in the supply chain; diversify the market; and reduce barriers to SMEs that are participating in public procurement that can take on part but not all of a project.

Landowners should consider whether elements of a project could be sensibly sectioned off and awarded as a separate contract. For example, demolition of existing structures does not have to be provided by the developer.

Whether to use lots or not is for the landowner to decide, and its decisions and reasons must be included in the tender notice.[15] The division of a project into lots could be explored in preliminary market engagement to test various approaches and market appetite for them.

Timings

When designing a procedure, landowners should include appropriate periods for bidding developers to prepare their responses at each stage.

The PA23 sets a minimum response period of 25 days for participation – unless it is a light-touch contract or there's a state of urgency (unlikely in developer partner procurements).

The minimum response period for tendering under the PA23 is between 10 and 35 days, depending on the circumstances. However, this can be negotiated[16] with those selected at the participation stage.

In most developer partner procurements, it will likely be appropriate to implement periods longer than the statutory minimum. Developers will likely need to engage with a large amount of information; appoint a project team; and prepare detailed responses, drawing on a range of expertise.

Periods could be explored as part of pre-market engagement; or can be negotiated with shortlisted developers. Any presentations, site visits, dialogue and negotiation requirements need to be factored into the programme too.

15. Guidance: Lots
16. Non-central government authorities only

Publishing the Tender Notice

Publication of the Tender Notice commences a procurement procedure. The Tender Notice should be supplemented with "associated tender documents" that provide further detail on the procedure. These should include a technical specification for the works; a development brief; a commercial prospectus; an invitation to tender; and so on. Between them, these tender documents must contain sufficient information to allow developers to prepare a tender. Guidance note 4: setting a brief and managing a procurement, considers these documents in more detail.

Best practice is for the Tender Notice and associated tender documents to be published at the beginning of a procurement. This would give potential developers clear insight into the objectives and process. Alternatively, the Tender Notice could be supplemented by associated tender documents during the procedure – noting that, by tender stage (when bids are to be submitted), they must contain everything the developers need to know in order to participate.

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Technical specification

This is a detailed description of the goods, services, and/or works required. In developer partner procurements, this will likely comprise a project brief and/or a commercial prospectus or memorandum.

The requirements must be clear and specific; and must not break the rules on technical specifications outlined in section 56, and section 21(5) and (6), of the PA23. The main points in section 56 are as follows:

- **Performance or function requirements** – landowners should keep requirements open and objective. This doesn't prevent landowners from specifying a design vision, minimum requirements or design codes, but they should allow developers to propose different means for achieving the same end (this also encourages innovation).
- **Non-referencing of specific makes or sources** – requirements should not refer to a specific make or source, or to a particular process, that characterises the products or services of a specific supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements. In such cases, the words "or equivalent" should be included.
- **Reference to standards** – where reference is made to a specific standard requirement, it should be clearly stated that items meeting equivalent standards will be accepted. UK standards can only be used where these adopt an internationally recognised equivalent, or where there is no such equivalent.

Identifying excluded and excludable suppliers

Before considering any tenders, landowners will need to conduct an assessment of whether the bidding developers are excluded or excludable. This is a mandatory stage of any procurement, and should be undertaken as early as possible.

The central digital platform is intended to include all relevant information on exclusion grounds concerning suppliers. As such, while there are many grounds to consider (and entities that must be considered), this part of the process should be relatively efficient. The intention is that from the commencement of the Act, suppliers will submit an exclusion questionnaire to the platform; and then contracting authorities can search for suppliers and review their submissions during their procurements.

A developer must be excluded from a procedure where they meet a mandatory ground for exclusion. These are set out in schedule 6 of the PA23. The landowner may exclude a developer that meets a discretionary ground for exclusion, as set out in schedule 7 of the PA23.

The government has published a procurement-specific questionnaire[17] to support contracting authorities in this exercise.

Of note are the following grounds for mandatory exclusion. These have been broadened to include:

- corporate manslaughter or corporate homicide (new)
- theft, fraud and blackmail, etc. (new and expanded)
- labour market, slavery and human trafficking offences (extended)
- tax offences and misconduct in relation to tax (extended)
- failure to cooperate with a debarment investigation (new)
- national security (new)
- equivalents outside the UK (extended).

Also of note are the following grounds for discretionary exclusion. These have been broadened to include:

- labour market misconduct (new)
- environmental misconduct (new)
- breach of contract and poor performance (extended)
- acting improperly in a procurement process (extended)
- national security (new).

Assessments must also be applied to the developer's "connected persons" (section 26 and schedule 6, paragraph 1 of the PA23) and "associated persons" (sections 26(3) and (4) of the PA23).

A **connected person** includes:

- a person with "significant control" over the supplier (within the meaning given by section 790C(2) of the Companies Act 2006)
- a director or shadow director of the supplier
- a parent undertaking or a subsidiary undertaking of the supplier
- a predecessor company
- any other person who, it can reasonably be considered, stands in an equivalent position (in relation to the supplier) as a person within the grounds listed above

17. (PA 2023) Procurement specific questionnaire

- any person with the right to exercise, or who actually exercises, significant influence or control over the supplier
- any person over which the supplier has the right to exercise, or actually exercises, significant influence or control.

An **associated person** is an entity on which the supplier is relying to satisfy a condition of participation – for example, a sub-developer or partner in a consortium with which the developer is bidding (note: this does not include a guarantor).

When considering whether an exclusion ground applies, the landowner needs to consider whether the circumstances giving rise to the exclusion ground are continuing or likely to reoccur. If not, the ground does not apply. The supplier/entity concerned can seek to self-clean, which might include the following (note: this list is not exhaustive):

- taking the circumstances seriously, for example by paying compensation
- taking steps to prevent the circumstances continuing or occurring again, for example by changing staff or management, or putting procedures and training in place
- making commitments that such steps will be taken, or to provide information or access to allow verification or monitoring of such steps
- referring to time that has elapsed since the circumstances last occurred.

Award criteria

Award criteria are the criteria against which tenders are assessed. They should be included in the Tender Notice and/or associated documents. Guidance note 4: setting a brief and managing a procurement, provides examples of the types of award criteria that landowners might adopt when procuring developer partners.

Award criteria must relate to the subject-matter of the contract; be clear, measurable and specific; and not break the rules on technical specifications. The criteria must be a proportionate means of assessing tenders, considering the nature, complexity and cost of the contract.

Landowners should also set out the relative importance of each criterion by "weighting" them – see guidance note 4: setting a brief and managing a procurement, for further guidance. Ideally, weightings and sub-weightings should be made clear from the beginning of a procedure, whenever possible.

The "subject-matter of the contract" means the following award criteria may include social, economic and environmental criteria:

- the goods, services or works to be supplied under the contract, including in respect of any aspect of their production, trading or other stage in their life cycle

- how or when those goods, services or works are to be supplied
- the qualifications, experience, ability, management or organisation of staff, where those factors are likely to make a material difference to the quality of goods, services or works being supplied
- price, other costs or value for money.

Landowners must also specify how tenders will be assessed, setting out any scoring methodology; and making clear where failure to meet one or more criteria would disqualify a tender. Guidance note 4, setting a brief and managing a procurement, explores assessment methodologies in more detail.

> “Award criteria must relate to the subject-matter of the contract; be clear, measurable and specific; and not break the rules on technical specifications. The criteria must be a proportionate means of assessing tenders, considering the nature, complexity and cost of the contract.”

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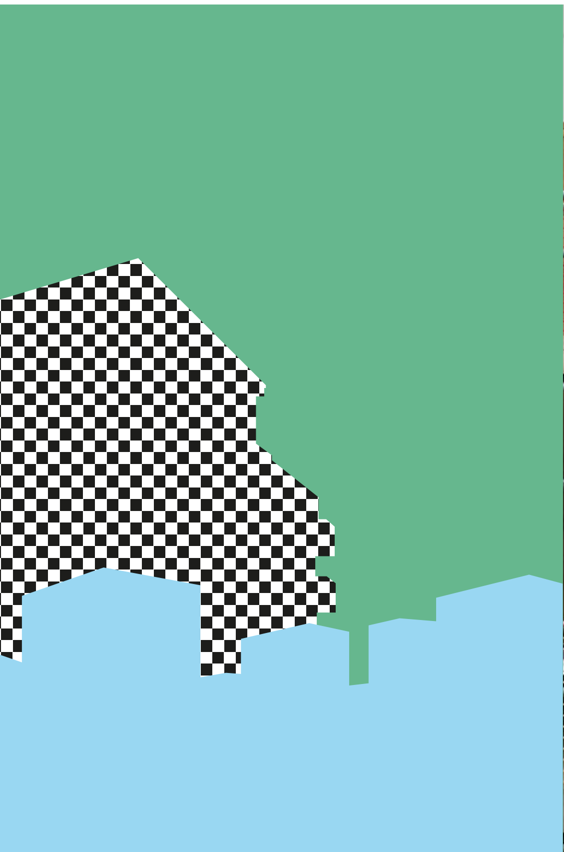

Flexibility during procurement

The PA23 provides some flexibility, enabling landowners to change aspects of their procurement processes as they are running. This may be helpful where elements of a project remain unresolved before the procurement is launched.

There are two options under the PA23:

- refine award criteria
- modify the process.

It is possible to **refine the award criteria** in a procedure, subject to the following rules:

- the Tender Notice/associated documents must reserve the right to do this
- the refinement must be made before tenders have been invited
- any refinement cannot change which developers have progressed during a procedure
- landowners must modify and republish, or re-provide, the Tender Notice and any associated tender documents affected by the refinements
- landowners cannot introduce new criteria, but can introduce new sub-criteria.

It would therefore be possible to list price and quality (each weighted, potentially as a range) as the award criteria; and refine these later in the process to include the precise weightings and relevant sub-criteria.

However, wherever possible, it is recommended that landowners publish their award criteria (including sub-criteria and weightings/sub-weightings) in full as early as possible. This promotes transparency, certainty and a smoother procurement process for landowners and developers.

It is also possible to **modify a CFP process after it has been started**, subject to the following rules:

- the process can be modified either:
  - — before applications to participate have been received
  - — if there is only one stage in a procedure, before tenders are submitted
- non-substantial modifications can be made before tenders are evaluated; “non-substantial” essentially means not changing who is participating (or would have participated) in the procurement.

5 Contract management

Key performance indicators

Where a contract has a value of over £5m,[18] then section 52 of the PA23 requires the landowner to set at least three key performance indicators (KPIs) that the developer must meet.

The Act defines a KPI as "a factor or measure against which a supplier's (developer's) performance of a contract can be assessed during the life cycle of the contract". Developer performance against KPIs is published by the landowner annually.

Landowners should carefully consider KPIs. They are required to publish annual reports that grade a developer's performance under the contract by reference to the following standards:

- **good**
- **approaching target**
- **requires improvement**
- **inadequate**
- **other.**

Landowners should consider whether the KPIs it sets are achievable. KPIs are likely to be agreed with the developer during the procurement process. Developers will be cautious when signing up to KPIs – if they don't meet them, there is a risk of being labelled a "poor performer" and this is a ground for discretionary exclusion.

This is true of all KPIs and performance obligations in the contract, as breach or poor performance must be published pursuant to section 71 of the PA23. However, only KPIs set in accordance with section 52 are reported on annually.

Landowners will need to find a balance between driving the right behaviours and standards (ensuring effective contract management) and not deterring the market.

Landowners should work with the developer to ensure accurate data is produced, against which to judge performance; and to agree on the content of notices before they are published (although the landowner should retain overriding discretion on this). This will help ensure notices are accurate; and reduce the scope for litigation, should the notice lead to the developer being locked out of other public-sector opportunities. Landowners should also be mindful not to publish confidential information in these notices.

18. This will likely include all development projects procured under the PA23, as the works contract threshold is (at the time of writing) £5,372,609 including VAT

Future-proofing a contract

Contracts subject to the PA23 must, during their term, remain substantially the same as when they were procured. If the contract does not remain substantially the same, it is seen as a new contract that must be procured as such. This can give rise to tension where contracts need to adapt to the realities of complex, long-term development projects.

The PA23 provides some useful flexibilities when it comes to modifying a contract. Making use of these requires some strategic forward planning.

Materialisation of known risk

This flexibility relates to risks that, whilst known at the procurement planning stage, cannot be predicted in terms of likelihood, extent or impact on the performance of the contract. As an example, a landowner has tested a site for contamination prior to procurement; but hasn't been able to test the land under an existing building on site, which will be demolished as part of the contract. As such, the landowner cannot rule out the risk of contamination under the building.

The PA23 allows the landowner to flag this risk in the Tender Notice and/or associated documents. If the risk materialises, the PA23 contains a ground via which the landowner can make necessary contract changes to accommodate and deal with this risk (schedule 8, paragraph 5 of the PA23).

In flagging the risk, landowners should note in its documents:

- how the risk may impact on the contract performance
- why it is not possible to address this upfront during the procurement
- to whom this risk is assigned (landowner or the developer)
- the possibility that modifications may need to be made to the contract if the risk materialises

With this, the contract can, in future, be amended to accommodate the risk if it materialises – provided it would not be in the public interest to award a new contract. (Award of a new contract would be in the public interest if, for example, the market has moved on considerably, such that a new tender exercise will likely deliver a different and better-value solution.)

“The PA23 provides some useful flexibilities when it comes to modifying a contract. Making use of these requires some strategic forward planning.”

Building in flexibility/options into a procedure and contract

Besides the ground for permitting contract modifications, general planning and foresight can ensure contracts include the right scope and degree of flexibility. Landowners should consider the life of the project, and what may arise or change in that time. They should seek to address these topics during the procurement, and in the contract.

Examples may include the possibility of additional requirements or land that may be pooled into the agreement at a future date. The idea is to ensure the market is made aware of the total possible opportunity. In this instance, thought should be given to how developer proposals are assessed with regards to potential future elements. For example, where additional land may be pooled into the agreement, is this to develop "more of the same" or would it be used to develop something entirely different (e.g., residential development versus a leisure centre)? Landowners should ensure the procurement process is relevant to the total possible potential scope.