

A photograph of three business professionals (two men and one woman) sitting around a table in a modern office or meeting room at night. They are looking at laptops and talking. The room has large windows showing a city skyline at night. The lighting is warm and focused on the people. The woman is on the left, wearing a grey blazer. The man in the middle is wearing a light blue sweater. The man on the right is wearing a dark red shirt and has a beard. There are coffee cups and a small potted plant on the table.

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Geldards Public Sector: Procurement Update

10th December 2024

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Agenda

- Competitive flexible procedure – Guidance and template
- Case law
- Below-threshold procurement

Competitive flexible procedure

- Starting point for drafting supplier-facing documents.
- Allows flexibility to design stages, e.g.:
 - Invitation to tender or participate
 - Negotiation or dialogue stages
- Benefits:
 - Common structure reduces administrative burden
 - Promotes optimal commercial outcomes
- Must comply with key legal obligations (e.g., proportionality, transparency)

Introduction to the Authority

- Describes the contracting authority's objectives and operations
- Ensures fair competition by sharing information equally with all suppliers
- Encourages competition by highlighting benefits of working with the authority
- Use links to publicly available policies and data

Overview of the Requirement

- Details contract scope, value, duration, and structure (e.g., lots)
- Enables suppliers to assess suitability for participation
- References specific objectives tied to government priorities
- Links to detailed requirements in Appendix B or other documents

Preliminary Market Engagement

- Describes pre-procurement supplier consultations
- Explains outcomes and ensures no supplier has undue advantage
- Clarifies why lots were or were not used (if applicable)
- Mitigates risks by shaping informed procurement strategies

Service Levels, Service Credits, KPIs

- Outlines service levels and associated credits or penalties
- Provides key performance indicators (KPIs) for contracts over £5M
- Ensures compliance with Section 52 of the Act
- Detailed specifics in Appendix C

Contract Risks

- Highlights key risks impacting contract performance
- Mitigation strategies include:
 - Incorporating flexibility for modifications
 - Dialogue / negotiation to address risks early
- Risks must align with permitted contract modification rules

Contract Terms

- Uses Cabinet Office model contracts as the foundation:
 - Mid-tier (up to £20M)
 - High-value (over £20M)
- Explains process for finalizing terms and integrating supplier submissions
- Addresses obligations to publish contracts over £5M

How to Respond to Opportunities

- Clear submission instructions for suppliers:
 - Formatting, word / page limits, file types, VAT inclusivity
 - Required documents (e.g., tender forms, certificates)
- Guidance for electronic submissions and deadlines

The Assessment Process and Award Criteria

- Full description of assessment methodology and criteria
- Conditions of participation and their assessment process
- Flexibility to refine criteria during procurement (Section 24)
- Allows clarifications and supplements for incomplete submissions

Procurement Terms and Conditions

- Tailored for specific requirements of the procurement
- Options for direct award under Schedule 5, paragraph 8
- Conflict assessments required under Section 83
- Ethical walls agreements may be included for fairness

Covered Procurement Objectives

- Core objectives:
 - Deliver value for money
 - Maximize public benefit
 - Ensure transparency and integrity
- Support SMEs by removing barriers
- Emphasis on fair and proportionate procurement

Legal Framework for Objectives

- Objectives apply to “covered procurement” under Section 12
- Covers award, entry, and management of public contracts
- Includes specific requirements like equal treatment and non-discrimination
- Applies throughout all stages, including contract termination

Key Points and Policy Intent

- Contracting authorities must "have regard to":
 - Value for money, integrity, and transparency
 - Supplier engagement and SME barriers
- Obligations demand genuine attention to objectives at every stage

Direct Requirements – Equal Treatment

- Suppliers must be treated equally unless differences justify otherwise
- Measures to prevent unfair advantages or disadvantages
- Ensures consistent access to information, deadlines, and criteria

Proportionality

- Actions must align with the nature, complexity, and cost of the contract
- Specific proportionality requirements include:
 - Tailored conditions of participation
 - Assessment criteria appropriate for contract scope
 - Evidence requests limited to necessary information

Updated Guidance

- **Dynamic Markets:** Clarifies alignment with National Procurement Policy Statement
- **Remedies:** Reflects TCC protocol updates on procurement claims
- **Frameworks:** Updates related to statutory obligations under NPPS
- **Oversight:** Revised publication timings for Procurement Review Unit updates

Case Law

- *Robert Heath Heating Limited v Orbit Group Limited* [2024] EWHC 3039
- Procurement for heating services
- Challenge on three grounds
 - Conflict of interest – former employee of contracting authority now employed by parent company of successful bidder
 - Manifest errors and/or breach of obligation of transparency
 - Breach of obligation of equal treatment

Robert Heath Heating Limited v Orbit Group Limited

- Applications before the court
- Lifting of automatic suspension – Defendant
 - Successful – Damages held to be an adequate remedy and no exceptional circumstances justifying suspension
- Court found that there is a serious issue to be tried

Robert Heath Heating Limited v Orbit Group Limited

- Early specific disclosure
 - All evaluation notes of individual evaluators
 - All moderation notes of individual moderator
 - All notes and / or minutes of all evaluators' meetings, including moderation meetings
 - All documents produced for training, guidance or instruction of evaluators/moderators, including any model answers
 - All documents relating to any actual or potential conflict of interest and steps taken to address these
- Successful

Below-threshold contracts

- Provisions in Part 6 of the Procurement Act 2023
- Definitions
 - Below threshold contract – Section 5 and Schedule 1
 - Regulated below threshold contract – Section 84

Below Threshold Contract

Section 5(5)

- “below-threshold contract” means:
 - (a) a contract for the supply, for pecuniary interest, of goods, services or works to a contracting authority,
 - (b) a framework, or
 - (c) a concession contract,that has an estimated value of less than the threshold amount for the type of contract

Below-Threshold Contract

	Type of contract	Threshold amount
1	Defence and security contract that is a works contract	£5,336,937
2	Defence and security contract that is a concession contract	£5,336,937
3	Defence and security contract not within row 1, 2 or 8	£426,955
4	Utilities contract that is a works contract	£5,336,937
5	Utilities contract that is a light touch contract	£884,720
6	Utilities contract not within row 3, 4 or 5	£426,955
7	Light touch contract that is a concession contract	£5,336,937
8	Light touch contract not within row 5 or 7	£663,540
9	Concession contract not within row 2, 6 or 7	£5,336,937
10	Works contract not within row 1, 4 or 9	£5,336,937
11	Contract for the supply of goods, services or works to a central government authority not within any other row	£138,760
12	Contract for the supply of goods, services or works to a sub-central government authority not within any other row	£213,477

Regulated below-threshold contract

Section 84

- Regulated below-threshold contract means below-threshold contract that is not:
 - Exempted contract
 - Concession Contract or
 - Utilities contract
- Does not apply to procurement by
 - A school
 - A transferred Northern Ireland authority, other than procurement under a reserved procurement arrangement or a devolved Welsh procurement arrangement, or
 - under a transferred Northern Ireland procurement arrangement

Regulated below-threshold contract procedure

Section 85

- May not restrict the submission of tenders by reference to an assessment of a supplier's suitability to perform the contract
- Does not apply to contracts with estimated value of:
 - £138,760 or more for central government authorities
 - £213,477 or more for other contracting authorities
- Does not apply to
 - Award of contract by devolved Welsh authority or under a devolved Welsh procurement arrangement
 - Award of contract under a framework

Regulated below-threshold contract procedure

Section 86

- Duty to consider small and medium-sized enterprises
- Must have regard to barriers faced by small and medium-sized enterprises
- Must consider whether such barriers can be removed or reduced
- Does not apply to award of contract under a framework

Regulated below-threshold contract - Notices

Section 87

- Below-threshold tender notice before advertising a notifiable below-threshold contract
- Does not apply if advertising only for the purposes of inviting tenders from particular or pre-selected tenders
- Contract details notice – after entering into a below threshold contract

Notifiable below-threshold contract

- Contract with estimated value of
- Not less than £12,000 for a contract to be awarded by a central government authority that is not a devolved Welsh authority
- Not less than £30,000 for a contract to be awarded by a central government authority that is a devolved Welsh authority
- Not less than £30,000 otherwise

Below-threshold tender notice

- Notice setting out:
 - That the contracting authority intends to award a contract
 - Any other information specified in regulations
- Time limits provided for in a below-threshold tender notice must be reasonable and the same for each supplier

Pipeline Notice

- Pipeline notice required if contracting authority considers that in the coming financial year, it will pay more than £100 million under relevant contracts
- Calculation needs to include payments under below-threshold contracts

Regulated below-threshold contracts: implied payment terms

Section 88

- Implied payment term of payment within 30 days
- Does not apply if contracting authority considers invoice invalid or disputes the invoice
- On receiving invoice contracting authority must notify payee if it considers invoice invalid or disputes the invoice
- Contracting authority may rely on payment by third party only with agreement of payee

Payment Terms – Valid Invoice

- Invoice is valid if it sets out the minimum required information and meets any other requirement set out in the contract
- Minimum required information:
 - the name of the invoicing party
 - a description of the goods, services or works supplied
 - the sum requested, and
 - a unique identification number

Implied payment terms

- Any term purporting to restrict or override the terms implied by section 88 is without effect
- Parties may agree to pay invoices earlier than required

UK Government Guidance

- Section 116 Procurement Act 2023 provides for disapplication of section 17 Local Government Act 1988
- UK Government guidance says section 17 Local Government Act 1988 will be modified to permit contracting authorities to reserve procurements for below-threshold contracts

UK Government Guidance

- Key points and policy intent
- Provisions for below-threshold contracts gives greater flexibility
- Restriction on selection by reference to assessment of suitability reflects the fact that this can be disproportionate, resource intensive and a particular barrier for small and medium-sized enterprises and voluntary, community and social enterprises

Unregulated below-threshold contracts

- Part 6 does not apply to procurements outside the definition of regulated below-threshold contracts
- Other obligations in the Procurement Act 2023 apply

Welsh Government Guidance

- If conducting a below-threshold contract under a reserved procurement arrangement, refer to UK Government below-threshold procurement
- Procurement Act 2023 imposes requirements on devolved Welsh authorities covering below-threshold contracts
- Welsh central government authorities listed in Schedule 2 to the Procurement (Wales) Regulations 2024

Notice Publication Requirements

- If a below-threshold tender notice or a below-threshold contract details notice is required to be published by a devolved Welsh authority it must be published on the Welsh digital platform

Other relevant guidance

- Thresholds
- Valuation
- Publication of information and the central digital platform
- National Procurement Policy Statement
- Wales Procurement Policy Statement
- Treaty state suppliers

Resources

- Guidance: Below-Threshold Contracts [Guidance: Below-Threshold Contracts \(HTML\) - GOV.UK](#)
- Welsh Government Guidance: Below-Threshold Contracts – Devolved Welsh Authorities [Procurement Act 2023 guidance: below-threshold contracts | GOV.WALES](#)

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