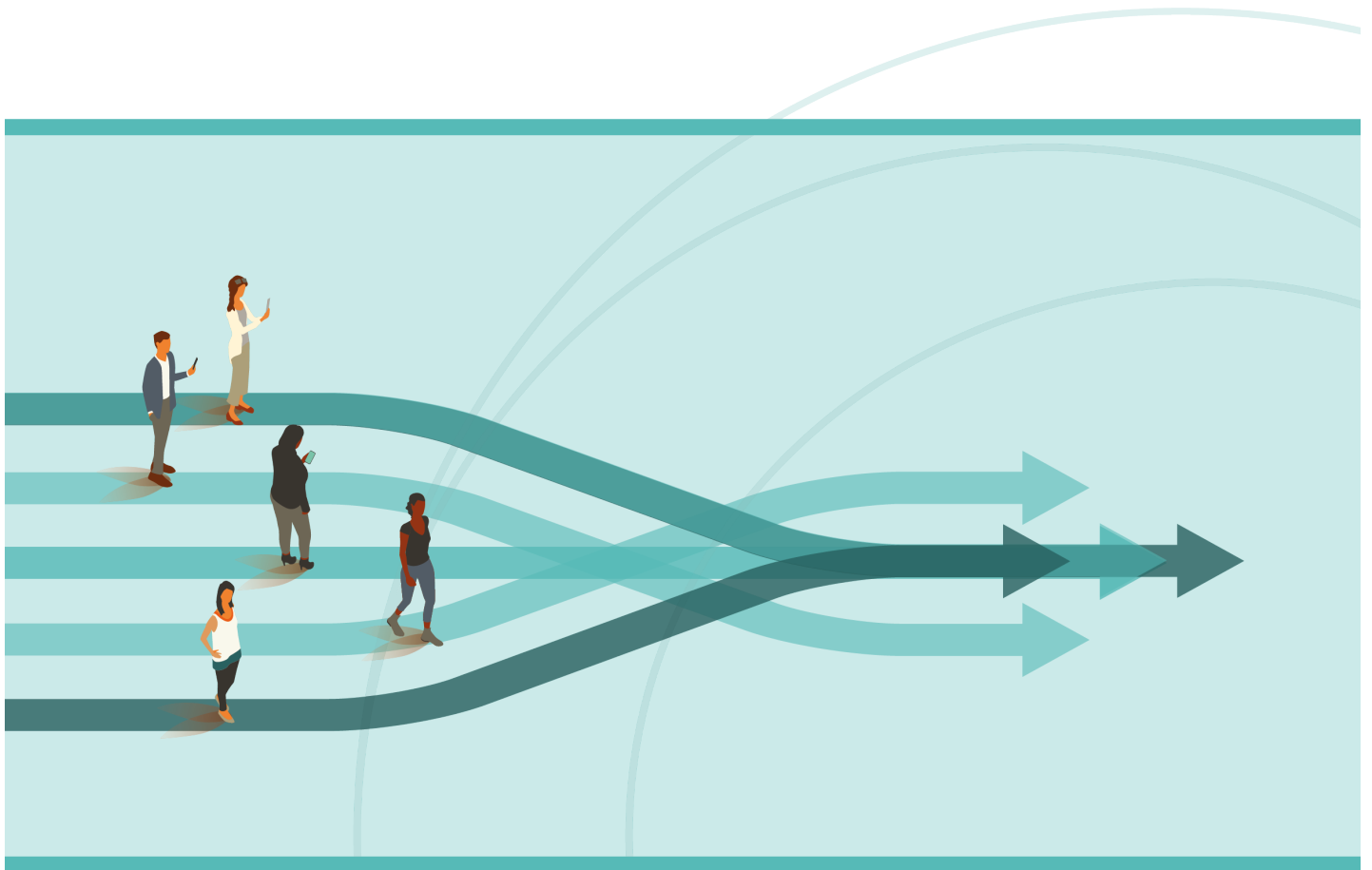




# Guidance: Covered Procurement Objectives



## Guidance on Covered Procurement Objectives

### What are covered procurement objectives?

1. The covered procurement objectives at section 12 of the Procurement Act 2023 (Act) guide contracting authorities' decision-making, assisting in the undertaking of effective and efficient public procurement with high standards of integrity, whilst at the same time recognising the importance of value for money and the need for contracting authorities to obtain the best value from procured goods, services and works.

### What has changed?

2. Public procurement under the previous legislation was subject to principles derived from the Treaty on the Functioning of the European Union that sought to create a single public procurement market in the EU and maximise cross-border procurement.
3. The Act does replicate some significant aspects of those principles, namely those that ensure fairness, but it does so by introducing revised objectives for covered procurement at section 12 that better meet the UK's domestic needs. These objectives set out the matters contracting authorities must give proper consideration to in the course of carrying out a procurement (value for money, maximising public benefit, transparency and integrity) (see paragraph 10 below).
4. With respect to equal treatment and non-discrimination, which were features of the previous regime, the Act provides, at sections 12(2) and (3), that contracting authorities must treat suppliers the same unless a difference between suppliers justifies different treatment (equal treatment) and, at sections 90 and 91 that 'treaty state suppliers' must not be discriminated against (see guidance on [treaty state suppliers](#)).
5. Ensuring value for money in procurement is key to ensuring the optimum utilisation of limited public resources. What is new in the Act is the explicit recognition (at section 12(1)(a)) that value for money is a key objective of public procurement.
6. Section 12(4) requires contracting authorities to have regard to the difficulties faced by small and medium-sized enterprises (SMEs) who wish to participate in public procurements, and consider whether these can be mitigated. The definition of SMEs is found in section 123(1).
7. The objectives in section 12 provide signifiers as to what contracting authorities must do, and have regard to, in order to carry out fair procurements in a proportionate manner; but a noticeable difference from the previous legislation is that there is no underlying principle of proportionality in the Act. That is not to say that proportionality is not an important principle. Under the Act, where proportionality must be considered, this is expressly set out in the relevant sections.

## **What is the legal framework that governs covered procurement objectives?**

8. The covered procurement objectives are set out in section 12 and only apply when carrying out a 'covered procurement', which is the award, entry into and management of a public contract (a public contract is defined in section 3). A reference in section 12 to 'covered procurement' (see sections 1(1) and 1(2)), includes:
  - a. any step taken for the purpose of awarding, entry into and management of a public contract;
  - b. a part of a covered procurement; and
  - c. termination of a covered procurement before award.
9. Section 12 includes direct requirements on contracting authorities (see paragraphs 38-43 equal treatment below) in addition to matters that contracting authorities must consider ('have regard to') when carrying out a procurement (see paragraph 10 and 33-37 below).

## **Key points and policy intent**

### 'Have regard to' objectives

10. When carrying out a procurement, contracting authorities must have regard to the importance of the following objectives set out at 12(1) and 12(4):
  - a. delivering value for money;
  - b. maximising public benefit;
  - c. sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions;
  - d. acting, and being seen to act, with integrity; and
  - e. removing or reducing the barriers faced by SMEs.
11. The requirement to have regard to the objectives at sections 12(1) and 12(4) means that contracting authorities must, throughout the procurement, give genuine attention and thought to each objective, considering its relevance and importance, if any, to the procurement.
12. Whilst the objectives set out in section 12(1) are free-standing, there are at times interactions between them and other objectives in section 12. For example, the requirement to have regard to the importance of information-sharing (at section 12(1)(c)) and the equal treatment objective (at section 12(2)) combine to ensure that information is published swiftly and in a manner that does not favour any one supplier over another.
13. Each of the objectives set out in section 12(1) has its own merit, and the significance given to each objective when carrying out a procurement must be considered independently.

14. It is not the intention of the Act that any of the objectives, for example value for money, disapply, override or take precedence over the obligation on contracting authorities to have regard to the other objectives in section 12(1) or (4).
15. Sections 12(1) and 12(4) are designed to influence contracting authorities' actions and decisions during a procurement by requiring that they actively consider these objectives throughout the procurement process.

#### Value for money

16. Public procurement should be focused on achieving the best value for money for the taxpayer, which is a well understood concept. Competition is a key enabler of value for money. It helps the contracting authority to secure the goods, services or works it requires at the right price and quality, and ensures integrity in the award of public contracts.
17. Section 12(1) does not define 'value for money' in order to leave a degree of flexibility for different types of contracting authorities, with different drivers, to place a different emphasis on the concept. For central government contracting authorities, the concept of value for money is refined by HM Treasury (HMT) from time to time in publications on gov.uk such as HMT's Green Book. Local authorities and arms-length bodies may publish further guidance related to implementing value for money decisions in their own area which are specific to their needs.
18. The guidance on assessing competitive tenders provides more detail on what value for money means in the context of an evaluation of bids by contracting authorities. For example, that guidance requires authorities to identify the 'most advantageous tender' (see definition at section 19(2)).

#### Maximising public benefit

19. The public benefit objective in the Act requires contracting authorities to consider the extent to which their contracts can maximise broader public benefit.
20. Section 12(1) does not define 'public benefit' in order to leave a degree of flexibility in how this is interpreted. As such, the public benefit objective allows for a range of, for example, social, environmental and labour factors to be considered where these factors are appropriate and relevant to the public contract being awarded.
21. Contracting authorities are required to consider whether their contracts can deliver broader public benefits such as, for example, equitable outcomes for groups such as armed forces veterans or particularly in the case of light touch contracts supporting specialist service providers that understand the particular needs of the communities they serve.
22. The public benefit objective has its own merit, and must be considered independently from the objective to deliver value for money. The public benefit objective in subsection (1)(b) requires contracting authorities to think about the extent to which public money spent on their contracts can deliver greater benefit than it otherwise would. Contracting authorities are

therefore still able to structure their procurements so as to give more weight to bids that address such broader public benefits. Contributing to socio-economic development in this way is absolutely in line with the objective of achieving value for money.

23. If a contracting authority identifies the extent to which their contracts can deliver greater benefit (for example socio-economic development), it must ensure, in the context of its procurement, that:
- a. the factors to be considered are appropriate and relevant to the contract; a requirement which could be satisfied if the factors are related to the goods, services or works, or the way in which they are produced, maintained or delivered; and
  - b. the application of the factors complies with the contracting authority's obligations on:
    - i. equal treatment at sections 12(2) and (3); and
    - ii. non-discrimination at section 90 that prohibits the use of factors which discriminate against treaty state suppliers.
24. By way of an example of maximising public benefit, in procuring taxi services for vulnerable children to get to school, the contracting authority could consider whether those services might be delivered to some degree by electric vehicles. The public benefit objective means the contracting authority should consider whether the contract can achieve more than the primary contractual aims and in doing so align with or contribute to the objectives of other contracting authorities or local or government policy.

#### Information-sharing

25. The Act creates an environment of 'transparency by default' by imposing procedural transparency obligations at each stage of the procurement so that contracting authorities are clear about exactly what they are required to publish. The Act therefore focuses the transparency obligations in a more effective manner than a broad-based transparency principle would allow.
26. The information-sharing objective at section 12(1)(c) complements these procedural transparency obligations by introducing an overarching, general requirement for contracting authorities to have regard to the importance of sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions.
27. This duty does allow the contracting authority some discretion in deciding what to share beyond the specific procedural transparency requirements although the purpose of the objective in its own right must be borne in mind. However, section 94(1) limits this obligation in specific circumstances by setting out that when contracting authorities are obliged by the Act to publish or disclose information, they may withhold information from publication or other disclosure:
- a. for the purpose of safeguarding national security; or

- b. where the information concerned is sensitive commercial information and there is an overriding public interest in it being withheld.

## Integrity

- 28. The integrity objective in section 12(1)(d) requires that contracting authorities have regard to the importance of acting, and being seen to act, with integrity. This is key to strengthening trust and combating corruption. Integrity refers to the objective propriety of the procurement: in other words, an absence of fraud, corruption or misfeasance in the process.
- 29. Contracting authorities must consider how to prevent fraud, corruption and misfeasance through good management, prevention of misconduct and control. Contracting authorities should periodically review their approach to the propriety of their procurements, including the identification and mitigation of risks<sup>1</sup>, evaluation of staff training, internal controls and audit.
- 30. The integrity objective does not just require contracting authorities to have regard to the importance of acting with integrity, but also requires them to consider the importance of being seen to do so and to demonstrate that proper process is taking place. Being seen to act with integrity may require, for example, being transparent about the reasons for the design of a competitive tendering procedure or providing meaningful and timely feedback to unsuccessful suppliers.
- 31. The integrity objective perhaps has the greatest interaction with the other objectives in section 12(1). Integrity refers to the propriety of the procurement process and having regard to the objectives of delivering value for money and maximising public benefit can help to demonstrate a regard for acting with integrity. Sharing information to allow suppliers and others to understand the contracting authority's policies and decisions supports being seen to act with integrity. Indeed, a benchmark for being seen to act with integrity is whether there is sufficient information published on the award procedure to assure suppliers and the public about the probity of the procedure.
- 32. Contracting authorities are also required to comply with the provisions in the Act on conflicts of interests and the exclusion of suppliers (see guidance on conflicts of interest, exclusions and debarment for more information), preventing contracts from being awarded to inappropriate suppliers. That provides further opportunities to directly address anti-corruption issues within the context of a procurement.

## Barriers to SME participation and their removal or reduction

- 33. SMEs not only play a key role in communities by providing local services and employment, but can also offer innovative solutions to public service delivery. By opening up public procurement opportunities to more SMEs and voluntary, community or social enterprises

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<sup>1</sup> Risks to the objective propriety of procurement include price fixing, market sharing, bid-rigging, manipulation of technical specifications or procurement procedure to favour a supplier, bribery, conflict of interest, overcharging, duplicate payments, false invoices, claims or performance reporting, substandard materials and misappropriation of assets.

(VCSEs), contracting authorities help to create a thriving, competitive marketplace with sustainable levels of growth.

34. Section 12(4) requires contracting authorities to have regard to barriers to participation that may be faced by SMEs and consider whether such barriers can be removed or reduced to help level the playing field for SME access to public procurement opportunities.
35. There are specific obligations set out in the Act which support opening up public procurement to SMEs (for example, considering whether the contract should be broken down into lots to facilitate access for SMEs, and ensuring the conditions for participation are limited to those necessary to ensure a supplier has the technical capacity to perform the contract or not requiring insurance to be in place before the contract is awarded ). Further actions which could help contracting authorities to meet this objective might include:
  - a. Ensuring that they publish a comprehensive pipeline notice so that suppliers know the opportunities that are coming up and can plan accordingly;
  - b. when conducting preliminary market engagement, running an event tailored for those new to working with the public sector;
  - c. considering the format of preliminary market engagement to save cost and time for suppliers, for example hosting digital webinars;
  - d. avoiding short timescales for bidders to submit requests or tenders (taking account of holiday periods), which may be a disadvantage for smaller suppliers with less capacity;
  - e. providing good quality feedback to unsuccessful bidders that enables them to improve their tenders for future procurements.

An example of some of the barriers faced by SMEs is at Annex A.

36. When considering whether a supplier is an SME, it is important to consider not just the definition in section 123(1) (i.e. whether the entity has fewer than 250 employees, less than or equal to £44m in annual turnover or a balance sheet total lower than or equal to £38m), but also the supplier's relationships with other entities. For example, a supplier that is a legal entity that meets the core threshold requirements but is wholly controlled by a large organisation is unlikely to be an SME. Please see separate supplementary guidance on SME definition available on [gov.uk](https://www.gov.uk) .
37. Section 12(4) applies only to covered procurement but a similar duty in section 86 of the Act applies to 'regulated below-threshold contracts'. See guidance on below-threshold contracts for more information.

#### Direct requirements: Equal treatment

38. Contracting authorities are required to do the following to ensure equal treatment during a procurement:

- a. to treat suppliers the same, unless differences between the suppliers justify different treatment (section 12(2)); and
  - b. where different treatment of suppliers is justified, to take all reasonable steps to make sure the different treatment does not put a supplier at an unfair advantage or disadvantage (section 12(3)).
39. Sections 12(2) and (3) seek to draw a distinction between those circumstances under which different treatment is unacceptable and can form no part of the procurement regime, and those where it is a necessary part of delivering improved tenders through legitimate competition. Contracting authorities must offer the same opportunities to suppliers on the same terms. This means ensuring that all suppliers have access to the same information, are subject to the same deadlines, and compete based on the same conditions of participation and assessment criteria.
40. For example, if a supplier is a new entrant to the market and does not have the necessary certification in relation to a required standard, the contracting authority could allow it to progress on the basis that certification is achieved and demonstrated by the time of contract award (provided this is set out in the tender documents). Even if different treatment is justified, contracting authorities must do what they can to make sure it is not unfair. In this example, it would be an unfair advantage to exempt the supplier from the requirement to achieve the certification.
41. Another supplier might only be able to communicate remotely whereas all other suppliers can take part in face-to-face presentations. The remote supplier is being treated differently, but the contracting authority must take all reasonable steps to ensure it is not being put at an unfair advantage or disadvantage by, for example, ensuring that all suppliers receive the same information and that the face-to-face suppliers do not have informal access to the contracting authority outside of the presentations that would not be available to the remote supplier.
42. Considerations of equal treatment often arise in the context of an incumbent supplier that is participating in a competitive procurement. The contracting authority already has a relationship with the incumbent in order to ensure the continued delivery of the existing contract and therefore has more contact with the contracting authority in a manner that it is not reasonably possible to mitigate against. Contracting authorities need to consider how to minimise any incumbent supplier's advantage to create a level playing field when re-procuring a contract, for example by providing as much information as possible to the other suppliers in the competition. However, there is not automatically unequal treatment if a supplier has acquired an advantage through performance of the contract.
43. The equal treatment rule does not limit the ability of a contracting authority to, for example:
- a. apply conditions of participation that relate to past performance: but, in the context of excluding suppliers for poor performance, the contracting authority must apply the same test to all suppliers seeking to participate in the procurement as set out in the tender documents;



- b. allow suppliers, during any financial assessment under section 22, to provide different types of evidence but the contracting authority must apply the same standards to all suppliers when analysing their financial position and determining the level of risk that it would represent to the contracting authority and delivery of the contract;
- c. determine award criteria and their weightings, but the contracting authority must apply the same criteria and weightings to all tenders received from the suppliers, as set out in the tender documents.

### Proportionality

44. Proportionality is a key concept in the Act, although it is not a separate objective in section 12. Instead, the Act has specific obligations that require contracting authorities to act proportionately that include:
- a. ensuring that the procurement procedure is proportionate to the cost, nature and complexity of the contract (section 20(3));
  - b. ensuring that the conditions of participation in a procurement procedure (including to establish or call off under a dynamic market or framework) must be proportionate (sections 22(1), 36(1) and 46(1));
  - c. being satisfied that the award criteria are a proportionate means of assessing tenders, having regard to the nature, cost and complexity of the contract (section 23(2)(d)); and
  - d. when considering whether a supplier is excluded or excludable, only requiring particular evidence or information where it is proportionate to do so (section 58(3)).
45. What is meant by proportionality is that any action taken must be appropriate to achieve its aim, but be no more burdensome than necessary to either the contracting authority or supplier(s).

## Feedback from SMEs highlighting barriers to public procurement access



### Lack of market engagement

*"really hard to understand what buyers want without engaging with them."*



### Not aware of opportunities

*"I need to see what opportunities are available to bid for, to prepare my teams and my workload."*



### Complex procurement process

*"bid bidding really time consuming. It can be difficult to navigate and confusing."*



### Unconscious bias

*"I've had some really bad experience with unnecessary criteria, small businesses like mine are being excluded."*



### Too specific or too vague requirements

*"I don't like the tender was written specifically for the incumbent to win, it's not worth bidding for."*



### Unachievable financial thresholds

*"The thresholds are too high to me. It doesn't feel proportionate to what I'm bidding for. We're going to cost too much."*



### Short tender timescales

*"can't mobilise a team that quickly. The timescales are unachievable for me bid and prepare everything they are asking for"*



### Resource heavy

*"I've had to pull my whole team in to help prepare this bid. It's costing me too much. I've not got a big bid team like these big firms."*



### Lacks innovation

*"this specification is too prescriptive, we could offer some really innovative solutions, but there is no way to offer this in the bidding process"*



### Unnecessary risk allocation

*"I've been asked to obtain DV security clearance, but the work is only for offsite construction. That doesn't seem proportionate."*



### Complex Terms and Conditions

*"I've not got the time or resource to read through this contract. It's out of my depth and I'd have to get a lawyer to review it if I was to bid."*



### Lack of constructive feedback

*"I've never receive any feedback about our bid, what's the point in bidding?"*

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