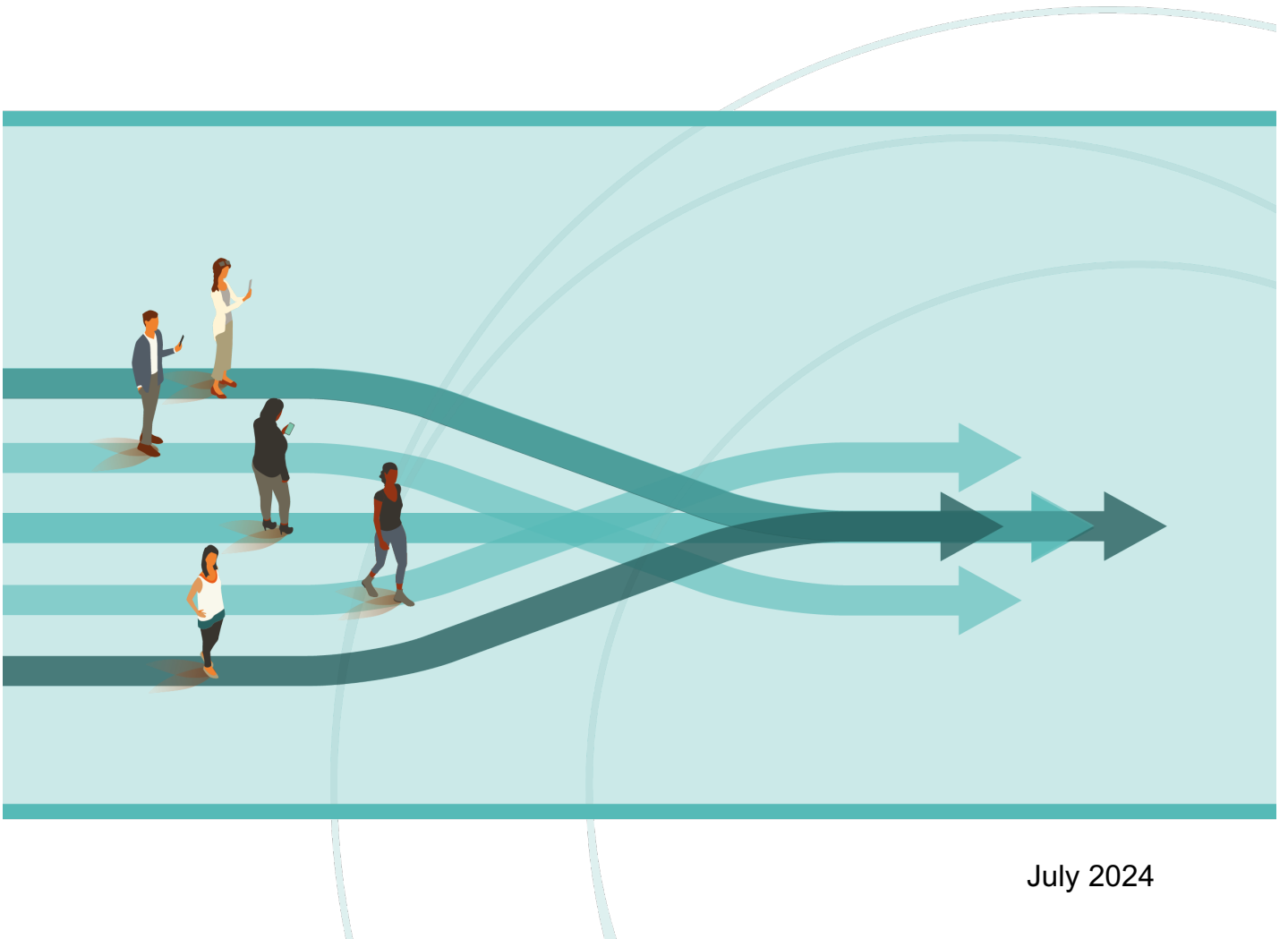




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Procurement Act 2023

Guidance: Treaty State Suppliers



July 2024

Guidance on Treaty State Suppliers

What are treaty state suppliers?

1. Section 89 of the Procurement Act 2023 (Act) defines a 'treaty state supplier' as a supplier that is entitled to the benefits of an international agreement specified in Schedule 9 of the Act.
2. The benefit for treaty state suppliers is that they cannot be discriminated against by contracting authorities (section 90). Treaty state suppliers have the same rights and, under section 100, access to remedies under the Act as 'UK suppliers' (see paragraph 14 below) for procurements covered by the relevant international agreement. This non-discrimination requirement has the effect of increasing the competitive pool of suppliers interested in participating in a procurement, driving better value for money.

What is the legal framework that governs treaty state suppliers?

3. Part 7 of the Act establishes the rights that are accorded to treaty state suppliers under the Act. This Part is generally¹ only relevant to the procurement of public contracts (contracts that are for pecuniary interest, above-threshold and non-exempted contracts) and does not prevent below-threshold contracts being reserved to UK-based suppliers only or UK-based suppliers in a particular region or county of the UK. (See guidance on below-threshold contracts for more information.)
4. Section 89 sets out the definition of a treaty state supplier.
5. Schedule 9 sets out the international agreements which confer treaty state supplier status.
6. Section 90 provides that, when carrying out a procurement, a contracting authority may not discriminate against a treaty state supplier and it sets out what would constitute discriminating against a treaty state supplier.
7. Section 100 (duties under this Act enforceable by civil proceedings) provides that the duties imposed on contracting authorities by Parts 1 to 5, 7 and 8 are owed to UK and treaty state suppliers (see paragraph 18 below).

¹ The UK-EU Trade and Co-operation Agreement extends the non-discrimination obligation to the procurement of any contract and not just public contracts. At Article 288 it prohibits the UK from adopting a measure that would discriminate against suppliers from the EU that are established in the UK (and vice versa). There are exceptions to this for NHS clinical healthcare services (as defined), and procurements that are subject to the national security and general exceptions.

What has changed?

8. The Act uses the term 'treaty state supplier', setting out a definition of the term and providing that contracting authorities cannot discriminate against such suppliers when carrying out a procurement. This replicates the position in the previous legislation. The Act makes it clear that contracting authorities may disregard requests or tenders submitted by suppliers that are not treaty state suppliers (i.e. suppliers from countries with which the UK does not have a relevant international agreement).

Key points and policy intent

9. The Act implements the UK's international obligations on public procurement by reflecting those obligations in its provisions and providing that contracting authorities must not discriminate against treaty state suppliers. A contracting authority complying with the Act will automatically be compliant with those international obligations.
10. Generally, the UK operates an open procurement regime²; this means that, subject to the provisions on excluded or excludable suppliers, contracting authorities should accept requests or tenders from both UK and overseas suppliers. The Act does permit contracting authorities to decide not to award a contract to a non-treaty state supplier (section 19(3)(b)) or to exclude non-treaty state suppliers from participating in a competitive flexible procedure (section 20(5)(c) and (d)). However, in order to ensure open competition and drive value for money, contracting authorities should think carefully before doing so. Before disregarding such a tender or excluding such a supplier, a contracting authority would need to assure itself that the supplier in question is not a treaty state supplier or is not proposing to provide goods, services or works that are covered by an international agreement. A contracting authority should only need to consider whether a supplier is a treaty state supplier or not if there is a good value for money reason to do so (for example, if this might impact the supplier's effectiveness to deliver the goods, service or works).

Treaty state suppliers: non-discrimination

11. Contracting authorities must not discriminate against treaty state suppliers. Section 90(2) provides that a contracting authority discriminates against a treaty state supplier if it treats the supplier less favourably than a UK supplier or another treaty state supplier based on the supplier's association with its treaty state or lack of association with the UK or another treaty state. Section 90(4) provides that this is also the case where the supplier supplies goods, services or works that originate in a 'treaty state', which is defined as a state, territory or organisation of states or territories that is a party to an international agreement set out in Schedule 9. This would be the case regardless of whether the supplier supplying those goods, services or works is a UK supplier, the relevant treaty state supplier or any other supplier. This applies throughout the procurement.
12. Section 90(3) provides that when considering whether a treaty state supplier is treated less favourably, the relevant comparison is between the way that treaty state supplier is treated

² The position for defence and security procurement is covered later in the guidance.

compared to a UK or other treaty state supplier in circumstances which are not materially different.

13. A supplier is a treaty state supplier only to the extent that it is entitled to the benefits of an international agreement specified in Schedule 9 in relation to the procurement being carried out or challenged. This means that a supplier may be a treaty state supplier for some procurements and not others. A supplier is only a treaty state supplier if it comes from a country that has an international agreement with the UK that covers the contracting authority carrying out the procurement, the goods, services or works being procured and the provisions of the Act in question are within scope of that agreement.
14. Section 90(7) defines a UK supplier as a supplier established in, or controlled or mainly funded from, the UK or a British Overseas Territory or a Crown Dependency, and is not a treaty state supplier.
15. The international agreements specified in Schedule 9 have a procurement chapter. Within the chapter, in most cases, there is a market access schedule that sets out which entities (i.e. central government authorities, sub-central authorities and utilities), goods, services, works (referred to as 'construction services') and exceptions are applicable to the agreement. In terms of operation, Schedule 9 will be updated as required to reflect the removal or amendment of any international agreement or to add new agreements.
16. Contracting authorities are able to check if their procurement is covered by any of the international agreements listed in Schedule 9. These agreements are all publicly available online at this [link](#) and there are exemptions, for example, for healthcare services, research and development services and broadcasting content and time.
17. Section 100 provides that the duty to comply with section 90 is enforceable in civil proceedings under the Act. This means that a treaty state supplier will have the same access to remedies under the Act to challenge a procurement covered by the relevant international agreement as a UK supplier. UK suppliers will have reciprocal access to remedies in procurement markets of treaty states. Under section 65 of the Act, treaty state (and UK) suppliers can also appeal to the court in relation to debarment decisions of a Minister of the Crown, for example, to add the supplier's name to the debarment list.
18. A supplier that is not a UK or treaty state supplier is not able to bring civil proceedings against a contracting authority under the Act but may raise a complaint directly with the contracting authority or with the new Procurement Review Unit.
19. As set out in paragraph 10, the Act does permit contracting authorities carrying out a competitive flexible procedure to exclude non-treaty state suppliers (section 20(5)(c)) or disregard a tender from a non-treaty state supplier (section 19(3)(b)(i)) in a competitive tendering procedure. Contracting authorities carrying out a competitive flexible procedure can also exclude suppliers that intend to sub-contract the performance of all or part of the contract to a non-UK or non-treaty state supplier (section 20(5)(d)) or decide not to award a contract to such a supplier (section 19(3)(b)(ii)).

Retaliatory measures

20. If a party to an international agreement does not comply with its obligations under that agreement, the other party may, subject to the terms of the agreement, be entitled to implement practical retaliatory measures or, if it is the party in breach, implement compensatory measures. Section 92 provides that regulations may be made where this arises as a result of a procurement-related dispute under an international agreement specified in Schedule 9. Retaliatory measures may be, for example, making regulations to remove market access to particular goods or services for treaty state suppliers from a country that is in breach. This power can only be used to make provision relating to procurement. It also requires Parliamentary approval.

National Security Unit for Procurement

21. The contracting authority should seek advice from the National Security Unit for Procurement in the Cabinet Office if there are any national security concerns relating to a prospective supplier. For more information, please see the guidance published by the Unit which aims to support contracting authorities to effectively engage and make referrals to exclude or debar a supplier on national security grounds.

Defence and security provisions in international agreements

22. Procurements for defence and security contracts listed at section 7(1)(a) to (f) are not covered by the international agreements in Schedule 9, so the right for suppliers to participate in these procurements under the Act is therefore only guaranteed to suppliers from the UK, Crown Dependencies and British Overseas Territories.
23. Contracting authorities awarding such defence and security contracts therefore have the discretion to disregard suppliers, including treaty state suppliers, outside the UK, Crown Dependencies and British Overseas Territories and extend this to the sub-contracting of all or part of the performance of the contract to such suppliers. They are, of course, able to include suppliers outside of the UK, Crown Dependencies and British Overseas Territories in their procurements where doing so would best meet the requirement and offer best value for money.
24. For defence and security contracts listed at Section 7(1)(g) and other contracts awarded by defence authorities, contracting authorities need to check the coverage of the international agreements listed in Schedule 9 as treaty state suppliers may have rights to participate in these procurements.

What other guidance is of particular relevance to this topic area?

Guidance on covered procurement objectives

Guidance on below-threshold contracts

Guidance on exclusions

Guidance on award rules

Guidance on remedies

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